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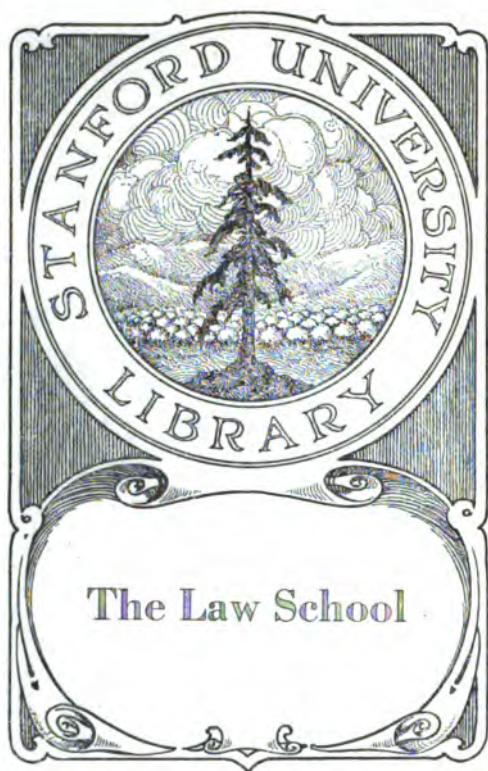
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law,

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

Gillaspie

HERETOFORE CONDENSED BY

THOMAS SERGEANT AND HON. THOS. M'KEAN PETTIT,

Now Reprinted in full.

VOL. XXX.

CONTAINING CASES IN THE KING'S BENCH IN MICHAELMAS, HILARY, EASTER
AND TRINITY TERMS, 1834-5; AND IN THE COURT OF COMMON PLEAS,
IN HILARY, EASTER, TRINITY AND MICHAELMAS TERMS,
1833; HILARY, EASTER AND TRINITY TERMS,
1834; TRINITY AND MICHAELMAS TERMS,
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IN

The Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES ARGUED
AND CITED, AND THE PRINCIPAL MATTERS.

BY

JOHN LEYCESTER ADOLPHUS,

OF THE INNER TEMPLE,

AND

THOMAS FLOWER ELLIS,

OF LINCOLN'S INN,

ESQRE., BARRISTERS-AT-LAW.

VOL. III.

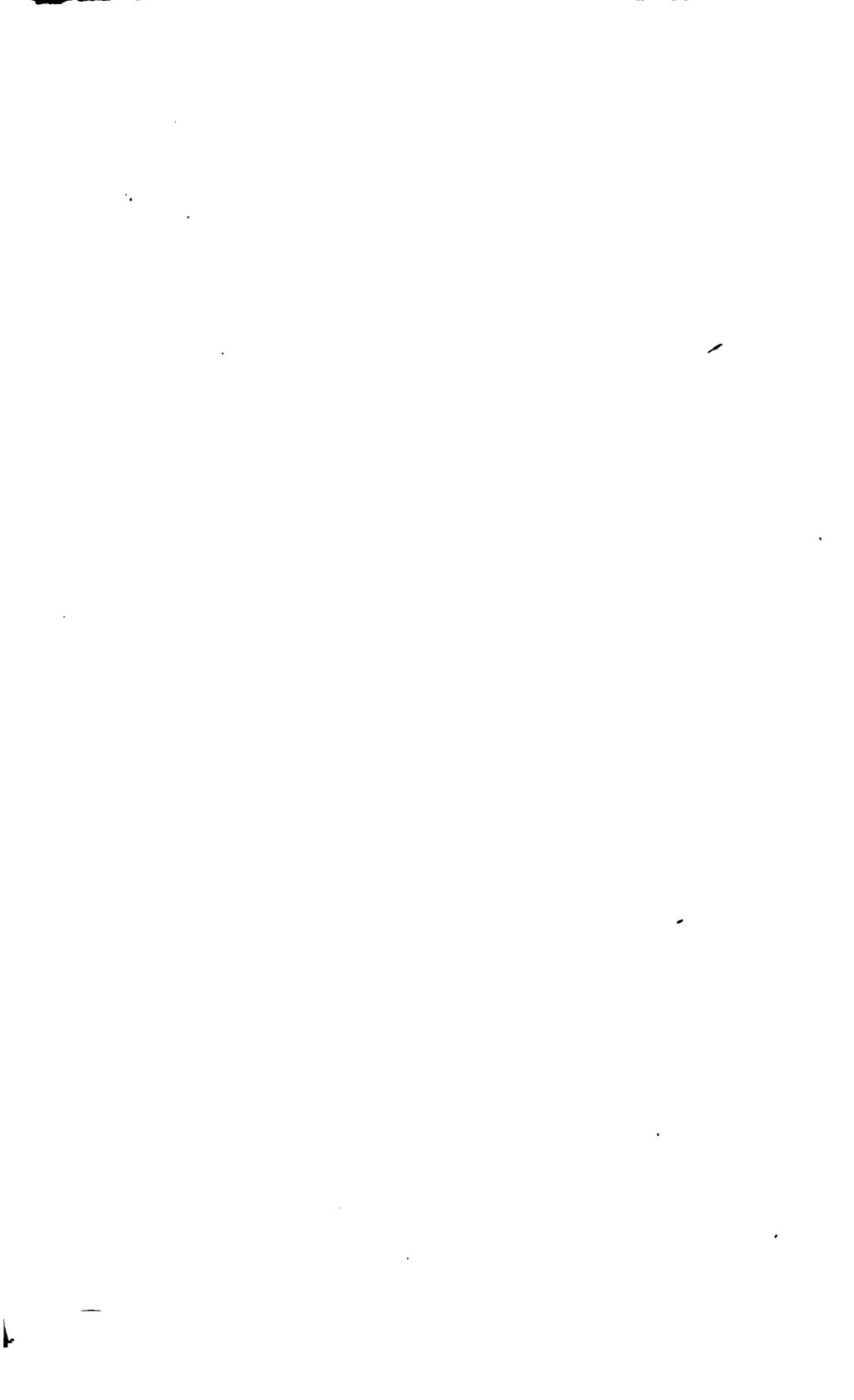
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1853.



J U D G E S

OF

THE COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEYS-GENERAL.

Sir JOHN CAMPBELL, Knt.
Sir FREDERICK POLLOCK, Knt.

SOLICITORS-GENERAL.

ROBERT MOUNSEY ROLFE, Esq.
Sir WILLIAM WEBB FOLLETT, Knt.

A

TABLE

OF THE

NAMES OF CASES

REPORTED IN THIS VOLUME.

	PAGE		PAGE
A.		Clark, Mayor and Burgesses of De-	
ANONYMOUS	552	vizes, v.	506
Archdeacon of Middlesex, Rex v.	615	Clarke, Ex parte	72
Avery v. Cheslyn	75	Clay v. Stevenson	807
B.		Cock, Brooks v.	138
Barons v. Luscombe	589	Cooper v. Gardner	211
Bartlett, Paddon v.	884	—, Wiles v.	524
Bastard v. Trutch	451	Copeland v. Nevill	668
Baytup, Doe dem. Johnson v.	188	Copland v. Laporte	517
Beedle, Rex v.	467	Cotton v. Browne	312
Beswick v. Swindells	868	Curwood, Rex v.	815
Blewett v. Tregonning	554	D.	
Bone v. Daw	711	Davies, Boodle v.	200
Boodle v. Davies	200	Davidson, Mead v.	303
Bramston, Doe dem. Corbyn v.	63	Daw, Bone v.	711
Brecknock and Abergavenny Canal		Dendy, Chitty v.	319
Company, Rex v.	217	Devizes, Mayor and Burgesses of, v.	
Briant, Farley v.	839	Clark	506
Brooks v. Cock	138	Dewar v. Purday	166
—, Doe dem. Rogers v.	513	Dobell v. Hutchinson	355
Browne, Cotton v.	312	Doe dem. Bartley v. Gray	89
Bruyeres v. Halcomb	381	— Chandler v. Ford	649
C.		— Corbyn v. Bramston	63
Chapman v. Keane	193	— Gallini v. Gallini	340
Chesleyn, Avery v.	75	— Herbert v. Thomas	123
Chittenden v. Walker	691	— Johnson v. Baytup	188
Chitty v. Dendy	319	— Lumley v. Earl of Scarbo-	
— v. Luxford	1b.	rough	2
Church Trustees of St. Pancras, Rex		— Phillips v. Morris	46
v.	535	— Roffey v. Harbrow	67
Clark and Austen, Rex v.	287	— Rogers v. Brooks	513
		— Saville, Earl of Scarbo-	
		rough v.	897

TABLE OF CASES REPORTED.

	PAGE		PAGE
<i>Doe dem Shelton v. Shelton</i>	285	<i>In re Parsons</i>	74 (n.)
<i>Douglas, Harrison v.</i>	396	— <i>Pering and Keymer</i>	245
<i>Douglass v. Stanbrugh</i>	316	— <i>Pilgrim</i>	485
<i>Downes, Wenham v.</i>	450	— <i>Tribe and Upperton</i>	295
<i>Duffield, Ex parte</i>	617		
		J.	
E.		<i>Jenkin, Vivian v.</i>	741
<i>Evans v. Evans</i>	132	<i>Jeyes, Rex v.</i>	416
<i>Ex parte Clarke</i>	72	<i>Jones, Ex parte</i>	74 (n.)
— <i>Duffield</i>	617	<i>Jones, Homfray v.</i>	640 (n.)
— <i>Jones</i>	74 (n.)	— <i>Sirhowy Tramroad Company v.</i>	640
— <i>Nuttall</i>	188	<i>Justices of Nottingham, Rex v.</i>	500
— <i>Smyth</i>	719		
— <i>Winfield</i>	614	K.	
F.		<i>Keane, Chapman v.</i>	193
<i>Farley v. Briant</i>	839	<i>Kelley, Philpott v.</i>	106
<i>Fawcett, Henslow v.</i>	51	<i>Kemp, Hiscocks v.</i>	676
<i>Fenton, In re</i>	404	<i>Kennett, How v.</i>	659
<i>Fletcher v. Lew</i>	551	<i>Kitchener v. Power</i>	232
<i>Ford, Doe dem. Chandler v.</i>	649		
		L.	
G.		<i>Lambert, Thomas v.</i>	61
<i>Gallini, Doe dem. Gallini v.</i>	340	<i>Lang, Mann v.</i>	699
<i>Gardner, Cooper v.</i>	211	<i>Laporte, Copland v.</i>	517
<i>Garritt v. Sharp</i>	325	<i>Leeds and Selby Railway Company,</i>	
<i>Graham v. Pitman</i>	521	— <i>Rex v.</i>	683
<i>Gray, Doe dem. Bartley v.</i>	89	<i>Lees v. Refit</i>	707
		<i>Lempriere v. Humphrey</i>	181
H.		<i>Lew, Fletcher v.</i>	551
<i>Halcomb, Bruyeres v.</i>	381	<i>Liverpool Oil Gas Company, Painter v.</i>	433
<i>Halls and Minshull, Rex v.</i>	494	<i>Lock, Powell v.</i>	315
<i>Hanley, Rex v.</i>	463	<i>Luscombe, Barons v.</i>	589
<i>Harbrow, Doe dem. Roffey v.</i>	67	<i>Luxford, Chitty v.</i>	319
<i>Harrison v. Douglas</i>	396		
— <i>Worley v.</i>	669	M.	
<i>Henslow v. Fawcett</i>	51	<i>Mabe, Inhabitants of, Rex v.</i>	531
<i>Hewes, Rex v.</i>	725	<i>Maddock v. Phillips</i>	198
<i>Hiscocks v. Kemp</i>	676	<i>Mann v. Lang</i>	699
<i>Hodgson and Ross, In re</i>	224	<i>M'Dougall v. Nicholls</i>	813
— <i>v. Mee</i>	765	<i>Mead v. Davison</i>	303
<i>Holland, Roper v.</i>	99	<i>Mee, Hodgson v.</i>	765
<i>Homfray v. Jones</i>	640 (n.)	<i>Middlesex, Archdeacon of, Rex v.</i>	615
<i>How v. Kennett</i>	659	<i>Middlewich, Inhabitants of, Rex v.</i>	156
<i>Hughes, Rex v.</i>	425	<i>Milverton, Lord of Hundred of, Rex v.</i>	284
<i>Humphery, Neck v.</i>	130	<i>Monmouthshire Canal Company, Rex v.</i>	119
<i>Humphrey, Lempriere v.</i>	181	<i>Morris, Doe dem. Phillips v.</i>	46
<i>Hungerford Market Company, Rtdg-</i>		<i>Mosely, Sir O., Rex v.</i>	488
— <i>way v.</i>	171		
<i>Hunter, Van Nyvel v.</i>	243	N.	
<i>Hutchinson, Dobell v.</i>	355	<i>Neck v. Humphery</i>	130
		<i>Nelson, Udall v.</i>	215
I.		<i>Nevill, Copeland v.</i>	668
<i>In re Fenton</i>	404	<i>Newmarket St. Mary, Rex v.</i>	151
— <i>Hodgson and Ross</i>	224	<i>Nicholls, M'Dougall v.</i>	813
— <i>of — Overseer of —</i>	552	<i>Norrish v. Richards</i>	783

TABLE OF CASES REPORTED.

	PAGE
Norton Bavant, Inhabitants of, Rex v.	161
Nottingham, Justices of, Rex v.	500
Nuttall, Ex parte	188
O.	
Ouze Bank Commissioners, Rex v.	544
P.	
Paddon v. Bartlett	884
Painter v. The Liverpool Oil Gas Company	433
Parry v. Roberts	118
— Spencer v.	831
Parsons, In re	74 (n.)
Pateshall v. Tranter	103
Penfold, Pound v.	655
Pering and Keymer, In re	245
Perrin v. West	405
Phillips, Maddock v.	198
Philpott v. Kelley	106
Pilgrim, In re	485
Pitman, Graham v.	521
Pound v. Penfold	655
Powell v. Lock	315
Power, Kitchener v.	232
Purday, Dewar v.	166
R.	
Ramsden, Rex v.	456
Reffitt, Lees v.	707
Rex v. Beedle	467
— v. Brecknock and Abergavenny Canal Company	217
— v. Clark and Austen	287
— v. Ourwood	815
— v. Halls and Minshall	494
— v. Hanley	463 (n.)
— v. Hewes	725
— v. Hughes	435
— v. Jeyes	416
— v. Leeds and Selby Railway Company	683
— v. Mabe, Inhabitants of	531
— v. Middlesex, Archdeacon of	615
— v. Middlewich, Inhabitants of	156
— v. Milverton, Lord of the Hundred of	284
— v. Monmouthshire Canal Company	619
— v. Mosley, Sir O.	488
— v. Newmarket St. Mary, Inhabitants of	151
— v. Norton Bavant, Inhabitants of	161
— v. Nottingham, Justices of	500
— v. Ouze Bank Commissioners	544
— v. Ramsden	456

Rex v. Roberts	111
— v. St. George, Exeter, Inhabitants of	373
— v. St. Mary, Leicester	644
— v. St. Nicholas, Leicester, Inhabitants of	79
— v. St. Pancras, Church Trustees of	535
— v. Stretch	503
— v. Sutton	597
— v. Whitney, Inhabitants of	69
— v. Wilson	817
— v. Wilts and Berks Navigation, Proprietors of	477
Richards, Norrish v.	733
Ridgway v. The Hungerford Market Company	171
Roberts, Parry v.	118
—, Rex v.	771
Roper v. Holland	99

S.

St. George, Exeter, Inhabitants of, Rex v.	373
St. Mary, Leicester, Rex v.	644
St. Nicholas, Leicester, Inhabitants of	79
St. Pancras, Church Trustees of, Rex v.	535
Sandys, Smyth v.	693
Scarborough, Earl of, v. Doe dem. Savile	897
—, —, Doe dem. Lamley v.	2
Sharp, Garritt v.	325
Shelton, Doe dem. Shelton v.	265
Sirhowy Tramroad Company v. Jones	640 (n.)
Smedley, Trinder v.	522
Smith v. Sandys	693
Smyth, Ex parte	719
Soady v. Wilson	248
Spencer v. Parry	331
Stanbrough, Douglas v.	316
Stephenson, Clay v.	807
Stretch, Rex v.	503
Sutton, Rex v.	597
Swindells, Beswick v.	868

T.

Taylor v. Wilkinson	784
Thacker v. Wilson	142
Thomas, Doe dem. Herbert, v.	123
— v. Lambert	61
Trantor, Pateshall v.	103
Tregonning, Blewett v.	554
Tribe and Upperton, In re	295
Trinder v. Smedley	522
Trutch, Bastard v.	451

TABLE OF CASES REPORTED.

	PAGE		PAGE
U.		Wiles v. Cooper	524
Udall v. Nelson	215	Wilkinson, Taylor v.	784
V.		Wilson, Rex v.	817
Van Nyvel v. Hunter	243	——, Soady v.	248
Vivian v. Jenkin	741	——, Thacker v.	142
W.		Wilts and Berks Navigation, Proprie-	
Walker, Chittenden v.	691	tors of, Rex v.	477
Wenham v. Downes	450	Winfield, Ex parte	614
West, Perrin v.	405	Worley v. Harrison	669
Whitney, Inhabitants of, Rex v.	69	Y.	
		Yonde v. Yonde	311

TABLE OF CASES CITED.

	PAGE		PAGE
A.		Barret v. Winchcomb, Cro. Jac. 361 . . .	
Abbot v. Weekley, 1 Lev. 176 . . .	569	Barrow v. Humphreys, 3 B. & Ald. 598	504
Abdy's Case, Cro. Car. 585 . . .	493	Beckford v. Hood, 7 T. R. 620 . . .	141
Ackerley v. Parkinson, 3 M. & S. 411	440	Bedell v. Constable, Vaugh. 182 . . .	606
Adam v. The Inhabitants of Bristol, 2		Bedford, Earl of, v. Russel, Poph. 4 . . .	126
A. & E. 395 . . .	848	Beeston v. Collyer, 4 Bing. 309 . . .	173
— v. Richards, 2 H. Bl. 574 . . .	104	Bennet v. Holbech, 2 Wms. Saund.	
Allen v. Bennet, 3 Taunt. 169 . . .	366	319. a . . .	750
Alsop v. Price, 1 Doug. 160 . . .	851	Benson v. Hodson, 1 Mod. 109 . . .	14. 923
Andrews dem. Jones v. Fulham, An-		Berkenhead v. Nuthall, Cro. Eliz. 198 . . .	797
draws, 263; Pig. Rec. 176 . . .	19. 912	Beswick v. Swindells, 5 B. & Ald. 914	871
Anonymous, Moore, 123 . . .	276	Bird v. Higginson, 2 A. & E. 696	673. 853
—, 1 Smith, 426 . . .	698	Bishop of Lincoln v. Attwood, 7 Vin.	
—, 2 Vent. 180 . . .	714	Abr. 176 . . .	569
—, 2 Vent. 195 . . .	714	Bissex v. Bissex, 3 Burr. 1729 . . .	849
—, Loft, 546 . . .	216	Bole's case, Palm. 389 . . .	598
—, 3 Leon. 71, pl. 108 . . .	124	Bolton v. Dugdale, 4 B. & A. 619 . . .	672
—, 1 Vent. 267 . . .	777	Bonner v. Hall, 1 Lord Raym. 338 . . .	748
Archard v. Hornor, 3 O. & P. 349 . . .	179	Boodle v. Davies, 3 A. & E. 200 . . .	692
Ashton v. Poynter, 1 C. M. & R. 738;		Booth v. Booth, 6 Mod. 288 . . .	682
S. C. 5 Tyrwh. 323 . . .	863	Borwick v. Walton, 2 B. & Ald. 623 . . .	130
Attorney-General v. Sutton, 1 P. Wms.		Bowen v. Shapcott, 1 East, 542. . .	750
754; 3 Bro. P. C. 75 . . .	346	Boyce v. Hanning, 2 Cr. & J. 334; S.	
Avelyn v. Ward, 1 Ves. Sen. 422 . . .	914	C. 2 Tyrwh. 327. . .	28. 926
B.		Boydell v. Drummond, 11 East. 142 . . .	368
Bagg's Case, 11 Rep. 98 a . . .	730	Bradwell's Case, Litt. Rep. 9 . . .	413
Bagot, Lord, v. Williams, 3 B. & C.		Bramah v. Baker, 1 Hodges, 66 . . .	523
235 . . .	803	— v. Roberts, 1 New Cases, 469	523
Baillie v. De Bernales, 1 B. & Ald. 331	552	Bramhall v. Hall, Ambl. 467 . . .	278
Baisley v. Newbold, 2 O. M. & R. 325.		Bramidge v. Adshed, 2 Dowl. P. C. 59	316
4 Dowl. P. C. 177 . . .	771	Brand v. Mears, 3 T. R. 388 . . .	454
Bardons v. Selby, 1 Cro. & M. 500; 3		Branwell v. Penneck, 7 B. & C. 536 . . .	528
Tyrwh. 430 . . .	746	Bree v. Holbech, 2 Doug. 654 . . .	110
Barker v. Barker, 2 Sim. 249 . . .	128	Brett v. Beals, Moo & M. 421 . . .	465
Barnes v. Gladman, 2 Lev. 19 . . .	748	— v. Pildredge, 1 Sid. 102 . . .	877
— v. Hunt, 11 East, 451 . . .	755	Briggs v. Bowgin, 2 Bing. 333 . . .	715
Barnstaple Case, 1 Peckw. 91 . . .	53	Broadbent v. Woodhead, 2 Tidd, 953	
		(9 ed.) . . .	716

	PAGE		PAGE
Brown v. Hodgson, 4 Taunt. 189 . . .	332	Crease v. Barrett, 1 C. M. & R. 919; S. C. 5 Tyrwh. 458 . . .	570
— v. Howard, 2 B. & B. 75 . . .	110	Crogate's Case, 8 Rep. 67 a. . .	746
Buckworth v. Thirkell, 3 B. & P. 652. (n) 915		Cuppledike's Case, 3 Rep. 5 b. . .	14
Bull v. Turner, 1 Tyrwh. & Gra. 367; 3 C. M. & R. 47.	318	Curtis v. Hunt, 1 C. & P. 180 . . .	701
Burton v. Haworth, 4 B. & Ad. 462 . . .	216	— v. Spitty, 1 New Ca. 17 . . .	135
Bush v. Ralling, Sayer's Rep. 289 . . .	54		
C.		D.	
Call v. Thelwell, 1 Cr. M. & R. 780; S. C. 5 Tyrwh. 231	766	Dakin's Case, 2 Saund. 291. b. . . .	285
Callo v. Brouncker, 4 C. & P. 518 . . .	178	Davies v. Bush, M'Clel. & Y. 58 . . .	915
Calthorp v. Culpepper, Cro. Jac. 654 . . .	802	— v. Lowndes, 1 New Ca. 619 . . .	509
Capel's Case, 1 Rep. 62. a. b.	14	Dawson v. Garrett, 3 Dowl. P. O. 624 693	
Careswell v. Vaughan, 2 Wms. Saund. p. 42. n. (e)	15. 923	— v. Linton, 5 B. & Ald. 521 . . .	332
Carlos v. Fancourt, 5 T. R. 482	672	Dean v. Newhall 8 T. R. 168 . . .	916
Carr v. The Earl of Errol, 6 East, 58 . . .	31	Derwentwater, Appeal of the Lord, 9 Mod. 172	11. 923
Carter v. Carter, 5 Bing. 406	337	Dibben v. The Marques of Anglesey, 10 Bing. 568.	853
— v. Warne, M. & M. 479	661	Dillon v. Browne, 6 Mod. 14	692
Carter's Case, 4 Rep. 66. b.	917	Dive v. Maningham, Plowd. 66 . . .	749
Carwardine v. Carwardine, 1 Eden. Ch. C. 34.	906	Dixon v. Dee, 1 C. M. & R. 645; 5 Tyr. 180. 3 Dowl. P. O. 259	504
Case v. Roberts, Holt's, N. P. C. 500 . . .	101	Dee-dem Blandford v. Applin, 4 T. R. 82	344
Castle v. Litchfield, Hardr. 509.	412	— Earl of Falmouth v. Alderson, 1 Mee. & Wel. 210.	570
Caswell v. Coare, 1 Taunt. 566	104	— Kenrick v. Lord Wm. Beauchamp, 11 East. 657	914
Chadwick v. Battye, 3 M. & S. 284 . . .	769	— Were v. Cole, 7 B. & C. 243 . . .	932
Chamberlaine v. Turner, Cro. Car. 129 128		— Cock v. Cooper, 1 East, 229 . . .	345
Chambers v. Bernasconi, 6 Bing. 498 . . .	216	— Jones v. Davies, 4 B. & Ad. 43 347	
Champion v. Plummer, 1 N. R. 252 . . .	368	— Hughes v. Dyeball, M. & M. 346 190	
Cheasley v. Barnes, 10 East, 73	746	— Cooper v. Finch, 4 B. & Ad. 304; S. C. 1 N. & M. 170 . . .	915
Chichester v. Lethbridge, Willes, 71 . . .	586	— Gallini v. Gallini, 5 B. & Ad. 821	340
Child v. Morley, 8 T. R. 610	333	— Garrod v. Garrod, 2 B. & Ad. 87	347
Chycke's Case, 3 Dyer, 357, a.	128	— Strong v. Goff, 11 East, 668 . . .	345
Clack v. Dixon, 3 M. & S. 98	754	— Bean v. Halley, 8 T. R. 5; 8 Bro. P. C. 75	348
Clark v. Hume, Ry. & M. 207	662	— Roffey v. Harbrow, 1 N. & M. 422	66
Clecott v. Dennys, Cro. Eliz. 67	776	— Heneage v. Heaneage, 4 T. R. 13	31. 933
Clendone v. Dinneford, 5 Car. & P. 13. 112		— Harris v. Howell, 10 B. & C. 191 934	
Cocker v. Crompton, 1 B. & C. 489 . . .	183	— Senter v. Hull, 2 D. & R. 38 . . .	66
Cockerill v. Armstrong, Willes, 99 . . .	746	— Brune v. Martyn, 8 B. & C. 516 917	
Cogan v. Cogan, Cro. Eliz. 360	936	— Bullen v. Mills, 2 A. & E. 17; 4 Nev. & M. 25	190
Comb v. Pitt, 2 Wils. 398	54	— Mussell v. Morgan, 3 T. R. 763 . . .	906
Compton v. Collinson, 1 H. Bl. 334; 2 Br. Ca. Ch. 377	276	— Smith v. Pike, 3 B. & A. 738 . . .	66
Conny's Case, 9 Rep. 95 a.	604	— Fenwick v. Reed, 5 B. & Ald. 232	580
Cook v. Jackson, 9 D. & R. 495	186		
— v. Stubbs, Cro. Jac. 584.	491		
Cooke v. Munstone, 1 New Rep. 351 . . .	333		
Cooper v. Monke, Willes, 52	754		
— v. Nias, 3 B. & Ald. 272	739		
Cotterell v. Griffiths, 4 Esp. 69	329		
Cotterill v. Tolly, 1 T. R. 655	717		
Cowlishaw v. Cheslyn, 1 Cr. & J. 48 . . .	579		
Cox v. Thomason, 2 Cro. & Jer. 498; 2 Tyrwh. 411.	894		

TABLE OF CASES CITED.

xiii

	PAGE
Doe d. King v. Robinson, 2 Dowl. P. C. 503	814
—— Morris v. Roaser, 3 East, 11	951
—— Milbourne v. Simpson, 2 Wils. 22	932
—— Candler v. Smith, 1 T. R. 581	344
—— Knight v. Lady Smythe, 4 M. & S. 347	180
—— Shaw v. Steward, 1 A. & E. 300	12, 932
—— Thorley v. Thorley, 10 East, 438, 439	128
—— Luscombe v. Yeats, 5 B. & Ald. 554	29, 992
Dome v. Smethier, Cro. Car. 416	453
Dore v. Gray, 2 T. R. 366	255
Dougal v. Wilson, 2 Wms. Saund. 175	228
Dowbiggin v. Harrison, 9 B. & C. 666	863
Dowland v. Thompson, 2 W. Bl. 910	747
Driver dem. Edgar v. Edgar, 1 Cowp. 379	20, 923
—— Frank v. Frank, 3 M. & S. 91	994
Duke of Norfolk v. Worthy, 1 Camp. 340	369
—— Northumberland v. Erington, 5 T. R. 522	520
Duncan v. Stint, 5 B. & Ald. 702	551
Duncomb v. Duncomb, 3 Lev. 437	945

E.

Eales v. Conn, 4 Sim. 68	17, 924
Eardley v. Steer, 2 O. M. & R. 327	693
Early v. Bowman, 1 B. & Ad. 899	402
Easton v. Pratchett, 4 Tyr. 472; S. C. 1 O. M. & R. 798	521
Edelsten v. Adams, 8 Taunt. 557; S. C. 2 B. Moore, 610	317
Edwards v. Watkin, Cro. Eliz. 185	797
Ellis v. Johnson, Cro. Car. 261	419
Ely, Case of the Isle of, 10 Rep. 142 b.	255
Emmett v. Lyne, 1 New R. 255	714
Engler v. Twisden, 2 New Ca. 263	863
Evans dem. Brooke v. Astley, 3 Burr. 1570	346
Exall v. Partridge, 8 T. R. 308	332
Exparte Adney, 2 Cowp. 460	851
—— Barclay, 7 Ves. 597	194
—— Dent, 1 B. & Ald. 189	188
—— Gordon, 2 Dowl. P. C. 470	75
—— Lambert, 3 Mo. & P. 269	74
—— Morgan, 2 Chitt. Rep. 250	721
—— Mosley, 4 Dowl. P. C. 69	75
—— Smyth, 2 C. M. & R. 748; S. C. 1 Tyr. & Gr. 222	724

Doe d. Stokes, 1 Chitt. Rep. 556	74
—— Tindal, 8 Bing. 402; S. C. 1 Deac. & Ch. 291; 1 Mont. Ca. Bank, 375. 462	848
—— Whetton, 5 B. & Ald. 824	226
—— Williams, 8 Price, 3	388
—— Winfield, 3 A. & E. 614	618

F.

Fairman v. Ives, 5 B. & Ald. 642	313
Fairtitle dem. Mytton v. Gilbert, 2 T. R. 169	654
Fawcett v. Cash, 5 B. & Ad. 904	173
Fazachary v. Baldo, 1 Salk. 352	409
Fazakerly v. Ford, 1 A. & E. 909	933
Fialder v. Starkin, 1 H. Bl. 17	104
Fish v. Broket, 2 Dyer, 182, a. pl. 54	751
Fisher v. Fallows, 5 Esp. N. P. C. 171	337
Fitch v. Rawling, 2 H. B. 392	569
Fittleworth v. Fulborough, Barr. S. C. 238; 2 Bott. 187, pl. 251. (6th Edit.)	156
Fitz-Hugh v. Dennington, 2 Salk. 585	880
Fitzwilliam's Case, Cro. Eliz. 915; Cro. Jac. 19	829
Finnagan v. Watkins, 3 B. & Ald. 186	850
Forster's Case	598
Foster v. Blakelock, 5 B. & C. 328	701
—— v. Jackson, Hob. 53	728
—— v. Lord Romney, 11 East, 594	346
Fountain v. Young, 1 Taunt. 60	244
Fox v. Mahoney, 2 Cro. & J. 325; S. C. 2 Tyr. 285	236
France v. Parry, 1 A. & E. 615	729
Frank v. Stovin, 3 East, 548	345
Franklin v. Lay, 2 Bligh. 59, note	345
Franks v. Morris, 10 East, 81	746
Frankum v. Earl of Falmouth, 2 A. & E. 452; S. C. 1 Harr. 1	313
Freeman v. Moyes, 1 A. & E. 338	749, 893
French v. Campbell, 2 H. B. 178	880
Fry, Lady Ann's Case, 1 Vent. 199	912
—— v. Porter, 1 Mod. 300	912
—— v. Wills, 3 Dowl. P. C. 6	552

G.

Gandell v. Pontigny, 4 Camp. 375	174
Gardner v. Jessop, 2 Wils. 45	750
Garth v. Cotton, 3 Atk. 751	15, 923
Gatewood's Case, 6 Rep. 59. b.	568
George v. Elston, 1 New Cas. 512; S. C. 1 Hodg. 63	708
Gibson v. Oldfield, 4 C. & P. 313	240
Glenville v. Hutchins, 1 B. & C. 91	244
Goddard v. Vanderheyden, 3 Wils. 262	851

	PAGE		PAGE
Godson v. Freeman, 2 C. M. & R. 585 ; S. C. 1 Tyrwh. & G. 35	867	Heath v. Brinley, 2 Ad. & E. 365	683
Gompertz v. Denton, 1 Cro. & M. 207	105	Hermitage v. Tomkins, 1 Ld. Raym. 729	12, 918
Goodiar v. Clarke, 1 Sid. 102	877	Hill v. Manchester Water W. Co., 2 B. & Ad. 544	651
Goodtitle dem. Edwards v. Bailey, 2 Cowp. 597. 1	918	Holford v. Copeland, 3 B. & P. 139	259
—— Lessee of Winckles v. Billing- ton, 2 Doug. 753	934	Hollis v. Goldfinch, 1 B. & C. 205	578
—— Newman v. Newman, 3 Wils. 516	601	Holroyd v. Breare, 4 B. & Ald. 43	709
—— Pearson v. Otway, 2 Wils. 7	125	Hooker v. Nye, 1 Cr. M. & R. 258. S. C. 4 Tyrwh. 777	746
—— Vincent v. White, 15 East, 174	927	Horne v. Lewin, 1 Ld. Raym. 639	762
—— Cross v. Woodhull, Wilses, 592	349	Hoskin's Case, 1 Godb. 400	598
Gosbell v. Archer, 2 A. & E. 500	359	Howell v. Young, 2 B. & C. 259	110
Gosling v. Dukes, 4 Dowl. P. C. 177	771	Hull v. Vaughan, 6 Price, 157	135
Gross v. Lord Nugent, 5 B. & Ad. 57	368	Hulle v. Heightman, 2 East, 145	176
Graham v. Pitmao, 3 A. & 521	525	Humberston v. Humberston, 1 P. Wms. 332	344
Granger v. George, 5 B. & C. 149	109	Humphreys v. Churchman, Ca. K. 13 temp. Hard. 289	752
Gray v. Cookson, 16 East, 13	378	Hunt v. Gateler, Poph. 5	14
—— v. Harvey, 1 Dowl. P. C. 114	795	Hunt v. Silk, 5 East, 449	105
Green v. Elgie, 3 B. & Ad. 437	794	Hussey v. Wilson, 5 T. R. 254	697
—— v. Jones, 1 Wms. Saund, 299. a.	716, 747	Hutchinson v. Lowndes, 4 B. & Ad. 118	529
Gregory v. Hurrill, 5 B. & C. 341	792	Hutton v. Simpson 2 Vern. 725	346
Griesley's Case, 8 Rep. 38, (a)	493	—— v. Stroubridge, 1 Stra. 631	734
Griffiths v. Eyles, 1 Bos. & P. 415, note (a)	321		
Grimstead v. Marlow, 4 T. R. 717	569		
Groome v. Forrester, 5 M. & S. 314	442		
Gryffth v. Biddle, Oro. Car. 275	285		
Gulliver dem. Corriev. Ashby, 4 Burr. 1990	20, 914		
Gunson v. Metz, 1 B. & C. 193	194		
Gwinne v. Poole, 2 Lutw. 935, 1560	444		
Gye v. Felton, 3 Taunt. 876	378		
H.			
Hale v. Gerard, Latch, 221	761		
Halford v. Dillon, 3 B. & B. 16	916		
Hall v. Doe dem Surtees, 5 B. & Ald. 687	66		
Hanson v. Stevenson, 1 B. & Ald. 303. 662			
Hardy v. Ryle, 9 B. & C. 603	528		
Harington v. Hoggart, 1 B. & Ad. 577	370		
Harper v. Carr, 7 T. R. 275	449		
Harris v. Booker, 4 Bing. 96	213		
Hartley v. Case, 4 B. & C. 339	194		
Harvey v. Archbold, 3 B. & C. 626	120		
Harwood v. Goodright, 1 Cowp. 87	48		
Hawkins v. Colclough, 1 Bur. 274	299		
Hayes v. Long, 2 Wils. 310	413		
Hayman v. Gerrard, 1 Wms. Saund. 103, a	849		
Haywarth v. David, Oro. Jac. 229	864		
		I.	
		In re Clark, 3 D. & R. 260	226
		—— Jackson v. Wood, 1 B. & C. 270	ib.
		—— Jacobs, 1 Woll. 123	504
		—— King and Treadwell, 1 A. & E. 560	226
		—— Leeming and Fearnley, 5 B. & Ad. 403	692
		—— Palmer, 2 A. & E. 686. S. C. 1 Harr. 55	226
		—— Price, Sir E., 4 East, 587	485
		Isherwood v. Oldknow, 3 M. & S. 386. 915	
		Ives v. Leggee, 3 T. R. 488 note (a)	349
		J.	
		Jackson v. Lowe, 1 Bing. 9	366
		Jackson v. Yabsley, 5 B. & Ald. 848	299
		Jacob v. Bowes, 6 East, 313	795
		Jameson v. Swinton, 2 Camph. 373	194
		Jarvis v. Chapple, 2 Chitt. Rep. 387	133
		Jasper v. Eadowes, 11 Mod. 23	154
		Jefferyes v. Legendra, 1 Show. 324. Holt, 465	305
		Jennor and Hardie's Case, 1 Leon. 283	124
		Jersey, Earl of, v. Deane, 5 B. & Ald. 569	915

TABLE OF CASES CITED.

XV

	PAGE		PAGE
Jesson v. Doe dem. Wright, 2 Bligh.		March, Earl of, v. Pigot, 5 Burr. 2804 .	305
58	345, 834	Marshalsea, Case of the, 10 Rep. 76 a.	439
Jobson v. Forster, 1 B. & Ad. 6 .	863	Martin v. Goble, 1 Camp. 322 .	327
John v. Steynar, Cro. Car. 272, 281 .	801	Martin dem. Tregonwell v. Strachan,	
Jones v. Fort, M. & M. 196 .	233	5 T. R. 107. 110. note (b); Willes,	
— v. Kitchin, 1 Bos. & Pul. 764 .	762	444; S. C. 1 Wils. 66; 6 Brown's	
— v. Lander, 6 T. R. 763 .	768	P. C. 319. 2d ed.; 2 Str. 1179. .	14. 923
— v. Roe, Lessee of Perry, 3 T. R.		Masters v. Scroggs, 3 M. & S. 447. .	255
88	915	Mayfield v. Davison, 10 B. & C. 223 .	794
K.		M'Dougal v. Paton, 8 Taunt. 584. .	850
Keighley's Case, 10 Rep. 139, a .	255	Meager v. Smith, 4 B. & Ad. 673 .	402
Kennycott v. Bogen, 2 Buls. 250 .	276	Mears v. Greenaway, 1 H. Bl. 291 .	717
Keat, Earl of v. Steward, Cro. Car.		Mellish v. Richardson, 9 Bing. 125 .	729
358	917	Mellor v. Spateman, 1 Wms. Saund.	
King v. Burchell, 1 Eden's Ca. Ch.		341.	569, 754
431	345	Middleton v. Hill, 1 M. & S. 240 .	709
Kingston v. Long, Bayley on Bills, p.		Midhurst v. Waite, 3 Burr. 1259 .	776
16	672	Mitchell v. Cue, et Ux, 2 Burr. 680 .	682
L.		Molins v. Werby, 1 Lev. 76 .	776
Lacey v. Forester, 5 Tyr. 567. S. C.		Monmouthshire Canal Company v.	
2 Cro. M. & R. 59	521	Hartford, 5 Tyr. 68. 1 Cro. M. R. 614	220
Lakin v. Massie, 4 Dowl. P. O. 239, b.	200	Moody v. King, 2 Bing. 447 .	915
Lampet's Case, 10 Rep. 476, b .	917	Moore v. Rawson, 5 B. & C. 332 .	329
Lancaster v. Greaves, 9 B. & C. 628 .	528	Mortimer v. West, 2 Sim. 274 .	345
Langford v. Webber, 3 Mod. 132 .	754	Moses v. Crafter, 4 O. & P. 524 .	701
Langley v. Baldwin, 1 Eq. Ca. Abr.		Mosley v. Walker, 7 B. & C. 40 .	507
185	346	Murthwaite v. Jenkinson, 2 B. & C. 357	345
Lawes v. Hutchinson, 1 Cr. M. & R.		N.	
766. S. O. 5 Tyrwh. 236 .	411	Naish v. Tatlock, 2 H. B. 319 .	665
Lawson v. Robinson, 1 Cro. & M. 499,		Nation v. Tozer, 1 C. M. & R. 172. 4	
766. S. C. 3 Tyrwh. 490 .	657	Tyr. 561	667
Le Bret v. Papillon, 4 East, 502 .	757	Netherton v. Ward, 3 B. & Ald. 21 .	256
Leeds v. Lancashire, 2 Campb. 205 .	672	Newis v. Lark, Plowd. 408 .	907
Letsom v. Buckley, 5 M. & S. 144 .	454	Newton v. Cowie, 4 Bing. 234 .	140
Lewis v. Willis, Wils. 314 .	135	Norfolk, Duke of, v. Worthy, 1 Camp.	
Lightfoot v. Creed, 8 Taunt. 268 120.	333	340	369
Lindon v. Hooper, Cowp. 414 .	120	Norris v. Daniel, 10 Bing. 507 .	853
Livett v. Wilson, 3 Bing. 115. S. C. 10		Northumberland, Duke of, v. Errington,	
B. Moore, 439	577	5 T. R. 522	520
Lockwood v. Stannard, 5 T. R. 462 .	717	Norton v. Palmer, Cro. Eliz. 829 .	797
Lowther v. The Earl of Randon, 8 East,		Nottingham's Case, 2 Roll. Rep. 412 .	598
113	530	Nunn v. Powell, 1 Smith, 13 .	317
Lucking v. Denning, 1 Salk. 202. .	412	O.	
Lundie v. Robertson, 7 East, 231 .	402	Okell v. Smith, 1 Stark. N. P. C. 107 .	105
Lysons v. Barrow, 10 Bing. 563 .	863	Osborn v. Carden, Plowd. 293 .	606
M.		Owen v. Saunders, 1 Lord Raym. 158	776
Macclesfield, Mayor of v. Pedley, 4 B.		Oxenden v. Palmer, 2 B. & Ad. 236 .	571
& Ad. 403	512	Oxley v. Flower, 2 Selw. N. P. 906 .	714
Magrave v. White, 8 B. & C. 412 .	388	P.	
Malcolm v. Ray, 3 B. Moore. 222 .	505	Paddon v. Bartlett, 2 A. & E. 9 .	887
Manchester, Earl of v. Vale, 1 Wms.		Page v. Hayward, 2 Salk. 570. Pig.	
Saund. 27	747	Rec. 178	19. 912

PAGE	PAGE
Paget v. Foley, 2 New Ca. 670 . . . 896	Regina v. Sutton, 16 Mod. 74 . . . 776
Pain v. Patrick, 3 Mod. 294 . . . 671	— v. Watson, 2 Ld. Raym. 856 . . . 599
— v. Rochester, Cro. Eliz. 871 . . . 313	— v. Watts, 1 Salk. 357 . . . 599
Paine v. Meller, 6 Ves. Jun. 349 . . . 308	Remon v. Hayward, 2 Ad. & E. 668 . . . 102
Pancras v. Rumbald, 3 Bott. Pl. 781. p. 661. . . 591	Rex v. —, 1 Chitt. Rep. 698 . . . 817
Papillon v. Voice, 2 P. Wms. 471 . . . 345	— v. Adlard, 4 B. & C. 772 . . . 490
Pariente v. Casile, 2 B. & P. 163 . . . 453	— v. Allington, 2 Stra. 678 . . . 428
Parker v. Palmer, 4 B. & Ald. 387 . . . 105	— v. Archdeacon of Middlesex, 3 A. & E. 615 . . . 618
Parkhurst v. Smith Lessee of Dormer, Willes, 327 . . . 945	— v. Ardington, 1 A. & E. 260 . . . 162
Parr v. Swindells, 4 Russ. 283 . . . 348	— v. Arnesby 2 B. & Ald. 584 . . . 378
Parsons v. Lloyd, 2 W. Bl. 845 . . . 442	— v. Atwood, 4 B. & Ad. 464, 266, 472 . . . 476
Patten Makers' Case, 4 B. & Ad. 483 . . . 475	— v. Badcock, 6 East, 359 . . . 465, 471
Paxton v. Popham, 9 East, 419 . . . 651	— v. Banks, 3 Burr. 1454 . . . 475
Peacock v. Bell, 1 Saund. 75 . . . 320	— v. Baraby Dan, 2 A. & E. 551 . . . 626
Pearce v. Morrice, 2 A. & E. 54 . . . 378	— v. Bellamy, Ry. & M. 171 . . . 726
— v. Pearce, 9 B. & C. 484 . . . 300	— v. Bens, 6 T. R. 198 . . . 427, 436
Pendred v. Chambers, Cro. Eliz. 256 . . . 748	— v. Bingham, 2 East, 308 . . . 450, 465
Penryn, Case of Mayor of, 1 Str. 582 . . . 780	— v. Birmingham, 9 B. & C. 925 . . . 164
Phelps v. Winchcomb, 3 Blust. 77 . . . 776	— v. Birmingham Canal Company, 2 B. & Ald. 570 . . . 637
Philpot v. Jones, . . . 714	— v. Bishop of Oxford, 7 East, 345 . . . 539
— v. Kelly, 3 A. & E. 106 . . . 121	— v. Boyles, 2 Stra. 836 . . . 471
Pickup v. Wharton, 2 Cro. & M. 405; S. O. 4 Tyr. 228 . . . 693	— v. Brecknock and Abergavenny Canal Company, 3 A. & E. 217 . . . 484
Pierce v. Street, 3 B. & Ad. 397 . . . 734	— v. Bristow, 6 T. R. 168 . . . 419
Pitt v. Knight, 1 Wms. Saund. 90 . . . 442, 748	— v. Broderip, 5 B. & C. 239 . . . 429
Plasket v. Beeby, 4 East, 485 . . . 847	— v. Byker, 2 B. & C. 120 . . . 163
Plimpton v. Howell, 10 East, 100 . . . 768	— v. Calder and Hebble Navigation Company, 1 B. & Ald. 267 . . . 631
Plumer v. Marchant, 3 Burr. 1380 . . . 847	— v. Carlisle, 2 B. & Ald. 364 . . . 729
Pomfret v. Ricroft, 1 Wms. Saund. 322 . . . 807	— v. Chelmer and Blackwater Navigation Company, 2 B. & Ad. 14 . . . 680
Poole v. Haskey, Ori. Bridg. 364 . . . 12, 917	— v. Churchwardens of Oreydon, 5 T. R. 713 . . . 445
Portington's Case, 10 Rep. 40. b. . . 911	— v. Churchwardens of St. Pancras, 1 A. & E. 80 . . . 462
Powis v. Powis, 6 B. Moore, 517 . . . 683	— v. Clapham, 1 Vent. 110 . . . 776
Price v. Messenger, 2 B. & P. 158 . . . 591	— v. Clapp, 3 T. R. 113 . . . 375
Price's Case, Str T. Jo. 46. . . 493	— v. Clear, 4 B. & C. 899. 7 D. & R. 395 . . . 481
Priddle and Napper's Case, 11 Rep. 13, a. . . 728	— v. Clixby, 4 B. & Ad. 153 . . . 153
Pullen v. Ready, 2 Atk. 587 . . . 921	— v. Colchester, mayor of, 2 T. R. 259 . . . 475
Purefoy v. Rogers, 2 Saund. 380 . . . 906	— v. Coleorton, 1 B. & Ad. 25 . . . 377
R.	
Randle v. Fuller, 6 T. R. 456 . . . 709	— v. Commins, 2 D. & R. 344 . . . 428
Rawsthorpe v. Arnold, 6 B. & C. 629 . . . 205	— v. Commissioners of Dean Inclosure, 2 M. & S. 80 . . . 420
Ray v. Pung, 5 B. & Ald. 561 . . . 915	— v. Commissioners of Navigating Rivers Thames and Isis . . . 426
Redman v. Edolph, 1 Wms. Saund. 318 . . . 794	— v. Commissioners of Sewers for the Tower Hamlets, 9 B. & C. 517 . . . 256
Regina v. Duchess of Buccleuch, 1 Salk. 358 . . . 600	— v. Constable, 7 D. & R. 663 . . . 428
— v. Sir John Bucknell, 7 Mod. 55. S. C. 2 Ld. Raym. 792, 804. 4 Vin. Abr. 288 . . . 599	
— v. Dyer, 9 Mod. 41 . . . 440	
— v. Layton, 1 Salk. 106, 353 . . . 821	
— v. Leighton, Fortesc. Rep. 173 (Mich. T. 7 Ann.) . . . 835	

	PAGE
Bex v. Corfe Mullen, 1 B. & Ad. 218 .	777
— v. Corporation of Bedford Level, 6 East, 356	460, 465, 471
— v. Courtenay, 9 East, 246. S. C. 2 Str. 994	779
— v. Cromford, 8 East, 25	378
— v. Culpepper, Skin. 673	47
— v. Dawbeny, 2 Str. 1196. S. C. 1 Bott. 347, pl. 358	459, 465
— v. Ditchcat, 9 B. & C. 186	894
— v. Dunsford, 2 A. & E. 568	163
— v. Dyer, 2 A. & E. 607	331, 428
— v. Ellis, 9 East, 252 (a). S. C. 2 Str. 994	779
— v. Elwell, 2 Ld. Raym. 1514. 3 Ld. Raym. 360	819
— v. Ford, 2 A. & E. 588	223
— v. Frome Selwood, 1 B. & Ad. 207	165
— v. Goudge, 2 Str. 1213	462
— v. Governor and Company of Bank of England, 2 B. & Ald. 620	482
— v. Grand Junction Canal Com- pany, 1 B. & Ald. 289	630
— v. Grantham, 2 W. Bl. 716	286
— v. Gravesend, 3 B. & Ad. 240	378
— v. ———, Mayor of, 2 B. & C. 602	776
— v. Hall, 1 B. & C. 123	465, 472
— v. Hanley, 3 A. & E. 463	473
— v. Harborton, 13 East, 311	645
— v. Harris, 1 B. & Ad. 936	776
— v. ———, 1 Ld. Raym. 482	834
— v. Havering Atte Bower, 5 B. & Ald. 691	779
— v. Hendon, 4 B. & Ad. 628	71
— v. Highmore, 5 B. & Ald. 771	460
— v. Hodgson, 3 C. & P. 422	816
— v. Hughes, 4 B. & C. 378	472
— v. Hulston, 1 Str. 621	155, 462
— v. Hungerford Market Company (ex parte Davies,) 4 B. & Ad. 327	222
— v. Ilminster, 1 East, 83	154
— v. Inhabitants of Oxfordshire, 1 B. & Ad. 289	70
— v. Jeyes, 3 A. & E. 416	481
— v. Johnson, 4 M. & S. 515	419
— v. Jones, 1 Stra. 474	838
— v. Jordan, 9 East, 263, note (a). S. C. Ca. K. B. Temp. Hardw. 255 .	779
— v. Justices of Buckinghamshire 3 Nev. & M. 68	428
— v. ——— Leicester, 3 B. &	

C. 891. S. C. 7 D. & R. 370	502, 542
Bex v. Justices of Middlesex, In re Bowman, 5 B. & Ad. 1113	730
— v. ——— Norfolk, 5 B. & Ald. 484	591
— v. ——— Somersetshire, 5 B. & C. 816	214
— v. ——— Stafford, 5 Nev. & M. 94	438
— v. ——— West Riding of Yorkshire, 5 T. R. 629	214
— v. ——— Same, 5 B. & Ad. 671	727
— v. ——— Wiltshire, 10 East, 404	727
— v. Leeds and Liverpool Canal Company, 5 East, 325	630
— v. Lenthal, 3 Mod. 143	776
— v. Lew, 8 B. & C. 655	
— v. London Assurance Company, 5 B. & Ald. 899	481
— v. Mabe, 3 A. & E. 531	895
— v. McKay, 4 B. & C. 351 460. 465. 471	
— v. Maulden, 8 B. & C. 78	83
— v. Marquess of Downshire, ...	816
— v. Mein, 3 T. R. 598	472
— v. Mersham, 7 East, 167	154
— v. Morgan, 2 A. & E. 618, note a. 428	
— v. Nicholson, 1 Str. 299 461. 465. 471	601
— v. Oakley, 10 East, 491	818
— v. ———, 4 B. & Ad. 307; 1 N. & M. 58	471
— v. Ogden, 10 B. & C. 230	163
— v. Ossett cum Gawthorpe, 4 B. & Ad. 216	632
— v. Page, 4 T. R. 543	780
— v. Penryn, Mayor of, 1 Str. 582	779
— v. Pindar, 8 Mod. 234	490
— v. Poynder, 1 B. & C. 178	77
— v. President and Council of the Marches, 1 Lev. 306	780
— v. Reeks, 2 Ld. Raym. 1447, ...	630
— v. Regent's Canal Company, 6 B. & C. 720	493
— v. Rice, 3 Keb. 627	419
— v. Richards, 8 B. & C. 420	378
— v. Ripon, 9 East, 295	162
— v. Rosliston, 8 B. & C. 668	420, 482
— v. Severn and Wye Railway Com- pany, 2 B. & Ald. 646	422
— v. Shaw, 5 T. R. 549	459, 465.
— v. Shepherd, 4 T. R. 381	475

	PAGE		PAGE
Rex v. Sheriff of Middlesex, 1 Chitt.		Rex v. Wingham, Burr. S. O. 223	156
R. 393	130	— v. Wix, 2 B. & Ad. 197	462
— v. Smith, 2 Bulstr. 342	591	— v. York, Mayor of, 4 T. R. 699	475
— v. —, 8 B. & C. 341	726	Reynel v. Kelsey, Cro. Jac. 675	802
— v. St. Albans, Mayor of, 12 East,		Rich v. Player, 2 Show. 262. 286	454
559	776	Richards v. Porter, 6 B. & C. 437	368
— v. St. Andrew the Great, Cam-		— v. Richards, 2 B. & Ad. 454	672
bridge, 8 B. & C. 664	162	Richardson v. Atkinson, 1 Str. 576	111
— v. St. George, Hanover Square,		Rigg v. Curgenvven, 2 Wils. 395	54
5 B. & Ad. 571	154	Right dem. Jefferys v. Bucknell 2 B. &	
— v. St. Gregory, 2 A. & E. 99	378	Ad. 278. 281	12. 916
— v. St. Helen's Auckland, 4 B. & Ad.		Roberts v. Karr, 1 Taunt. 501	183
718	163	— v. Peake, 1 Burr. 323	672
— v. St. Margaret's in Lincoln,		Robinson v. Robinson, 1 Burr. 38	344
Burr. S. O. 728	376	Roderick v. Hovil, 3 Camp. 103	305
— v. St. Martin, Leicester, 8 B. & C.		Roe dem. Crow v. Baldwere, 5 T. R.	
674	162	104	15. 923
— v. St. Mary, Beverley, 1 B. & Ad.		— dem. Dodson v. Grew, 2 Wils. 323	345
201	645	Rogers v. Pitcher, 6 Taunt. 206	213
— v. St. Mary, Leicester, 6 M. & S.		Rooke's Case, 5 Bep. 99, b.	255
400	630	Roper v. Hallifax, 8 Taunt. 845	17. 914
— v. St. Matthew, Bethnal Green,		Rosher v. Kieran, 4 Camp. 87	194
Burr. S. O. 485	644	Rowe v. Brenton, 3 Mann. & R. 497	570
— v. St. Nicholas in Ipswich, Burr.		Roworth v. Wilks, 1 Camp. 98	140
S. C. 91	378	Rubery v. Stevens, 4 B. & Ad. 241	147
— v. St. Nicholas, Nottingham, 2 T.		Rush v. The Chancellor and Scholars	
R. 726	374	of Oxford, 1 Salk. 343	413
— v. St. Peter the Great, Worcester-		S.	
shire, 5 B. & C. 473	630	Saffery v. Elgood, 1 A. & E. 191	260
— v. Stogursey, 1 B. & Ad. 795	159	Salter v. Slade, 1 A. & E. 608	729
— v. Stoke Damerel, 7 B. & C. 563	378	Saunders v. Newman, 1 B. & Ald. 258	329
— v. Stoughton, 2 Wms. Saund. 159		— v. Wright, 1 Taunt. 369	651
c.	70. 599	Saunderson v. Bourn, 2 Cro. & M. 515	669
— v. Stretch, 3 Dowl. P. C. 368	504	— v. Jackson, 2 B. & P. 238	366
— v. Swyer, 10 B. & C. 486	779	Sayer v. Pocock, 1 Cowp. 408	750
— v. Taylor, 3 B. & C. 512	750	Scamon v. Maw, 3 Bing. 378	274
— v. Thatcher, 1 D. & R. 426	460. 474	Schlencker v. Moxsy, 3 B. & C. 789	337
— v. Toddington, 1 B. & A. 565	606	Schoole v. Noble, 1 H. Bl. 23	709
— v. Treasurer of the County of		Scholastica's Case, Plowd. 408	907
Surrey, 1 Chitt. Rep. 650	419	Searl v. Bunion, 2 Mod. 70	754
— v. Trustees of Northleach and		Seddon v. Tutop, 6 T. R. 607	803
Witney Roads, 5 B. & Ad. 978	224	Selby v. Bardons, 3 B. & Ad. 2	746
— v. Venables, 2 Ld. Raym. 1405; 1		— v. Robinson, 2 T. R. 758	571
Str. 630	428	Semple's Case, 1 Leach, O. C. 420; 2	
— v. Wakefield, 5 East, 333	647	East's P. C. c. 16, s. 112. p. 691.	
— v. Warrington, 1 Salk. 152	454	2 Russ. on Crimes, 129	234
— v. Westerham, 2 Bott. 68. pl. 108	645	Shannon v. Bradstreet, 1 Sch. & Lef.	
— v. Whitchurch, Burr. S. C. 365	156	67	916
— v. Whittlesea, 4 T. R. 807	153	Sharington v. Minors, Moore, 543	911
— v. Whixley, 2 Bott. 13. pl. 30	647	Shelley's Case, 1 Rep. 104. a.	347. 934
— v. Wilkes, 4 Burr. 2566	804	Sherwood v. Robins, M. & M. 194; S.	
— v. Willis, Andr. 279; S. C. 7 Mod.		C. 3 C. & P. 339	367
261	286	Shopland v. Rysler, Cro. Jac. 99	613
— v. Wilson, 1 A. & E. 627; 3 Nev.		Short v. Coffin, 5 Burr. 2730	749
& M. 753	817		

TABLE OF CASES CITED.

xix

	PAGE		PAGE
Shrewsbury's, Earl of, Case, 9 Rep.		Thomas v. Pemberton, 7 Taunt. 206	. 662
46. b.	. 776	—— v. Williams, 1 A. & E. 685	. 180
Sinclair v. Eldred, 4 Taunt. 10	. 736	Thompson v. Miles, 1 Esp. 185	. 369
Slack v. Wilkins, 1 Cr. & M. 23; S. C.		—— v. Symonds, 5 T. R. 41	. 140
3 Tyrwh. 158	. 227	Thorpe v. Eyre, 1 A. & E. 926	. 931
Smith v. Boucher, Ca. Temp. Hardw.		Timewell v. Perkins, 2 Atk. 102	. 127
62; 2 Str. 993	. 412	Tindal v. Brown, 1 T. R. 167; 2 T. R.	
—— v. Edge, 6 T. R. 562	. 716	186	. 194
—— v. Smith, 3 Dowl. P. C. 733	. 244	Tomlinson v. Dighton, 1 P. W. 149.	
—— v. Woodward, 4 Car. & P. 541	. 234	154; S. C. 10 Mod. 31	. 125. 915
—— dem. Richards v. Clyfford, 1 T.		Topham v. Braddick, 1 Taunt. 572	. 110
R. 738	. 923	Towler v. Chatterton, 6 Bing. 258	. 893
Snelling v. Chennells, 5 Dowl. P. C. 80	816	Tremeere v. Morison, 1 New Ca. 89	. 146
Solarte v. Palmer, 7 Bing. 530	. 194	Trevor v. Wall, 1 T. R. 151	. 320
Solomons v. Lyon, 1 East, 370	. 752	Trueman v. Hurst, 1 T. R. 40	. 751
Southgate v. Crowley, 1 New Ca. 518		Turner v. Brown, 2 Dowl. P. C. 547	. 769
	199. 863	—— v. Robinson, 5 B. & Ad. 789	. 174
Sowerby v. Woodroffe, 1 B. & Ald. 567	415	Tyrrell v. Marsh, 3 Bing. 31	. 915
Spain v. Arnott, 2 Stark. N. P. C. 256	174	Tyrwhitt v. Wynne, 2 B. & Ald. 554	. 578
Spence v. Albert, 2 A. & E. 785	. 863		
Stafford v. Hamston, 2 B. & B. 695	258	U.	
Stanley v. Lennard, 1 Eden's Ch. Ca.		Underhill v. Devereux, 2 Wms. Saund.	
87	. 348	72, c.	. 679. 794
—— v. Stanley, 16 Ves. 491	. 31. 933		
—— v. White, 14 East, 332	. 578	V.	
Stead v. Gamble, 7 East, 325	. 715	Van Wart v. Woolley, Ry. & Moo. 5	. 273
Stearn v. Mills, 4 B. & Ad. 657; S. C.		Vaspor v. Edwards, 12 Mod. 658	. 154
1 N. & M. 436	. 701	Vooght v. Winch, 2 B. & Ald. 662	. 652
Stevens dem. Wise v. Tyrrell, 2 Wils. 1	275		
Stevenson v. Roche, 9 B. & C. 707	. 804	W.	
Stewart v. Kennett, 2 Camp. 177	. 194	Wade v. Baker & Cole, 1 Lord Raym.	
Stile v. Butts, Cro. Eliz. 434	. 569	131	. 613
Stockdale v. Chapman, Hil. T. 1836	. 750	Walker v. Robinson, 1 Wils. 93	. 716
Stott v. Stott, 16 East, 343	. 579	Warwick v. Slade, 3 Camp. 127	. 305
Stoughton v. Earl of Kilmorey, 5 Tyr.		Washer v. Smith, 2 Barnard, K. B. 180.	
568; 2 Cro. M. & R. 72	. 521	277	. 714
Stourbridge Canal Company v. Whee-		Watkins v. Flanagan, 1 Bing. 413	. 850
ley, 2 B. & Ad. 792	. 630	—— v. Woolley, Gow's N. P. C. 69	110
Strachey v. Turley, 7 East, 507	. 388	Webb, Dr., v. Batchelour, 1 Vent. 273;	
—— v. —, 11 East, 194	. 388	S. C. Freem. 396. 407. 457. 488	. 439
Street v. Blay, 2 B. & Ad. 460	. 104	Webber v. Tivill, 2 Saund. 127. b	. 751
Sulston v. Norton, 3 Burr. 1235	. 54	Welsh v. Nash, 8 East, 403	. 442
Swain v. Lewis, 3 Dowl. P. C. 700	. 750	—— v. Welsh, 4 M. & S. 333	. 850
Swayne v. Stephens, Cro. Car. 245.		Wendover v. Cooper, 10 B. & C. 614	. 766
333	. 112	Westfaling v. Westfaling, 3 Atk. 466	. 848
Swinburne v. Ogle, 1 Lutw. 239	. 752	Wheeler v. Collier, M. & M. 123	. 368
		Wheelwright v. Jutting, 7 Taunt. 304	. 795
T.		White v. Stubbs, 2 Taunt. 294	. 746
Tattershall v. Groote, 2 B. & P. 253	. 145	—— v. West, Cro. Eliz. 793	. 14. 923
Taylor v. Eastwood, 1 East, 218	. 754	Whitfield v. Faussett, 1 Ves. Sen. 391	917
—— v. Gregory, 2 B. & Ad. 257.		Whitnel v. Cook, Cro. Eliz. 812	. 761
264	. 789	Whiting v. Wilkins, 1 Bulstr. 219	. 128
—— v. Markham, Yelv. 157; Cro.		Wiffin v. Kincard, 2 N. R. 471	. 714
Jac. 224; Brown & Gold,		Wilcocks v. Bradell, Cro. Car. 73	. 413
215	. 754		

	PAGE		PAGE
Wilcock's Case, Litt. Rep. 40; S. C.		Wood v. Norton, 9 B. & C. 885 . . .	533
Hetley, 25	413	Worley v. Lee, 2 T. R. 112 . . .	738
Wilkinson v. Adams, 1 V. & B. 466 . .	904	Wright v. Pearson, Amb. 358 . . .	345
—— v. Edwards, 1 New Ca. 301 . . .	867	—— v. Wright, 1 Ves. Sen. 411 . . .	917
—— v. Howel, M. & M. 495 . . .	734		
Williams dem. Porter v. Fry, 1 Mod.		Y.	
86	912	Yates v. Plaxton, Levinz's Entries, 170	798
Williamson v. Bennett, 2 Campb. 417	672	Year Book, M. T. 17 Ed. 3, p. 52. pl.	
—— v. Henley, 6 Bing. 299 . . .	334	32, (Fine by Feme Covert), . . .	276
Wilson v. Anderton, 1 B. & Ad. 450 . .	111	——, M. T. 9 H. 6. 44, (Habeas	
—— v. Knubley, 7 East, 128 . . .	846	Corpus)	409
Wilson v. Swaby, 1 Stark. N. P. C. 34	194	——, M. T. 35 H. 6. f. 11. B. pl. 18.	602
—— v. Weller, 1 B. & B. 57 . . .	443	(Infant)	602
Withers v. Harris, 7 Mod. 50. 64; 1		——, T. T. 15 H. 7. 12, (Devise Es-	
Salk. 258; 2 Salk. 600; 3 Salk.		tate)	124
319; Holt, 77. 265; 2 Raym. 806. 678		——, T. T. 26 H. 8, p. 5, pl. 25.	
Wollen v. Andrewes, 1 Bing. 126 . . .	345	(Churchwarden)	466
Wood v. Grimwood, 2 B. & Ad. 264 . .	800	Young v. Fowler, Cro. Car. 555 . . .	604

TABLE OF STATUTES CITED.

(See also the title STATUTES in the Index to the Principal Matters.)

HENRY III.

9. c. 35. (Magna Charta, Holding of Court Baron) 285

EDWARD I.

13. stat. 1. c. 45. (Westminster 2.)
(Scire facias) 679
27. stat. 1. c. 1. (De finibus levatis) 278

EDWARD III.

31. st. 1. c. 15. (Holding of Court Baron) 285

RICHARD II.

5. st. 1. c. 8. (Forcible entry) 823
15. c. 2. (Forcible entry) 824

HENRY V.

2. c. 2. st. 1. (Habeas corpus) 409

HENRY VI.

8. c. 9. (Forcible entry) 823

HENRY VIII.

22. c. 5. s. 3. (Repair of Bridges) 599
23. c. 5. s. 3. (Sewers) 249
— c. 15. s. 1. (Payment of costs by executors) 145
24. c. 12. (Appeals) 720
27. c. 10. s. 1. (Of uses) 125
32. c. 1. s. 1. (Wills) 917
— c. 28. s. 6. (Leases by tenants in tail) 65
— c. 30. (Pleading) 322
— c. 36. (Fines) 278
33. c. 10. (Petty Sessions) 834
— c. 39. (Recognizances) 390
34 & 35. c. 5. s. 4. (Wills) 917

EDWARD VI.

3 & 4. c. 8. s. 1 (Sewers) 250

PHILIP & MARY.

2 & 3. c. 8. (Repair of bridges) 598

ELIZABETH.

5. c. 4. s. 15. (Labourers' wages) 528
s. 41. (Binding of apprentices) 378
13 c. 10. (Ecclesiastical leases) 556
— c. 29. (Privileges of Universities) 412
18. c. 14. s. 1. (Jeofails) 794
27. c. 5. s. 1. (Informal pleading) 748
43. c. 2. (Poor) 374. 490
s. 4. (Distress) 430—437
— c. 5. s. 2. (Habeas corpus) 410
— c. 6. s. 2. (Certificate for costs) 713

JAMES I.

3. c. 7. (Attornies) 226
— c. 14. (Sewers) 250
4. c. 3. s. 2. (Costs. Executors) 145. 864
7. c. 3. s. 4. (Binding apprentices) 376
— c. 18. (Improvement of land, Cornwall) 568
21. c. 13. s. 2. (Jeofails) 794
— c. 16. s. 3. (Limitation of actions) 892
— c. 23. ss. 2, 3, 4. 6. (Habeas corpus) 410

CHARLES II.

12. c. 14. (Abolition of court of wards) 606
13 & 14. c. 2. (Sewers) 251
c. 12. (Settlement of poor) 375, 439

	PAGE	GEORGE III.	PAGE
CHARLES II.		23. c. 90. s. 33. (St. Martin in the Fields, paving and lighting) . . .	494
22. & 23. c. 9. s. 136. (Certificate for costs)	713	25. c. 52. (Public Accounts) . . .	249
29. c. 3. s. 4. (Frauds)	366	— c. 80. (Attornies)	226
WILLIAM & MARY.		28. c. 52. s. 9. (Recognizances) . . .	388
1. c. 21. s. 9. (Oath of office) . . .	776	— c. 76. (Exeter, poor)	476
2. sess. 2. c. 8. s. 14. (Sewers) . . .	251	32. c. 102. (Monmouthshire Canal) . .	620
3. c. 11. s. 6. (Settlement by office)	153, 158	35. c. 63. s. 11. (Stamp. Policy of Insurance)	305
3 & 4. c. 14. s. 3. (Fraudulent de- vises)	844	— c. 101. s. 2. (Suspended order of removal)	375
WILLIAM III.		37. c. 90. s. 31. (Attornies)	226
8 & 9. c. 11. s. 2. (Costs. Executors) 145		— c. 100. (Monmouthshire Canal) . .	621
s. 8. (Assigning breach- es)	849	c. 111. s. 1. (Stamp, indenture of Apprenticeship)	532
c. 30. s. 5. (binding apprentices) . .	376	38. c. 5. (Land-tax)	288, 333
WILLIAM III.		42. c. cxv. (Monmouthshire Canal) . .	622
11 & 12. c. 4. s. 4. (Purchase of land by papists)	15	43, c. 46. s. 2 s. 3, (Arrests. Costs)	317, 243
ANNE.		— c. 140. (Habeas corpus)	486
4. c. 16. s. 1. (Pleading)	748	44. c. 98. (Stamp)	533
s. 4. (Pleading several mat- ters)	321	— c. 102. (Habeas corpus)	486
s. 20. (Bailbonds)	216	47. Sess. 1 c. vii. (Sewers)	251
6. c. 7. s. 8. (Continuation of office after demise of crown)	778	48. c. 149. (Stamp)	533
7. c. 10. s. 3. (Sewers)	254	49. c. 121. ss. 8. and 17. (Bankrupts. Proof of debts)	850
GEORGE I.		50. c. 49. s. 2. (Overseers' accounts) .	593
3. c. 15. s. 19. (Oath of office) . . .	776	52. c. xlviii. (Sewers)	253
5. c. 13. s. 1. (Errors in record) . .	794	53. c. 71. (Election of Members of Parliament)	390
7. st. 1. c. 31. s. 1. Bankrupts. Proof of debts)	851	— c. 141. s. 2. (Enrolment of Annu- ity Deeds)	649
12. c. 29. s. 3. (Habeas corpus) . . .	410	54. c. 107. (Execution of Inden- tures)	379
GEORGE II.		55. c. 184. (Stamp).	90, 532, 700
2. c. 23. s. 6. (Attornies)	225	56. c. 139. (Binding parish appren- tices)	374
— c. 24. s. 7. (Bribery at elections) .	51	— c. xxxix. (St. Pancras Church) . .	536
11. c. 46. s. 11. (Attornies)	231	57. c. 45. (Continuation of offices beyond death of King)	778
20. c. 19. (Masters and servants) . .	527	— c. xxix. s. 38. (Paving Metropolis) .	495
22. c. 46. s. 11. (Attornies)	224	58. c. 69. (Parish Vestries)	618
24. c. 44. s. 6. (Justices' warrants) .	590	— c. 70. s. 4. (Expenses of prose- cution)	422
27. c. 20. (Distress warrants)	441	59. c. 12. s. 7. (Overseers of poor) . .	160
31. c. 11. (Labourers' wages)	528	GEORGE IV.	
GEORGE III.		1 & 2. c. 32. (Indentures of appren- ticeship)	379
9. c. 44. (Taunton Market)	465	c. xxiv. (St. Pancras burial ground)	536
13. c. 63. s. 44. (Examination of Witnesses in foreign countries) . .	809	c. xcvi. (North Wilts Canal) . . .	477
14. c. 78. s. 41. (Building Act)	144	3. c. 117. s. 2. (Stamp)	89
15. c. 33. s. 16. (Somerset House) . .	248	4. c. 34. s. 5. (Masters and servants) .	527
17. c. 57. (Copyright)	138	— c. xxxix. (Liverpool; gas)	433
19. c. 70. s. 6. (Habeas corpus)	410	5. c. 18. (Recovery of Penalties) . .	527
20. c. 36. s. 2. (Binding poor Appren- tices)	377		

TABLE OF STATUTES CITED.

xxiii

GEORGE IV.	PAGE
5. c. 71. (Lunatics)	83
— c. cxxv. St. Mary Islington; poor)	463
6. c. 16. (Bankrupts)	
s. 56. (Proof of debts)	848
s. 92. (Depositions. Evi- dence)	233
— c. cv. (St. Katherine's Docks)	842
— c. clxxv. (St. Andrew Holborn; poor)	457
7. c. 64. s. 23. (Expenses of prose- cution)	417
7 & 8. c. 29. s. 47. (Embezzlement)	816
c. 30. (Malicious injuries)	445
c. 71. s. 2. (Bail)	317
9. c. 22. s. 63. (Costs on election petitions)	381
— c. 40. ss. 38. 44. (Lunatics)	81
10. c. xcvi. (County of Chester; con- stables)	157
11. c. x. ss. 92, 93. (St. Giles and St. George, Bloomsbury)	331
— c. xlv. (Stafford, paving and lighting)	425
— c. lxx. (Hungerford Market Com- pany)	173
11 Geo. 4. and 1 WILL. 4. c. 47. s. 3. (Liability of estates to bond debts)	846
c. lix. ss. 1, 2. (Leeds and Selby Railway)	683
WILLIAM IV.	
1. c. 6. (Continuation of offices after death of Geo. 4.)	778

WILLIAM IV.	PAGE
1. c. 21. s. 6. (Costs of mandamus)	286, 421
— c. 22. (Examination of witnesses in foreign countries)	809
1 & 2. c. 58. s. 6. (Interpleader)	315
c. 60. (Vestries; election of officers)	462, 535
c. lxxiii. (Eau Brink Cut)	544
2. c. 39. s. 3. (Entering appearance)	668
s. 8. (Execution)	696
s. 16. (Default of appearance)	767
2 & 3. c. 71. s. 1. s. 3. (Prescription)	556, 328
c. 92. s. 3. (Judicial Commit- tee of Privy Council)	721
c. cvi. (Exeter, paving and lighting)	467
3 & 4. c. 27. s. 2. s. 17. s. 42. (Limi- tation of actions)	64, 889
c. 41. s. 3. (Judicial Commit- tee of Privy Council)	721
c. 42. s. 3. Limitation of ac- tions)	892
s. 23. (Amendment of record)	173
3 & 4. c. 42. s. 24. (Special verdict)	173
s. 25. (Special case)	248, 524
s. 31. (Payment of costs by executors)	198, 863
3 & 4. c. 74. s. 15. (Power of alien- ation of estates tail	43
4 & 5. c. 48. s. 1. (County rate)	500
5 & 6. c. 62. s. 9. (Oaths of Church- wardens)	617

RULES OF COURT CITED.

	PAGE		PAGE
Trin. 31 G. 3. (Attornies' notices) . . .	73	Mich. 3 W. 4 (Declaring de	
Easter 2, G. 4. (Objections to award) . . .	205	bene esse)	766
Hil. 2 W. 4. I. s. 34. (Several pleas) . . .	321	Hil. 4 W. 4. General Rules and Regu-	
s. 35. (Time to declare)	736	lations.)	
s. 50. (Service of rules)	857	s. 9. (Plea. Bar of whole	
s. 58. (Notice of trial)	657	action. Prayer of Judg-	
s. 74. (Costs)	853, 894	ment)	672, 748
s. 93. (Settling off costs)	708	Pleadings in particular ac-	
s. 95. (Charging in exe-		tions.	
cution)	453	IV. 2. ("Not Guilty," in	
s. 98. (Security for		Case	313
costs)	551	V. 1. (Declaration. Abut-	
V. (Bailbond security)	765	tals)	183

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,

UPON WRITS OF ERROR FROM THAT COURT

TO THE
EXCHEQUER CHAMBER,

IN *William IV*
Easter Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who usually sat in Banc this term were,

LORD DENMAN, C. J.
LITTTLEDALE, J.

PATTESON, J.
COLERIDGE, J.

MEMORANDA.

ON the 23d of April, in this term, Lord LYNTHURST resigned the Great Seal, which, on the 24th, was put into commission, and the Right Honourable Sir *Charles Christopher Pepys*, Knight, Master of the Rolls, the Right Honourable Sir *Launcelot Shadwell*, Knight, Vice-Chancellor, and the Right Honourable Sir *John Bernard Bosanquet*, Knight, one of the Judges of the Court of Common Pleas, were appointed Commissioners.

In the course of this term Sir *Frederick Pollock*, Knight, resigned the office of Attorney-General, and was succeeded by Sir *John Campbell*, Knight; and
*2] Sir * *William Webb Pollett*, Knight, resigned the office of Solicitor-General, and was succeeded by *Robert Mounsey Rolfe*, Esquire, who afterwards received the honour of knighthood.

DOE dem. The Hon. FREDERICK LUMLEY *against* JOHN LUMLEY
SAVILE, Earl of SCARBOROUGH.

(IN ERROR.)

Lands were devised to A. for life, remainder to his first and other sons successively in tail male; remainder to B., A.'s younger brother, for life; remainder to B.'s first and other sons successively in tail male; remainders to other younger brothers of A.; and re-

mainders to their sons successively in tail male; remainders over. The will provided, first, that every person who should become under the will entitled to possession of certain premises, being part of the lands devised, should take the name, &c. of S. in a certain time; and, in default thereof (such default being made during certain lives in being, or within twenty-one years after the survivor's decease), that the devise to such person should become void, and the lands should go to the person next in remainder, as if the person making default were dead, if tenant for life; or dead without male issue, if tenant in tail: secondly, that if the title to a certain earldom should descend upon A. or any of his younger brothers, or any of his or their sons during the life of A. or of any of his younger brothers, or within twenty-one years after the survivor's decease, the estate of such person, to whom the title should come, should cease, and the lands should go to the person next in remainder expectant upon the decease and failure of issue male of the person to whom the title should come, in the same manner as if the person on whom the title descended were dead without issue, such person next in remainder taking the name &c. of S. as aforesaid.

Held, first, that the proviso for shifting the estate in case of the descent of the title, was not confined to A.'s estate, but attached to all the estates created by the will, as they should successively vest in possession.

Secondly, that on the title descending to any tenant for life, the estates were to go, not to his issue, but to the next branch of the family.

A., being in possession, a common recovery was suffered, in which the lands were conveyed (by lease and release by A. and his eldest son) to a tenant to the præcipe, during the joint lives of such tenant and A.; and A.'s eldest son was vouched over, but A. was not vouched; afterwards the title descended upon A.:

Held, first, that such recovery destroyed all remainders expectant upon the natural determination of the estate tail of A.'s son, and the proviso for shifting the estates in the event of the title descending, so far as it was attached to that estate tail, and all remainders or subsequent estates limited to come into possession on the descent of the title upon A.'s son, grandson, &c.

But, secondly, that B. was entitled to claim by virtue of the proviso, not merely as defeating or determining the estate tail, but as operating antecedently to that estate; and that such antecedent claim was not barred by the recovery.

While A. was in possession, B. and his eldest son, by deed truly reciting the facts, released their interest to trustees: Admitted that, this being a release of a possibility to a party not privy in estate, and the whole truth appearing by the deed, no legal interest passed either by way of conveyance of interest or by way of estoppel.

EJECTMENT for lands in the county palatine of Durham. On the trial in the Court of Pleas of the county palatine, at the Durham Summer assizes, *1833, before Bolland, B., the parties agreed that the jury should find a [*3 special verdict, and that judgment should be given in the court of the county palatine for the defendant; upon which judgment the present writ of error was brought. The special verdict found the following facts:—

Sir George Savile, being seised in fee of the premises in question, and also of certain lands in Nottinghamshire, by his last will and testament, dated 18th August, 1783, devised the same to trustees, to the use of certain persons therein named for twenty-one years from the day of his death, upon certain trusts; and after the determination of that term, and subject thereto, to the use of certain other persons therein also named for 500 years from thenceforth, on certain trusts; and, after the determination of that term, and subject thereto and to the trusts thereof, in the mean time, to the use of his testator's nephew, the Honourable Richard Lumley, second son of the testator's sister, Barbara, Countess of Scarborough, by the then late Earl of Scarborough, for life; remainder to the use of trustees to preserve contingent remainders; remainder to the use of the first son of the body of the said Richard Lumley lawfully begotten, and the heirs male of the body of such first son, lawfully issuing; and for default of such issue, to the use of the second, third, fourth, and all and every other the son and sons of the body of the said Richard Lumley lawfully begotten, whether born in the lifetime of the said Richard Lumley or after his decease, severally, successively, and in remainder, one after another, as they and every of them should be in priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully [*4 issuing, the older of such son and sons and the heirs male of his body

lawfully begotten being always preferred, and to take before the younger of the same sons, and the heirs male of his and their body and bodies issuing; and, for default of such issue, to the use of the testator's nephew, the Honourable John Lumley (now the Earl of Scarborough, and the defendant above named), the third son of the testator's said sister by the said then late Earl of Scarborough for life; remainder to the use of trustees to preserve contingent remainders; remainder to the use of the first, and all and every other the son and sons of the body of the defendant lawfully begotten, severally, successively, and in remainder one after another, and the several heirs male of their respective bodies lawfully issuing, in like manner and for such and the like estates, rights, and interests, as were therein-before limited to the first and other son and sons of the body of the said Richard Lumley begotten, and the heirs male of their respective bodies lawfully issuing; and in default of lawful issue male of the body of the said defendant begotten, to the use of the testator's nephew, the Honourable Frederick Lumley (the fourth son of the testator's said sister by the said then late Earl of Scarborough), for life; remainder to the use of trustees to preserve contingent remainders; remainder to the use of the first and all and every the son and sons of the body of the said Frederick Lumley, severally, successively, and in remainder, one after another, and the several heirs male of their respective bodies lawfully issuing, in like manner and for such and the like estates, rights, and interests, as were therein-before limited to the first and other the son and sons of the body of

*5] the said *Richard Lumley and the heirs male of their respective bodies lawfully issuing; and in default of lawful issue male of the body of the said Frederick Lumley begotten, the estate was limited in like manner to the use of the testator's nephew, the Honourable Savile Henry Lumley (the fifth son of the testator's said sister by the said then late Earl of Scarborough), for life; remainder to the use of trustees to preserve contingent remainders; remainder to the use of his first and other sons successively in tail male; remainder to the use of the said testator's nephew, the Honourable William Lumley (the sixth son of the the testator's said sister by the said then late Earl of Scarborough), for life; remainder to the use of trustees to preserve contingent remainders; remainder to the use of his first and other sons successively in tail male; with divers remainders over; and the ultimate remainder to the use of the right heirs of the deviser. The will then contained the clauses following:—"And it is my will and meaning that all and every person and persons, who by virtue of this my will shall become entitled to the possession or the rents and profits of the mansion house and estates in Nottinghamshire herein-before devised, shall and do within the space of two years next after he and they shall severally become entitled to the possession or to the rents and profits thereof, take upon himself and themselves, and use in all deeds and writings whereto or wherein he or they shall be party or parties, and upon all other occasions, the surname of Savile, after his or their own surname and surnames, and jointly with any dignity or title that may be vested in him or them; and also shall and do quarter the arms of Savile with his or their own family arms; and shall and do, within

*6] the space of two *years, apply for and endeavour to obtain an act of parliament, or a proper license from the crown, or take such other means as may be requisite or proper, to enable and authorise him or them respectively, to take, use, and bear the said surname and arms of Savile; and in case any such person or persons shall refuse or neglect to take such surname and arms, and to take such proper steps or means as may be requisite to enable and authorise him or them so to do, within the said space of two years, then it is my express will and meaning, that from and after the expiration of the said space of two years, the gift, devise, and limitation of all and every the manors and hereditaments herein-before devised or limited to him or them so neglecting or refusing, shall, in case such neglect or refusal shall happen within the period of the life or lives of any of the younger sons of the said late Earl of Scarborough who shall be living at my decease, or of twenty-one years after the decease of the survivor of

such younger sons so living at my decease, cease, determine, and become utterly void ; and all the same manors and hereditaments shall in such case immediately go to the person next in remainder in this my will, in the same manner as if such person or persons so neglecting or refusing, being tenant or tenants for life, was or were dead, or being tenants or tenant in tail, was or were actually dead without issue male, charged nevertheless with, and subject and without prejudice to, any such jointure or jointures, portion or portions, or the term or terms of years, remedies and securities for the same respectively, lease or leases, and demises, as before such ceaser or determination of the estate of the person or persons so neglecting or refusing shall have been limited, settled, appointed, *created, granted, or demised, of or in the said hereditaments hereby devised, or any of them, by any of the devisees thereof, pursuant to and by [*7 virtue of the powers herein-after for those purposes respectively contained, or any of them : Provided also, and it is my further will and meaning, that if the title of Earl of Scarborough shall descend or come to any of them, the said Richard Lumley, John Lumley, Frederick Lumley, Savile Henry Lumley, and William Lumley, or to any of their sons within the period of the lives of any of such of the younger sons of the said late Earl of Scarborough as shall be living at my decease, or within the term of twenty-one years after the decease of the survivor of such sons so living at my decease, then and in such case, and as and when the title of the said Earl of Scarborough shall come and fall in possession to him or them, the estate which he or they shall then be entitled unto, in all and every the manors and hereditaments herein-before devised, under or by virtue of this my will, shall then cease, determine, and become void : and the same manors and hereditaments shall immediately thereupon go to the person and persons who, under the limitations aforesaid, shall then be next in remainder expectant on the decease and failure of issue male of the person to whom the said title shall so descend or come, in the same manner as such person or persons so in remainder as aforesaid would take the same by virtue of this my will, in case he or they to whom the title of the said Earl of Scarborough shall come and fall in possession as aforesaid was or were actually dead without issue ; such person and persons so in remainder performing and complying with the condition or proviso herein-before contained for taking and using the surname, and *quartering the arms of Savile as aforesaid : Provided nevertheless, that any such [*8 ceaser, &c. (as before, for preserving jointures, and other charges on the estate). The will also gave power to Richard Lumley, when in possession, to charge the lands with a jointure for his wife ; and a further power to him, and the other younger sons of the then late Earl of Scarborough by the testator's sister, when in possession, to charge the lands with portions for daughters and younger sons, and with payments for their maintenance, &c. ; and with powers, of leasing, &c. to the persons successively entitled, when in possession ; and there was also a provision for the ceaser of the term of 500 years.

Sir George Savile died in January, 1784, leaving Richard Lumley, John the defendant, the said Frederick Lumley, Savile Henry Lumley, and William Lumley, in the said will named, him surviving. At the time of the death of Sir George Savile, the title of Earl of Scarborough was vested in George Augusta Lumley, then Earl of Scarborough, the eldest son of the testator's said sister Barbara, by the said then late Earl of Scarborough. After the death of Sir George Savile, the events in which it was provided by the said will that the said term of 500 years should cease and determine took place ; and thereupon the same term ceased and determined accordingly. Afterwards the said Richard Lumley, under and by virtue of the said will, entered into possession of the premises in the declaration mentioned, and, pursuant to the direction in that behalf contained in the said will, took upon himself and used the name of Richard Lumley Savile, and quartered the arms of Savile with his family arms, and in all other respects complied with the provisions in that behalf contained in

*9] *the said will. In September, 1807, the said George Augusta, Earl of Scarborough, died without issue, and the title of Earl of Scarborough descended to the said Richard Lumley Savile; and thereupon the above-named defendant, under and by virtue of the aforesaid devise, entered into the possession of the premises in the declaration mentioned, and took the name of John Lumley Savile, and quartered the arms of Savile, &c., and in all other respects complied with the provisions of the will in that behalf. The defendant was found by the verdict to be in the possession of the same premises. John Savile Lumley, commonly now called Viscount Lumley, was and is the eldest son of the defendant.

By indentures of lease and release, of the 27th and 28th of November, 1809 (the release made between the defendant of the first part, Lord Lumley, by the name of John Savile Lumley, then aged twenty-one, of the second part, and three other persons of the third, fourth, and fifth parts respectively), the lands were conveyed by the defendant and Lord Lumley to a tenant to the præcipe for the joint lives of such tenant and the defendant, to the use of the tenant to the præcipe during such joint lives for the purpose of a common recovery being suffered to such uses as the defendant and Lord Lumley should appoint, which recovery was afterwards suffered with double voucher, the vouchees being Lord Lumley and the common vouchee; and afterwards, by deed of the 28th of May, 1812, the defendant and Lord Lumley appointed the uses of the recovery to the defendant for life, remainder over. By lease and release, July 1st and 2d, 1817, reciting the above-mentioned will and conveyances, and reciting (but by mistake) that no recovery had been suffered of the premises in the county of

*10] Durham, *and reciting also that Frederick Lumley the elder (the fourth son of Lady Scarborough), and Frederick Lumley the younger (his eldest son, the lessor of the plaintiff), had contracted and agreed with the said John Lumley Savile, the defendant, for the absolute sale to him of all the right and interest whatsoever, whether vested or contingent, legal or equitable, or in possession, remainder, or reversion of them the said Frederick Lumley the elder and Frederick Lumley the younger, and each of them, of, in, to, from, or out of the freehold, copyhold, and leasehold estates respectively devised and bequeathed in and by the said will of the said Sir George Savile, and of such leaseholds as had been or might be renewed, at or for the price or consideration of one annuity or clear yearly sum of 1000*l.*, to be paid to the said Frederick Lumley the elder during his life, and after his decease to the said Frederick Lumley the younger during the joint lives of the said Frederick Lumley the younger and John Lumley Savile, the same to be secured by the covenant of the said John Lumley Savile in the manner therein-after mentioned; and reciting that the said John Lumley Savile was desirous, and it had been agreed, that the several freehold, copyhold, and leasehold estates should be released, surrendered, and assigned respectively by the said Frederick Lumley the elder and Frederick Lumley the younger, unto certain parties to that deed, in the manner and upon the trusts therein-after mentioned and declared, or referred to, of, or concerning the same: It was witnessed that, in pursuance of the said agreements, and in consideration of the said yearly sum of 1000*l.* so to be paid to the said Frederick Lumley the elder and Frederick Lumley the younger, as

*11] therein-after was mentioned, and for the *nominal consideration of 10*s.*, they the said Frederick Lumley the elder, and Frederick Lumley the younger, then of the age of twenty-nine years, and each of them, did (at the request, &c.) grant, bargain, sell, alien, release, and confirm unto certain trustees, parties to the deed, their heirs and assigns, the premises in the declaration in this cause mentioned, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, or thereunto incident, belonging, or in any wise appertaining; and all the estate, right, title, interest, trust, inheritance, possession, property, possibility, claim, and demand whatsoever, both at law and in equity, of them the said Frederick Lumley the

elder and Frederick Lumley the younger, or either of them, in, to, or out of the same premises, every or any part thereof, and all deeds, evidences, and writings touching or in any wise concerning the same premises or any part thereof, alone or jointly with other hereditaments of less value, which they or either of them, then had in their or either of their custody or power, or could obtain without suit at law or in equity. The trusts were then declared to be such as should correspond with the uses, trusts, powers, provisoes, &c. expressed, &c., in the indenture of the 28th of May, 1812; and the said John Lumley Savile, in consideration, &c., for himself, his heirs, executors, &c., covenanted with the said Frederick Lumley the elder, his executors, &c., to pay to him or his assigns, during his, Frederick Lumley the elder's, life, the annuity of 1000*l.*; and there was a similar covenant by John Lumley Savile to pay Frederick Lumley the younger the annuity of 1000*l.* after the death of Frederick Lumley the elder, during the joint lives of John Lumley Savile and Frederick *Lumley the younger. The first annuity was regularly paid till the [*12 death of Frederick Lumley the elder, which took place in September, 1831. Frederick Lumley the younger was the lessor of the plaintiff, and the only son of Frederick Lumley the elder. The second annuity had been paid regularly, since the death of Frederick Lumley the elder, till the death of Richard Lumley Savile, Earl of Scarborough, who died on the 17th of June, 1832, without issue male, when the title descended upon the defendant.

The case was argued in Michaelmas term, (14th and 18th of November, 1834). (a)

Sir *John Campbell*, Attorney-General, for the plaintiff in error (the plaintiff below.)

In order to shew the right of the lessor of the plaintiff to recover, there are three points to be established: First, that the interests of the lessor of the plaintiff, and of his father, being possibilities not assignable at law to strangers, no legal interest passed to the trustees under the deeds of 1817: (b) Secondly, that the deed of release of 1817 having disclosed the whole truth of the case, it does not operate by way of estoppel: (c) and, Thirdly, that the recovery did not bar the use which was to arise under the proviso for shifting the uses on the accession of the earldom. [*Preston*, for the defendant in error, admitted that he could not controvert either of the first *two points.] Then, the only [*13 question between the parties relates to the effect of the recovery.

As respects this point the case stands thus:—Devise to the defendant for life; remainder to trustees during his life; remainder to his eldest son in tail, with a proviso, that if a given event (the accession of the earldom) happen during the life of the defendant, or within twenty-one years afterwards, the lands shall remain to the use of the lessor of the plaintiff. The defendant conveys to A., during the joint lives of himself and A., to make him tenant to the præcipe, and the eldest son is vouched in a recovery. Then the event happens during the life of the defendant, and the question is, whether the use to arise under the proviso is barred by the recovery. It will be most convenient to consider, I., whether the proviso would have been barred if it had been restricted to the case of the event happening during the life of the defendant; and, if not, then, II., whether the circumstance of the proviso not being so restricted makes any difference.

I. First, upon general principles, the recovery ought not to bar the use to arise under such a proviso. There are two points of view in which recoveries are spoken of in the books. In the very old cases recoveries are treated as real actions; but in all modern authorities they are treated as common assurances.

(a) Before Lord Denman, C. J., Taunton, Patteson, and Williams, Js.

(b) See *Poole v. Haskey*, OrL. Bridg. 364; *Doe dem. Shaw v. Steward*, 1 A. & E. 300.

(c) See Co. Litt. 352, b.; *Hermitage v. Tomkins*, 1 Ld. Raym. 729; *Poole v. Haskey*, OrL. Bridg. 364; *Right dem. Jefferys v. Bucknell*, 2 B. & Ad. 278, 281.

If recoveries were now to be regarded as real actions, it might be difficult to contend that the proviso would not be barred; because, according to that view, the estate gained by recovery would be recovered by title paramount to the estate tail, and thus paramount to all the estates limited by the will creating the entail, and, consequently, paramount to the use which arises under the

*14] proviso in question. But it is perfectly clear that a common recovery now is, and for a long period has been, regarded by the courts and the legislature as a mode of assurance: *Benson v. Hodson*, 1 Mod. 109, *Martin dem. Tregonwell v. Strachan*. 5 T. R. 107, 110, note.(b) When the latter case came before the House of Lords, Willés, C. J., who delivered the judgment, said, (a) "I shall consider them" (common recoveries) "only as common assurances, and not at all as real transactions, being of opinion that all the confusion which has arisen concerning these recoveries has been occasioned by resembling a common recovery to another recovery, by considering it as a real transaction." Taking recoveries, then, to be a mode of assurance, it ought to follow on principle, that the interest passed by the recovery of tenant in tail is an interest derived out of his estate tail; and this is clearly established in *Capel's case*, 1 Rep. 62, a. b. (*S. C.* as *Hunt v. Gateler*, Poph. 5; and see *Cuppledike's case*, 3 Rep. 5, b), where, upon the principle that "the recoveror is in an estate which he hath gained under the tenant in tail in possession, it was held, that an estate gained by recovery suffered by tenant in tail is not subject to a rent-charge granted by the remainder-man. So in *Benton v. Hodson*, 1 Mod. 109, the Court came to a similar decision, on the principle, that "the recoveror comes in in the continuance of that estate that is not subject to the rent, but is above all

*15] "those charges." Again, in *The Appeal of the Lord Derwentwater*, 9 Mod. 172, (and see *Pigott on Recoveries*, 119,) where a papist, being a tenant in tail, suffered a common recovery, and declared the uses to himself and his heirs, it was held, that this was not a purchase within the stat. 11 & 12 W. 3, c. 4, s. 4, (b) but a modification of the family estate, on the principle, that he took no new estate by the recovery by way of purchase, but was in of his old estate. And so in *Martin dem. Tregonwell v. Strachan*, In D. P. Willés, 444, (c) and *Roe dem. Crow v. Baldwere*, 5 T. R. 104., upon the principle, that on a recovery the new use arises wholly out of the estate tail, it was held, that the estate gained by a recovery suffered by a tenant in tail, who did not come in as purchaser, will descend as the estate tail would have done; that is, it will go to the heir ex parte paternâ, or maternâ, according as the estate tail was derived from the paternal or maternal ancestor. From these cases, therefore, it is clear that the recoveror is in under the estate tail; and that the fee simple gained by the recovery is an estate derived out of the estate tail. The rule is stated accordingly in note (7) to 2 Wms. Saunders, p. 42, n. (*Note to Careswell v. Vaughan*.) If it be asked, how a larger estate can be derived out of a less? the proper answer is, as Willés, C. J. said in *Martin dem. Tregonwell v. Strachan*, Willés,

*16] 449, that the reason of the operation of the *recovery is a thing in its nature inexplicable. It is sufficient that the principle is clear, and that in the cases above cited it was made a ground of legal inference and decision. From the principle it necessarily follows, that the derivative estate recovered must be subject to whatever the entire estate tail, out of which it is derived, was

(a) Willés, 448. So in *White v. West*, Cro. Eliz. 793, (cited p. 16, post) the court expressly distinguished between a common recovery and a recovery by title, and said that the latter defeated the estate utterly: the main point decided there being, that if land be given to W. in tail, rendering rent, the rent shall remain a charge on the land after a common recovery suffered by W.

(b) Which incapacitated papists from purchasing lands mediately or immediately.

(c) *S. C.* 1 Wils. 66; 6 Brown's P. C. 319, 2d edit., and in K. B., 2 Str. 1179, and 5 T. R. 107, note (b). On the same principle, in *Garth v. Colton*, 3 Atk. 751, it was held, that for waste done before the recovery, the quondam tenant in tail might bring waste after the recovery: see pp. 756, 757.

itself subject to: and applying this inference to the present case, it is clear that the fee gained by the recovery is subject to the use to arise under the proviso. The effect of limiting an estate to A. for life, remainder to B. in tail, with a proviso that, if a given event happens during the particular estate, the lands shall go over to C., obviously must be to make the limitation to B. wholly subject, on the given event, to the limitation over to C.; and, a fortiori, an estate derived out of the interest so limited to B., must necessarily be subject to the same limitation over.

Secondly, there is abundant *authority* illustrating and supporting the proposition, that the estate gained by recovery is subject to the estates to which the entire estate tail was subject; and one express decision that the estate acquired by the recovery in the present case is subject to the use arising under the proviso. It is clear law that charges created by the donor before the creation of the entail are not barrable by recovery. In *White v. West*, Cro. Eliz. 792, where a gift was made by A. to B. in tail, rendering rent, it was held that a recovery by B. did not bar the rent, a decision which seems to turn on the principle that the reservation is a *charge* on the estate tail itself. So in Mr. Butler's note to Co. Litt. 203, b. (n. l. sect. 4.) it is said, "Supposing A. to be tenant *for life, with the usual powers of leasing, jointuring, and charging; remainder to trustees to preserve contingent remainders; remainder [17 to A.'s first and other sons in tail male; remainder to his daughters as tenants in common in tail, with cross remainders in tail between them, if more than one with remainders over; A. and his daughters may suffer a common recovery; and it will be good against A. and his daughters, and their issues in tail, and the remainders over. But the estates tail of the sons, being prior to the estates of the daughters, and being supported by the estate of the trustees for preserving contingent remainders, are not, whether vested or contingent at the time of the recovery, affected by it." And so in *Eales v. Conn*, 4 Sim. 65, where an estate was limited by marriage settlement to uses, as follows:—To the husband for life, remainder to the wife for life, remainder to trustees for 500 years, remainder to the first and other sons in tail male; the trusts of the term being, first, to raise portions for the younger children (if any), which failed, and, secondly, if the wife should die without leaving any issue of the marriage living at her death, to pay J. Sharland 600*l.*:—the husband died; then the wife and only son suffered a recovery; then the son died without issue, and then the mother died; it was held that the 600*l.* charge was not barred. In *Roper v. Hallifax*, 8 Taunt. 845, the like principle was applied under circumstances in effect exactly similar to those of the present case. The similarity of the two cases will be seen by comparing the limitations in each:—

*The case of *Roper v. Hallifax* was in effect thus:—

- A. for life.
- Trustees to preserve.
- B. for life.
- Trustees to preserve.
- C. in tail.

Power to trustees during the lives of A. and B., or the survivor, to revoke and appoint new uses.

Question, whether, a tenant to the præcipe being made by A., and recovery suffered by C., the power will be barred.

The present case is thus:—

- A. for life.
- Trustees to preserve.

C. in tail.

Proviso that on a given event taking place during the life of A., certain of the old uses shall cease, and new ones take effect.

Question, whether, a tenant to the præcipe being made by A., and recovery suffered by C., the *proviso* will be barred.

As a power to alter the uses of a settlement, and a proviso for altering them upon a given event, differ only in the nature of the event upon which the new uses are to arise (a power to alter uses being a proviso that they shall be altered upon the power being exercised), the two cases are exactly similar. *Roper v.*

Halifax, 8 Taunt. 845, was twice argued, and the decision was that the power was not barred.

Thirdly, all the cases in which a recovery has been held to be a bar to a condition or shifting use have been distinguished from the present case by one marked feature. Here the estate arising from the descent of the title, is precedent, in point of limitation, to the estate tail. This appears from the words of the proviso of cesser, and of the limitation consequent upon the cesser, and also from the circumstance that the latter is followed by a new provision that the party taking under it shall take the name and arms, which would have
 *19] been *unnecessary if the estate tail arising under the limitation had merely effected an acceleration of the younger son's estate tail. But in the cases referred to, the limitation over, or springing use, which was held to be barred, was not precedent in point of limitation to the estate tail (as here), but subsequent. The use did not, as in the present case, spring from a point anterior to the commencement of the estate tail, but only abridged or determined the estate tail after it had commenced in interest and enjoyment. Thus, in *Benson v. Hodson*, the two following cases are put by Lord Hale, 1 Mod. 111:—He says, "A man made a gift in tail, determinable upon his nonpayment of a thousand pounds, the remainder over in tail to B. with other remainders; the tenant in tail before the day of payment of the thousand pounds suffered a common recovery, and doth not pay the thousand pounds; yet because he was tenant in tail when he suffered the recovery, by that he had barred all." And again, "if tenant in tail be with a limitation so long as such a tree shall stand, a common recovery will bar that limitation." In both which cases the limitation which is barred is *subsequent* to the estate tail. So in *Page v. Hayward*, 2 Salk. 570, (Pig. Rec. 178, 4th point in the judgment,) it was laid down that if an estate were limited to Mary and the heirs male of her body by a Searle to be begotten, provided and upon condition that, if she should marry any but a Searle, then the estate should remain and be to J. S. and his heirs; a common recovery suffered before marriage would bar the estate tail and remainders, and her marriage afterwards with another would not avoid the recovery. Here again the limitation over is *subsequent* to the estate tail. In
 *20] *Gulliver dem. *Corrie v. Ashby*, 4 Burr. 1929, an estate was devised according to certain limitations under which Ambrose Saunders became tenant in tail male in possession, and rather more than two years afterwards suffered a recovery; and the will contained a proviso, and the devise was declared to be expressly upon condition, that every person to whom the estates should descend or come should take the name of Wykes; but there was no devise over for non-performance. Ambrose Saunders never took the name, and the question was whether the estate went over by the proviso? It was held that it did not, on the ground that either this was not a conditional limitation, for want of a devise over, or that, if it was a conditional limitation, it was barred by the recovery. But here also the gift over (if any) must have been *subsequent*, in point of limitation, to the estate tail. So also in *Driver dem. Edgar v. Edgar*, 1 Cowp. 379, where the devise was to Mary Edgar in tail, proviso that if she should die not leaving a child or children living at her decease, the estate should be "void, as to inheritance of heirs," and go over; and Mary Edgar suffered a recovery; it was held that she took an estate tail, and that the recovery barred the limitation over. Here also the gift over was clearly *subsequent*. These cases, therefore, are distinguishable from *Roper v. Halifax*, 8 Taunt. 845, and from the present case, in which the springing use does not take effect subsequently to the estate tail, but arises from a point anterior to the commencement of that estate.

Fourthly, the *principle* on which *Page v. Hayward*, 2 Salk. 570, Pig. Rec. 176, and the like cases depend, has no application to the case *of a springing
 *21] use which arises antecedently in point of limitation to the estate tail, that is, which springs from a point anterior to the commencement of it. The ground
 VOL. XXX.—3

on which a recovery bars a remainder expectant on an estate tail is, as was said by Lord Hale in *Benson v. Hodson*, 1 Mod. 109, that the recoverer comes in *in continuance* of the estate tail; so that the remainder never comes into possession. Now it is obvious that this continuance of the estate tail may well prevent any limitation or springing use from taking effect which merely abridges or determines the estate tail, such as the conditional limitation in the case put by Lord Hale (*Benson v. Hodson*, 1 Mod. 111,) of a conveyance to A. and the heirs of his body so long as a tree stands, and then over. The prolongation of the estate tail by the recovery may, on the same principle as it prevents the determination of that estate by the failure of issue, also prevent its determination under a conditional limitation annexed to it. But the mere prolongation of the interest of the tenant in tail can have no tendency to preclude the operation of a proviso which springs from a point anterior to the commencement of the estate tail, and overreaches the entirety of it. In such a case the proviso does not *determine* the estate tail; it substitutes a new use in the place of the entirety of it, in the same manner as if the limitation in tail had never been contained in the settlement. A distinction much to this effect is suggested in two MS. notes of the late Mr. Serjeant Hill, which have been printed in *Sanders on Uses*, (Vol. i. p. 436, 4th ed. (1824).) From the first note, it appears that the *Serjeant at one time considered that *Page v. Hayward*, 2 Salk. 570, [*22 *Pig. Rec.* 176, went too far, and that even in such cases the recovery would not bar the conditional limitations. He afterwards altered this opinion and added a second note, which is as follows:—"N. B. Since the above was written it seems *clear on further consideration*, that where an estate is devised to one in fee simple, upon condition, and in case the condition be not performed, then to another; this, if within due bounds, will be good as an executory devise, and therefore not barrable by recovery; because no executory devise can be barred by recovery (at least not unless the person to whom the executory devise is made is vouched in the recovery); yet if in such case, the first devise be *not a fee-simple*, but a *fee-tail*, then the devise over will operate, not by way of executory devise, but as a contingent remainder; and consequently a recovery suffered by tenant in tail before the condition, or contingency, happens on which the remainder is to take effect, must extinguish it, because a remainder cannot, though an executory devise may, and always does, subsist without a particular estate to support it; but where lands are devised in tail on condition, and if the condition be broken, then to B.; this, though called a condition, is by reason of the devise over a limitation, or, as it is frequently called, a conditional limitation, and the devise over being limited after a particular estate (*viz.*) an estate tail which is capable of supporting it, as a contingent remainder, and therefore a recovery suffered (before breach of condition) by the tenant in tail must destroy the contingent remainder *by destroying the particular estate, which supported it before the contingency happened; that is, before the remainder vested; [*23 for it is a clear rule, that every remainder must vest during the particular estate, or eo instante that it determines, or otherwise it can never vest at all." The deliberate opinion, therefore, of this very learned person was that the principle on which *Page v. Hayward*, 2 Salk. 570, *Pig. Rec.* 176, and other similar cases depend, applies only to cases where the conditional limitation is *subsequent to or expectant* on the estate tail, not to a case where the conditional limitation or springing use arises from a point anterior to the commencement of it. This note, taken with the decided cases, justifies the position, that the operation of a recovery, as a bar to a conditional limitation, is in analogy to its operation as a bar to remainders; according to which rule, the right of the plaintiff in this case would be clear, since the analogy holds only as to uses which are subsequent to and expectant on the estate tail, and not as to uses which are antecedent to it.

There are, therefore, two classes with respect to the effect of a recovery in barring a springing use. The first, consisting of cases like *Page v. Hayward*,

2 Salk. 570, Pig. Rec. 176, where an estate tail may be determined or abridged by a conditional limitation, or springing use, annexed to it and expectant upon it; the second, consisting of cases such as *Roper v. Hallifax*, 8 Taunt. 845, and the present case, where the springing use arises from a point anterior to the commencement of the estate tail, and overreaches the entirety of it. In the first class of cases a recovery by the tenant in tail will bar the springing use: in the second it will not.

*24] All text writers on the subject expressly or impliedly recognize this distinction. In Sugden on Powers, ch. 1, s. 5, V. Page 80, 5th ed. (1831), the author supposes the case of an estate limited to a parent for life, and then to his children, as he shall appoint by will, and in default of appointment, to the children in tail; and observes, "The case has been considered similar to that of Page and Hayward, 2 Salk. 570, Pig. Rec. 176. To this opinion the author himself once inclined, but further consideration has induced him to consider the point very doubtful. For, in Page v. Hayward, 2 Salk. 570, Pig. Rec. 176, although the words expressed a condition, yet they were construed to be a limitation; and, therefore, it is the common case of a vested estate-tail, with a limitation over in a certain event, in which case it is quite clear that a recovery suffered before the happening of the event will defeat the limitations over. It is like the case put by Hale, Chief justice, in *Benson v. Hodson*, 1 Mod. 111, of a tenant in tail, with a limitation so long as such a tree shall stand; and he held, that a common recovery would bar that limitation. But in our case the question would be, whether, during the life of the donee of the power, the estates to be created under the power would not be considered a charge upon the estate tail." These observations were written before the decision of *Roper v. Hallifax*, 8 Taunt. 485, and the correctness of them was confirmed by that case: the word "charge" is only another mode of describing the interests which, it is insisted, are not barrable. In Cruise's Digest, tit. Recovery, c. 10, s. 1, 3, Vol. v., p. 407, 4th ed., (1835,) it is said, "No estates or interests were barred by a common recovery, but those which were subsequent, in

*25] point of limitation, to the estate of which the recovery was suffered; for all interests precedent remained as they were before." In Burton's Compendium of the Law of Real Property, after noticing that, in the common case of a settlement, with a power of sale and exchange, to be exercised with the consent of the tenant for life, or tenant in tail in possession for the time being, the power is not barrable during the estate for life, for which proposition the author cites *Roper v. Hallifax*, 8 Taunt. 845, he remarks thus, (page 272, 3d ed., 1834): "The tenant in tail in remainder cannot suffer a recovery without the concurrence of the tenant for life: and even this concurrence will not necessarily destroy the power. For his old estate for life may still continue; and whilst that lasts, any shifting use arising by an exercise of the power given to the trustees must be antecedent to the estate tail, and paramount to it in title; and therefore that power will still continue exerciseable notwithstanding any act of the tenant in tail." In Bayley on Fines and recoveries, Chap. xviii. § 5, p. 229, it is stated on the authority of *Roper v. Hallifax*, 8 Taunt. 845, that "A recovery by tenant for life and remainderman in tail will not destroy a power which is antecedent to the estate tail." In Sanders on Uses, Vol. i. p. 176, 4th ed., (1824,) the principles above relied upon are distinctly stated and insisted on: he says, "Holt, C. J., in *Page v. Hayward*, 2 Salk. 570, having stated generally his opinion, that a recovery will bar a condition or limitation collateral to the estate tail, for the destruction of which it is suffered, it has been contended, that a recovery will destroy a power, originally reserved with a view to defeat such estate tail. But a recovery has the effect of barring a collateral

*26] condition or limitation on the principle, that it bars all remainders expectant upon it; but it cannot affect a use precedent to the estate tail, of which the recovery is suffered; for the recoveror comes in as of the estate of the tenant in tail, and subject to all charges, to which it is subject, and to all

limitations preceding it." And afterwards he puts exactly the present case. He says, page 177, "Suppose lands limited to the use of A. for life, with remainder to B. in tail, remainder to C. in fee, subject to a proviso, that if a certain act be done within the compass of A.'s life, the uses limited to B. and C. should cease, and in lieu thereof, the use should be to D. in fee. It could scarcely be contended, that any act by the tenant in tail could defeat this springing use. It would not, in the sense in which the expression is used, determine the estate tail of B.; but it would prevent its taking effect in possession. It would substitute another estate in lieu of the estate tail." Before the action in *Roper v. Halifax*, 8 Taunt. 845, was brought, an opinion had been written on the case, which is printed in *Sanders on Uses*, vol. 1, p. 426, Fourth ed., 1824; see the same vol. p. 192, note (a), and in which the same principles are relied on. The preceding authorities are confirmed by the language of the late statute, 3 & 4 W. 4, c. 74, which, as is well known, was not intended to alter the general powers possessed by a tenant in tail. The fifteenth section of that statute excepts from among the interests which may be barred by tenant in tail "the rights of all persons in respect of estates prior to the estate tail."

Upon a full examination, then, of principles and authorities, the first proposition of the plaintiff appears completely made out. But the same conclusion *may be come to, even upon a more general and cursory consideration [27 of the case, and of the principles affecting it. Thus, if lands be limited to the use of A. for life, with a limitation to trustees for a term of 1000 years, with remainder to B. in tail, it is clear that a recovery by B. will not affect the term of 1000 years. Upon the like principles, if the limitation be to A. for life, remainder to B. in tail, with a proviso that, upon a given event happening during the life of the tenant for life, a term of 1000 years shall take effect between the life estate and the estate tail, it is clear that the springing use under this proviso could not be affected by a recovery: and the same conclusion necessarily follows if the term, instead of being for 1000 years, be for 10,000 years, or be indefinitely extended, or if the proviso be that, upon the given event happening during the life of the tenant for life, entirely new uses shall be substituted for the old ones. Or, lastly, the case may be put simply as follows:—If the recovery, instead of being suffered by Viscount Lumley, had been suffered by a remote tenant in tail, for instance by a son of William Lumley, it seems impossible to conceive that such a recovery could have the effect of barring the shifting use, supposing it to have arisen during the life of the defendant. But the only principle upon which that conclusion can be escaped from is, that the use is precedent to the estate tail of such remote tenant in tail, and on that ground is not barrable; and this principle, if applicable to the one case, applies with equal force where the party vouched, instead of being a remote tenant in tail, is entitled to a remainder in tail immediately expectant upon the determination of the life estate.

*II. The plaintiff's second proposition is, that as the event has happened during the life of the defendant, the circumstances of the proviso not [28 having been restricted to that event makes no difference. Since the result of the case is the same as if the proviso had been restricted in the manner supposed by the first proposition, the legal conclusion ought to be the same also. But an argument may be attempted to the effect that, by the recovery, the proviso would, according to *Page v. Hayward*, 2 Salk. 570, Fig. Rec. 176, clearly be barred in case of the event not happening till after the defendant's death, and that this circumstance in some way affects the efficiency of the proviso, and prevents its operating at all. In answer to this, the shifting clause may be construed divisim, i. e., as containing in itself several provisos applicable to the estates of the respective takers; that is, one proviso that if the given event should happen during the estate for life, the uses should shift, and so on; and a separate proviso for the time of each estate. Such a construction appears to have been adopted in the case of *Boyce v. Hanning*, 2 Cr. & J. 334, S. C. 2

Tyrwh. 327, where a power of sale, given to trustees, to be exercised with the consent of tenants for life, and after their deaths at the discretion of the trustees was held valid, apparently on the ground that the power might be considered as comprising two powers; one exercisable during the life estates, which would be good, and the other exercisable after the determination of those estates. If the like construction be adopted here, the proviso applicable during the estate *29] for life is the proviso which in the event has taken effect, and, therefore, *according to the proposition already established, it is not affected by the recovery. These observations, however, enter into niceties which this part of the plaintiff's case does not require. The question arises upon a limitation by way of use, and is, therefore, unaffected by any technical rules; in the event, the case put by the second proposition is identical with the case put by the first proposition; and therefore the legal consequences must be the same.

Preston, for the defendant in error (the defendant below). The defendant rests his case upon four propositions:—

I. The proviso for shifting the estates on the accession of the earldom operated only on the estates for life of the defendant, and its effect was to make only the life estate determine, so as to give the estate over, not to the lessor of the plaintiff, but to his eldest son Viscount Lumley; and, therefore, admitting that the recovery has not barred the proviso, the lessor of the plaintiff is not entitled to recover. The proviso for shifting the estate is in the nature of a forfeiture, and is to be construed strictly, to prevent, as far as possible, a forfeiture from being incurred, as was laid down in the judgement in *Doe dem. Luscombe v. Yates*, 5 B. & Ald. 554. It is preceded by a proviso for taking the name and arms of Savile, which is drawn with great skill, and affords a key to the construction of the proviso in question. The name and arms clause contains, first, a provision of cesser directing that the estate of the party who neglects to take the name and arms shall cease, and, secondly, a provision declaring the conse-

*30] quence of such cesser, viz., that the estate shall *go over to the person next in remainder; and it is perfectly clear that the effect of this clause would be to determine the estate of that party only who neglected to take the name and arms. Analogy would lead us to expect that the clause for shifting the estates on the accession of the earldom should have a similar operation, and that it would determine the estate of that party only who acquires the earldom. Accordingly, this is the effect of the clause. It contains, like the name and arms clause, two provisions, viz., first, a provision of cesser, and secondly a provision directing to whom the estate is to go. The provision of cesser only determines the estate of the party who shall become earl, that is, in the present case, the estate of the tenant for life, Lord Scarborough. The directory provision cannot give over more than the provision of cesser takes away; and, as only the life estate of Lord Scarborough is given over, it must be intended that it should go over to the person next in remainder expectant on that life estate, viz., to Viscount Lumley. This result is supported and confirmed by the following consideration. If the tenant for life had died before the descent of the earldom, and the earldom had descended on a tenant in tail, it cannot be disputed that, under the words of the shifting clause, according to any construction, the estates would have gone over to the next tenant in tail; that is, to the person next in remainder after the person who became earl. The construction now contended for has the effect of carrying it over in like manner to the person next in remainder after the person who becomes earl, where the earldom descends on a tenant for life: whereas the construction, for which the plaintiff must contend, would, in the latter case,

*31] carry it over, not to the person next *in remainder after the person who becomes earl, but to the person in remainder after that person and his sons, thus giving a different operation to the clause in the two cases. In *Doe dem. Heneage v. Heneage*, 4 T. R. 13, and in *Stanley v. Stanley*, 16 Ves. 491, where there were provisions for shifting the estates, the same effect was given to the provisions which is here contended for on behalf of the defendant. In

Carr v. The Earl of Errol, 6 East, 58, a different effect was given to the provisions; but in that case the words could not be got over. On these grounds, therefore, admitting the recovery not to have barred the proviso, the lessor of the plaintiff could have no title to recover.

II. The effect of the proviso for shifting the estate upon the accession of the earldom, was to *accelerate* the old remainders, not to confer new interests. And this is an answer to the argument on the other side, because the acceleration of the old remainders does not render them antecedent to the estate tail; and by the admission of the plaintiff, the recovery bars all except what is so antecedent. The argument urged from the repetition of the provision for taking the name and arms, is of no weight; that repetition was merely inserted *ex majori cautela*. It has been already noticed that the clause upon which the lessor of the plaintiff relies, contains two provisions, viz., first a provision of cesser, and secondly a provision of gift over; and it is obvious that the operation of the clause might be effected by either of these provisions without the aid of the other. Its operation is effected by means of the provision of cesser. This construction must be adopted upon the following considerations. Suppose the lessor of the plaintiff, before the proviso took effect, had granted an annuity, chargeable upon his estate and interest in the property. If the proviso takes effect by way of cesser, accelerating the old remainders, such annuity would continue a charge, notwithstanding the operation of the clause: but, if the proviso takes effect by way of limitation of new uses, the annuitant would have no charge on the new use, and the annuity would be defeated; a result which the Court will not adopt. Again, the provision of gift over directs that the estate shall go only to the person and persons *next* in remainder. If, therefore, the clause were to be held to take effect under the provision of gift over, it would carry the estate over to the next taker only. It is only by considering the clause to take effect under the proviso for cesser, that is, by way of acceleration, that all the persons entitled in succession in the old line of limitations can be made to take under it. For these reasons the proviso must be held to take effect by means of the provision of cesser; that is, by way of acceleration, and not by way of new use; and then the argument of the plaintiff, which rests wholly on the new use being antecedent to the estate tail, necessarily fails.

III. The estate and interest of the lessor of the plaintiff is subsequent, or at least collateral, to the estate tail of Viscount Lumley, the tenant in tail. It is subsequent, for it divests the estate tail after it is vested. Therefore, being subsequent, it will, according to the rule stated by the plaintiff himself, be barred by the recovery.

IV. Whatever construction is adopted, the plaintiff's reasoning is fallacious, and the recovery has barred the **proviso*. The argument of the plaintiff proceeds upon the principle that the fee gained by the recovery is derived out of the estate tail. But such is not the rule. The true effect of a recovery is to gain a fee simple "so far as the estate was in the donor." It is upon this principle, that charges upon the estate of the donor are not barred by a recovery; and, according to this principle, it is clear that the proviso is barred.

With respect to *Roper v. Halifax*, 8 Taunt. 845, it is distinguished from the present case by the circumstance that, in that case, it was not the intention of the parties to bar the recovery to bar the power. Here it was the intention to bar the proviso. The intention was the ground on which that decision was founded.

Sir John Campbell, Attorney-General, in reply. I. The first proposition of the defendant is in direct contradiction to the words of the proviso for shifting the uses. The result of that proposition would be, that the estate would go over to the issue of the person becoming earl, in the same manner as if such person were dead; whereas the words of the clause are, that the estate shall go over in the same manner as if the person becoming earl "were dead without issue." And as to the arguments in support of the proposition: First, Doe dem. Lus-

combe v. Yates, 5 B. & Ald. 544. 554, is not applicable, because the object and effect of this proviso are not forfeiture, but a mode of disposition. Secondly, the name and arms clause does not afford any key to the construction of the clause in question, for the nature and purposes of the two clauses are entirely

*34] different. The object of the name and arms clause was to enforce compliance with the requisition for taking the name and arms, by imposing a forfeiture in case of non-compliance, and of course such forfeiture is in all cases confined to the person for whom the punishment is intended; and the estate is consequently in all cases given over to the person next in remainder. But the object of the clause for shifting the estates on the accession of the earldom, was to make provision for a second branch of the family, when an elder branch should succeed to the earldom and its fruits; an object which would not be effected in cases where the person who becomes earl is tenant for life, by giving the estate to the person next in remainder; that is, to the son of such person. In such cases it is necessary, in order that a second branch may be provided for, that the estate should go over to the person who would take the estates if the tenant for life were dead without issue. Thirdly, neither is it true that the plaintiff's construction gives different operations to the clause in the several cases where a tenant for life, and where a tenant in tail, acquires the earldom. In the one case, indeed, the estate goes to the person next in remainder, and in the other it does not. But, in both cases, the estate is carried from the person who becomes earl to the brother of that person, or the issue of such brother, conformably with the design of providing for the next branch. Fourthly, Doe dem. Heneage v. Heneage, 4 T. R. 13, and the other cases cited by the defendant, were decided (as this case must be) according to the words used in the will or deed.

*35] *II. The second proposition on the part of the defendant is incorrect; and, if correct, it would not affect the argument of the plaintiff. As stated for the defendant, the clause consists of two provisions, namely, first, a provision of cesser, and, secondly, a provision of gift over. And it is contended for the defendant, that the operation of the clause is effected by means of the former of these provisions, not of the latter. Now it will be observed, that the provision of cesser directs only, that the estate of the party who becomes earl shall cease; it does not direct that the estates limited to the sons of such person (when a tenant for life) shall cease. But the provision of gift over declares, that the estate shall go over in the same manner as if the person who becomes earl were dead without issue. Therefore the latter provision goes farther than the preceding one; and, in order that the whole intent of the clause may be effected, it must operate under the second provision, namely, by way of limitation of new uses; and not under the previous provision, by way of acceleration merely. The supposed case of an annuity having been granted cannot influence the legal construction of the will; and no argument arises on the ground of hardship or impolicy, because, in whichever way the proviso operates, such annuity would be a charge in equity. To the argument founded on the word "next," it is a sufficient answer, that the proviso directs the estate to go over "in the same manner" as the person or persons in remainder would take the same, in case the party acquiring the title were dead without issue; words which are sufficient to show that it was intended to go to the several takers in succession. But, further, if the proviso were to be held to take effect by way of acceleration

*36] of the old remainders, and not as a limitation of new uses, it would not affect the argument for the plaintiff. The suggested construction could not take effect by virtue of the provision of cesser, because, in order to give effect by way of cesser to the intention that the estates should go over as if the party becoming earl were dead without issue, it would be necessary that all the precedent estates should cease: whereas the provision of cesser in the present case makes only the estate of the tenant for life cease. If, therefore, it be adopted at all, it must be by *implying* that the estate originally limited in

remainder to the plaintiff was intended in the given event to be accelerated; that is, that such estate should, in the given event, take effect and spring from a point anterior to the determination of the particular estates upon which such remainder depends. And the result of such a construction will be, that the use limited to the plaintiff by the will has a capacity of taking effect in either of two ways; namely, either by way of remainder upon the natural determination of the particular estates, or by way of accelerated use antecedent to the determination of such particular estates. In the event which has happened, it takes effect in the latter way, and springs from a point antecedent to the commencement of the estate tail, so that the recovery does not bar it. The circumstance that the recovery bars it, so far as it had a capacity of taking effect subsequently to the estate tail, is no reason why the recovery should bar it so far as it had a capacity of taking effect antecedently to the estate tail.

III. With respect to the defendant's third proposition, it may be admitted, that the proviso is subsequent in the sense that it divests the estate tail after *it has become vested; but that circumstance does not render it subse- [*37
quent in the sense which is necessary in order that it may be barred by the recovery. The argument now urged for the defendant was attempted in *Eales v. Conn*, 4 Sim. 65, and failed: *Roper v. Hallifax*, 8 Taunt. 845, is also a complete answer to it, because, in that case, the power divested the estate tail after it was vested. The proposition is also disproved by the received rule in a case of daily practice. Suppose an estate is limited to several successive tenants for life, A., B., and C., with remainders to the first and other sons of each in tail, and with powers of jointuring and portioning to each tenant for life; the exercise of any one of the powers will defeat the estates tail, after they are vested; but it cannot be contended that a recovery in which A. is tenant to the præcipe, and the first son of C. is vouchee, will bar the powers given to B. The true criterion for determining whether a springing use is precedent or subsequent to the estate tail for the present purpose is, not whether it divests the estate tail, but whether it springs from a point antecedent or subsequent to the estate tail.

IV. The defendant's fourth proposition is sufficiently answered by the original argument of the plaintiff. It is true that in *Roper v. Hallifax*, 8 Taunt. 845, the intention of the parties to the recovery was different from the intention here. But the discussion of that case turned, principally, not on the intention, but on the power being antecedent to the estate tail. *Cur. adv. vult.*

*Lord DENMAN, C. J., in this term (May 11th) delivered the judgment of the Court, as follows:— [*38

Upon this special verdict four questions arose:

First, Whether the proviso in the will of Sir George Saville respecting the shifting of his estates in the event of the title of the Earl of Scarborough descending upon the possessor of them, applied to any but the first person upon whom it should so descend.

Secondly, If it did, whether the effect of that proviso, in the event of the title descending on a tenant for life, was to let in the son, if any, of the tenant for life until the title should descend on him, or to carry the estates over at once to the next branch of the family.

Thirdly, Whether the recovery suffered in 1812 destroyed the proviso.

Fourthly, Whether the deeds of 1817 barred the lessor of the plaintiff from maintaining this action. Upon the argument, the last of these questions was abandoned by the learned counsel for the defendant, who admitted that the deeds could neither operate by way of conveyance of any interest, nor by way of estoppel.

The first question was material, because, on the descent of the title to the first taker of the estates, they had shifted to the present defendant, and so it was contended that the proviso was satisfied and at an end. This point was not, however, much pressed, and, indeed, it is plainly contrary to the meaning of the proviso, in which, although the words "from time to time" are not inserted,

yet the obvious intent is that the proviso should attach to each of the estates created by the will as they should successively vest in possession.

The second question was much laboured in argument, and it was contended that this proviso must be *read and interpreted with reference and by
*39] analogy to the proviso as to taking the name and arms of Savile. We think that it is only necessary to read the two provisos in order to be fully satisfied, that as the motive and object of the deviser was different in the two, so the effect is and was intended to be different also. In the name and arms proviso, the cesser of the estate was intended as a personal punishment, by way of forfeiture, against the individual neglecting to comply with it, and the distinction is carefully drawn between tenant for life and tenant in tail; for the estates are to "go to the person (in the singular number) next in remainder in this my will in the same manner as if such person or persons so neglecting or refusing, being tenant or tenants for life, was or were dead, or being tenant or tenants in tail was or were actually dead without issue male." In the provision in question the cesser was not intended as a punishment to the individual, but to prevent the union of the earldom and estates in the same person, and for the benefit of the next branch of the family: accordingly the words used are different, for the estates are to "go to the *person and persons* who, under the limitations aforesaid, shall then be next in remainder expectant on the decease *and* failure of issue male of the person to whom the said title shall so descend or come, in the same manner as such person or persons so in remainder as aforesaid would take the same by virtue of this my will, in case he or they to whom the title of the said Earl of Scarborough shall come and fall in possession as aforesaid was or were *actually dead without issue*." These words, both in the description of what persons in remainder are to take, and of the manner in which

*40] they are to take, *plainly point out the exclusion of an entire branch of the family, and cannot receive the same construction as the words of the other proviso without doing great violence to the obvious meaning of the deviser, the framers of whose will evidently knew how to express his meaning in appropriate language. It is said that this construction will exclude the younger children of the defendant, who have no present benefit from the earldom. It certainly will exclude them, whether the earldom may descend upon them or not; but this is no reason for putting a sense upon the words of the will which they cannot fairly bear, and it may be observed that to both the provisos the deviser has added a clause protecting all jointures and portions for younger children duly settled before the cesser.

It was said that this clause of cesser is the operative part of the proviso, and the other words cannot carry over a greater interest than that which is made to cease; but we see no reason for saying that the words of cesser are rather the operative words than those by which the estate is carried over; and if the latter are more extensive than the former, there is no authority to prevent them from receiving their full effect.

We are, therefore, clearly of opinion that the effect of the proviso is, on the descent of the title, to carry over the estates at once to the next branch of the family.

We come now to the third question, on the effect of the recovery suffered in 1812 by the defendant, the tenant for life, and his eldest son, the tenant in tail in remainder.

We have no hesitation in holding that this recovery barred and destroyed
*41] not only the estate tail and all *remainders expectant on the natural failure of that estate; but also that it destroyed the proviso in question so far as it was attached to that estate tail, and all remainders and subsequent estates that were limited to come into possession on the descent of the title upon the defendant's son, or grandson and so on. The case of *Page v. Hayward*, 2 Salk. 570, Pig. Rec. 176, and other cases abundantly establish this position, which is fully sanctioned by the text writers.

Therefore the recovery undoubtedly barred and destroyed the vested remainder in tail of the present lessor of the plaintiff expectant on the determination of the estate tail vested in the defendant's son, and the conditional limitation to the lessor of the plaintiff in the event of the descent of the title upon the defendant's son; and if the defendant had died in the lifetime of his elder brother, the lessor of the plaintiff would have had no claim whatever in any event.

Neither have we any hesitation in holding that, if no estate had been limited to the lessor of the plaintiff, except such as was to take effect on the happening of the event contemplated by the proviso, so as that such estate would clearly be a new interest then first arising, the recovery would not have barred or destroyed the proviso, so far as it was attached to the life estate of the defendant; and that the lessor of the plaintiff would in the events which have happened be entitled to recover. It does not appear to us necessary to determine to what extent the estate of a recoveror in a common recovery is derived out of the estate tail: it may be admitted *that the recoveror cannot take a greater estate than the original donor had, and so that his estate is not derived *simply* from the estate tail; and it may be admitted that a recovery suffered by tenant in tail of lands *ex parte maternâ* will or will not alter the course of descent according as the tenant in tail was himself in by purchase or by descent. This, however, is clear, viz., that the estate of the recoveror is not derived out of the estate for the tenant for life, where he is not vouched, as he was not in this case. The conveyance by the tenant for life to make a tenant to the præcipe is no forfeiture of his life estate; it does not determine that life estate; though it may pass it wholly to another, where it is granted without keeping any reversion. This was not done in the present case; the conveyance being to the tenant to the præcipe for the joint lives of himself and the defendant, according to the practice adopted by conveyancers in order more effectually to preserve powers annexed to the life estate. It is a mere matter of form in order to enable the tenant in tail in remainder to bar his estate tail and the remainders over. Any person who has an estate in remainder between a tenant for life and a remainder-man in tail, is entitled even after a recovery suffered by them to treat the life estate as still subsisting, and to make his entry on the death of the tenant for life. It is conceded that no such intermediate estates are barred by such a recovery. Why, then, should this proviso attached to the estate for life be barred? It operates, not by way of determining or defeating the estate tail of the defendant's son, but antecedently to that estate by preventing the estate tail from ever vesting in possession, and being antecedent, *to that estate tail, cannot be affected by the recovery. [43
The case of *Roper v. Hallifax*, 8 Taunt. 845, is an express authority to this effect, which case has been discussed but never overruled. See 1 Sanders on Uses and Trusts, pp. 178, 426, and 486, (4th edit. 1824). It is argued that that case was decided on the intention of the parties expressed in the deed to lead the uses: but it is quite plain from the language of the judgment that the point as to the recovery and its effect was determined by the Court without reference to the intention of the parties, as indeed in reason and principle it ought to have been; and the intention of the parties was used only in answer to an argument arising from the effect of the deed itself, which was the second point in the case. The stat. 3 & 4 W. 4, c. 74, s. 15, has been referred to, but it is expressed in general terms, and proves only what in reality is not disputed as a general proposition, viz., that a recovery will not affect estates prior to the estate tail of which it is suffered.

It being then our opinion that the proviso in question, if a new interest arises from the happening of the event contemplated by it, is not barred or destroyed by the recovery, the only remaining point is, whether the limitation to the lessor of the plaintiff of a remainder expectant on the natural termination of the estate tail in the defendant's son, makes any and what difference.

It is argued on the part of the defendant that the proviso, supposing no recovery to have been suffered, and the title of Earl of Scarborough to have descended on the defendant, would have operated only to accelerate and vest in *44] possession that estate of the lessor of *the plaintiff which was already vested in him in remainder, and that, as that vested remainder was barred and destroyed by the recovery, it cannot by the happening of any subsequent event revive, be accelerated, and vest in possession. On the other side it is contended, either that it may so revive, or that the proviso would operate so as to create a new interest, and that the lessor of the plaintiff took under the will two interests, one a vested remainder in tail which is barred, the other a mere possibility, which, on the descent of the title upon the defendant, became a new estate tail, and which is not barred.

The words of the will in effect are, that the estate shall go to the lessor of the plaintiff, in the same manner as he would take the same under the will, if the defendant were dead without issue. A condition is added in these words : "such person and persons so in remainder performing and complying with the condition or proviso herein before contained, for taking and using the surname, and quartering the arms of Savile as aforesaid :—" which, it is argued, shows that a new estate was intended to arise ; otherwise why add these words of condition ? for, if the old estate only was accelerated, the name and arms proviso was already attached to it. It is answered, that the condition was added for greater caution, and, at all events, cannot alter the legal construction of the will, whatever arguments it may be supposed to furnish as to the opinion of the framer of it. Two reasons are assigned why the Court should hold the proviso to operate by way of acceleration : the one, that otherwise any charge made upon his estate in remainder by the lessor of the plaintiff, prior to the descent of the

*45] title on the *defendant, would not remain a charge on the happening of that event, because he would take a new estate ; the other, that otherwise, the next person in remainder only would take, and not all others in succession, as would be the case if the remainders were only accelerated. As to the first of these reasons, we do not think that the consequence pointed out, supposing it necessarily to follow, is of sufficient moment to have any influence on the legal construction of the will ; and we by no means accede to the construction assumed, though we are not now required to discuss it. As to the second reason, the words of the proviso, "*the person and persons* next in remainder, &c., and in the *same manner* as such person or persons, &c.," seem to point at a succession of persons ; but if not, still the lessor of the plaintiff may take an estate in tail ; and it is not necessary now to determine, whether those in remainder after him can take any thing or not. No authority upon this part of the case was cited at the bar, nor have we been able to discover any. The general intention of the deviser appears to be clear ; viz. that his estates should never go in the same line, or to the same persons, as the earldom of Scarborough ; and that if any person being tenant for life of his estates should become Earl of Scarborough, the remainder in tail to that person's children should never vest, but the estates should go over as if that remainder in tail had never existed. By holding that a new estate arose in the lessor of the plaintiff on the descent of the title of Earl of Scarborough on the defendant, we are giving effect to that intention so far as we can ; and we are not aware that in so doing we are contravening any rule of law : there is no inconsistency in treating the will as giving the lessor of the plaintiff an estate tail vested in remainder, and *46] also a *possibility, to the same person, of a similar, though not the same, estate tail, on the happening of a certain event ; the former of which is barred by the recovery, but the latter not. If we were to hold the contrary, this inconsistency would follow ; that the defendant, the tenant for life, would hold the estate, together with the title, (a thing quite contrary to the intention of the deviser), by reason of his son having barred the entail ; there being no rule of law to compel such a departure from the intention of the deviser. For

these reasons we are of opinion, that the lessor of the plaintiff is entitled to recover, and that the judgment of the court below ought to be reversed.

Judgment for the plaintiff.(a)

DOE on the Demise of THOMAS PHILLIPS, and MARY, his Wife,
against MORRIS. April 15.

Where a document is proved to have come into the hands of one party to a cause, the opposite party cannot entitle himself to give secondary evidence of its contents by shewing that it has been since lost or destroyed, unless he has served notice to produce.

Defendant in ejectment relied on a will devising all the testator's property except a pecuniary legacy. In answer, plaintiff proved that, after the execution of such will, a document which he alleged to have been a will, was signed by the testator, and delivered to a woman whom the defendant afterwards married, since which the witness, who prepared it, had heard nothing of it. It was then asked, on behalf of the plaintiff, whether the deceased had declared that paper to be his will, and whether the witness and others had signed it in his presence: Held, that the questions could not be put, no notice having been given to produce the last-mentioned document.

ON the trial of this ejectment, before Williams, J., at the last assizes for Pembrokeshire, it appeared that Thomas Phillips claimed in right of his wife, the joint lessor of the plaintiff, as heiress at law (which she was admitted to be) of Henry John, who died seised of the premises in question in 1819. The defendant claimed in right of Anne his wife, formerly the wife of the said Henry *John, to whom the said Henry John in April, 1819, being then pos- [47] sessed of the premises in question, devised all his property, except a pecuniary legacy to his daughter. Mr. Mortimer, one of the attesting witnesses, who proved the execution of this will, was cross-examined by *Chilton* for the plaintiff, and stated that very shortly afterwards he had prepared another instrument for the testator, who signed it, and that Mortimer witnessed it; that after the testator's death it was delivered to the said Anne John, the testator's widow, and that the witness had never heard her say what she had done with it. No notice had been given to produce this paper. *Chilton* then proposed to ask whether the testator, on signing the paper, declared it to be his last will, whether the witness signed it afterwards in his presence, and whether any other persons signed it in the presence of the testator; but the questions were objected to, and the learned judge refused to admit them, observing that the will itself was the best evidence to shew whether or not it had been executed and attested, and that the plaintiff had laid no ground for offering secondary evidence. The defendant had a verdict.

Chilton now moved for a new trial on the grounds of a misdirection (which is not material here), and of the above rejection of evidence. The objection was at all events taken too soon. It is laid down, in the case of a lost deed, that after proof of its due execution the loss of the deed must be proved.(b) And the plaintiff in this case not only had a right, but was called *upon, to [48] prove in the first place, not indeed the contents of the instrument, but its execution: in other words, that some paper was put into the testator's hands; that he declared it to be his will, and signed it; that others signed it in his presence; and that it subsequently came into the possession of the defendant. After having proved that such an instrument had once been in existence, it would have been for the plaintiff to call for the production of the paper itself, if he had given notice to produce; or to offer evidence (which would have been done here) of the paper having been destroyed. [Lord DENMAN C. J. How could you talk of the paper as a will at all, if you had not given notice to produce it? LIT-

(a) A writ of error upon this judgment is now depending in the House of Lords.

(b) *Rex v. Culpepper*, Skin. 673.

LITTLEDALE, J. The course is, that, before a party can talk of a written instrument, he must call upon the opposite side to produce it, or shew that it was lost and did not come to their hands. PATTESON, J. The proposed questions could have tended to nothing, unless you had had means of shewing that the paper had been destroyed; and even then, the evidence would not have made out the plaintiff's case, unless the contents of the will could have been shewn.] There would have been evidence to justify the jury in presuming that the contents amounted to a revocation of the previous will; for as the paper supposed to contain that revocation was in existence when the testator died, and would have been proved to have been destroyed by the defendant, this, if the jury thought the evidence sufficient, would have overthrown the defendant's title. In *Harwood v. Goodright*, 1 Cowp. 87, the jury found specially that the testator after *49] executing a will, under which *the defendant claimed, made another will; and that the disposition by the latter will was different from that in the preceding one, but in what particulars the jury did not know; and they did not find that the testator cancelled the previous will, or that the defendant destroyed it, but what was become of the same they were together ignorant. In that case it was held that the special verdict did not find any revocation of the first will; but Lord Mansfield said, that "in case the *defendant* had been proved to have destroyed this last will, it would have been a good ground for the jury to find that this was a revocation." In the present case, evidence would have been offered to shew that the defendant or his wife had destroyed the will. [PATTESON, J. You assume that both the wills related to the same property. In *Harwood v. Goodright*, 1 Cowp. 87, it seems by the verdict that the jury must have got at that fact by some legitimate evidence, though in other respects the contents of the will were unknown to them.] As the first will here purported to dispose of all the testator's property, it must be presumed that the second will made some alteration in that disposition; and as the defendant or his wife destroyed the second will, the presumption will be taken most strongly against them.

Lord DENMAN, C. J. It was proved here that the paper spoken of as the second will was delivered to the testator's widow. Whatever that paper was, therefore, it is proved to have been in the possession of the adverse party in the *50] cause. It is, consequently, impossible *that the rule now moved for should be granted. Before any thing which has been in the hands of the opposite party can be talked of as a will, there must be proof of a notice to him to produce it; for although a witness might be called to say that it had been destroyed, it might be in the hands of the adverse party notwithstanding.

LITTLEDALE, J. When a document is shewn to have been in the possession of a defendant, the plaintiff is not at liberty to talk of it till he has given notice to produce it; though, if it were shewn that the paper had been lost without coming to the defendant's hands, the case would be different. The supposed will, here, was traced to the defendant; the plaintiff then could not stir without proving notice to produce. Without such proof, even if he had given evidence that the defendant had destroyed the document, he was not entitled to talk of it as a will.

PATTESON, J. To give effect to the second document as a revocation of the previous will, it would have been absolutely necessary to shew that it related to the same subject-matter. When it had been traced to the defendant, no further evidence could be given of it without proving notice to produce. If the plaintiff alleged that the paper had been destroyed after it reached the defendant, he might say, "I dispute that. I have the document, but I will not produce it, because I have not been served with notice." If, indeed, it had been proved that the document was destroyed without having got into the defendant's hands, *51] the case would have *been different. Here the learned Judge stopped the evidence at the point where the will was traced into the hands of the defendant. There is no ground for a rule.

COLERIDGE, J. I am of the same opinion. Where you wish to prove the destruction of an instrument which has been traced to the hands of the opposite party, you must give notice to produce. Rule refused.

The Court, however, gave *Chillon* leave to move upon affidavits, on the ground of surprise, Lord DENMAN, C. J., saying that the court would perhaps reserve the question of costs if a gross case of fraud appeared.

HENSLOW against FAWCETT. April 22.

If A. give money to B. to induce B. to vote for a candidate at an election for a member of parliament, and B. agree to do so in consideration of the gift, A. is liable to the penalty of 500*l.* for corrupting B. to vote, within stat. 2 G. 2, c. 24, s. 7, though B. never gives the vote. A jury may infer the fact of the agreement from circumstances, although B., who is a witness does not state that he ever intended to vote.

Where, in such a case, A.'s counsel, and the judge, at the trial of an action against A. for the penalty, put the question merely on the credibility of the evidence, and the jury found against A., the court refused to grant a new trial on the ground that the judge should have desired the jury to say, whether B. ever intended to give the vote.

Per Patteson and Coleridge Js., if in fact B. never did so intend, A.'s offence was complete by his giving the money for the purpose of inducing B. to vote, and by B.'s professedly accepting it on these terms.

DEBT for 500*l.*, upon the seventh section(a) of st. 2 G. 2, c. 24. The declaration alleged that, at an election of two burgesses for the borough of Cambridge, *the defendant did corrupt one John Garner, who had a right to vote at the election, to give his vote for a candidate, James Lewis Knight, by corruptly giving to J. G. the sum of 5*l.*, and by corruptly promising to give J. G., after he should have so given his vote for J. L. K., the further sum of 5*l.*, which sums were respectively so given and promised as a reward to J. G. so to give his vote in the said election.(b) [*52]

On the trial before Lord Abinger, C. B., at the last Cambridge Assizes, the proof for the plaintiff was, that the defendant had gone to Garner's house shortly before the election, and had solicited his vote for Mr. Knight, and that Garner had answered, that it depended upon circumstances how he should vote: that the defendant had, at the same time, asked Garner if money would be a convenience to him; to which Garner replied that it would; that the defendant then asked Garner if 5*l.* would be of use to him; that Garner replied, "No, you must not treat me worse than my neighbours;" *upon which the defendant said, "I will give you 5*l.* now, and 5*l.* when you poll," and gave [*53] Garner five sovereigns. Garner then said, "Now we are level handed, you have five, and I have five." Defendant then said, "You will go and poll for Mr. Knight." Very shortly after this, Garner went to the committee of the two,

(a) St. 2 G. 2, c. 24, s. 7, enacts, "That if any person who hath, or claimeth to have, or hereafter shall have, or claim to have any right to vote in any such election, shall, from and after" &c. (24th June, 1729), "ask, receive, or take any money or other reward, by way of gift, loan or other device, or agree or contract for any money, gift, office, employment or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote in any such election, or if any person by himself, or any person employed by him, doth or shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any person or persons to give his or their vote or votes, or to forbear to give his or their vote or votes in any such election, such person so offending in any of the cases aforesaid, shall for every such offence forfeit the sum of 500*l.* of lawful" &c., "to be recovered as before directed, together with full costs of suit;" and every such offender, after lawful conviction, is to be for ever disabled from voting in any election of members to parliament, and from holding or exercising any office or franchise to which he then shall or any time afterwards may be entitled, as a member of any city, borough, town corporate or cinque port, as if such person was naturally dead.

(b) See the declaration at length, post, p. 59, note (a).

and only other, candidates, who were standing on an interest opposed to that of Mr. Knight, and told them what had passed, and afterwards voted for those two. These facts were sworn to by Garner, but he did not state what his intention was at the time of his taking the money. The counsel for the defendant called no witness, but endeavoured, in his address to the jury, to shew that the story was improbable, and the principal witness not to be credited. The Lord Chief Baron left the question to the jury entirely on the credibility of the same witness. Verdict for the plaintiff.

Storks, Serjt. now moved for a new trial. The Lord Chief Baron should have pointed out to the jury the distinction between attempting to corrupt, and actually corrupting. The former was shewn by the evidence, but not the latter. The offence of attempting to corrupt is no doubt a misdemeanor; but it is not the offence described in the statute, and charged in the declaration. The distinction is shewn by the different expressions used in different parts of the seventh section, as was pointed out in the argument in the *Barnstaple* case, 1 Peckw. 91. "The legislature have, in the stat. 2 G. 2, c. 24, s. 7, distinctly

*54] defined what bribery is, *and in what it consists, both as it relates to a voter, and to a candidate. The voter is guilty of bribery, if he *asks*, receives, or takes, or agrees or contracts for, any money, &c. to give, or to forbear to give his vote. The candidate is guilty of bribery, if he, by any gift or reward, or by any promise, agreement, or security for any gift or reward, *corrupts* or *procures* any person to give, or refuse his vote. In the voter, it is a crime to *ask*; but the *offer* on the part of the candidate, which appears to be, as it were, the counterpart of a request by the elector, seems to have been studiously omitted in the second part of the clause; and an actual corruption, or procurement, is made necessary to complete the offence. Therefore, the consent of the voter is essential, for otherwise no person can be said to have been corrupted." And the reason given is, that, upon this construction, the voter cannot inform against the candidate without accusing himself also; but that a different interpretation of the act would "leave a candidate, who in the course of his canvass must solicit the votes of a number of electors, at the mercy of any one of them who could be brought to swear, that he accompanied his solicitation with the offer of a bribe," which would be dangerous and unjust. [COLERIDGE, J. Suppose a person to have no right at all to vote, may he not be corrupted? The cases say that he may; *Selwyn*, N. P. Debt, s. XI.(a)] In those cases an agreement, and an actual voting in pursuance of it, were proved. [COLERIDGE, J. Your argument is much the same as that used for the defendant in *Sulton v. Norton*, 3 Burr. 1235, (see *Bush v. Ralling*, *Sayer's Rep.* 289,)

*55] *where, upon the objection being taken that the person alleged to be corrupted voted for the opponents of the persons for whom he agreed to vote, Lord Mansfield said, that he wondered how it could ever be a doubt; for that the offence was completely committed by the corrupter, whether the other party should afterwards perform his promise or break it.] But in that case, also, there was an agreement. The first part of the section must be taken conjointly with the second, or it must be held that there is no distinction between "asking" in the former, and "corrupting or procuring" in the latter. The language of the statute "corrupt or procure" must be taken as if the words were "corrupt and procure." At any rate there must be a bona fide agreement between the parties. The court will not be disposed to relax the strictness of proof in an action so highly penal.

Lord DENMAN, C. J. The ground of this motion is, that the judge did not properly leave to the jury a question supposed to arise from the distinction, in the words of the statute, between the offence of the party to whom, and that of the party from whom, the bribe is to come. That distinction is not to the pre-

(a) Page 646, (8th ed. 1831), referring to *Rigg v. Curgenvén*, 2 Wils. 395, and *Comb v. Pitt*, cited *ibid.* 398.

sent purpose, except by way of illustration. The act of the party who offers to corrupt is distinct from that of the other party. The offence here charged is corrupting. The statute says, that if any person shall "corrupt or procure" any person to vote or forbear voting, he shall forfeit 500*l*. That is a distinction which fixes the defendant. Procuring is one thing; it is essential that the vote should be given. Corrupting (which word is connected by the disjunctive particle) is another; it seems to me to *lie altogether in the act of the party giving the bribe. It is true that, in *Sulston v. Norton*, 3 Burr. 1235, notes were exchanged between the parties. But here the consideration for the money was the promise to vote. No doubt it would have been so found, if the question had been expressly left to the jury. The breaking of the contract would not prevent it from having existed as a contract: if we were to hold that it could, we should be confounding all principle. Had there been any real doubt as to the existence of a contract, the defendant's counsel should have called the attention of the judge to that doubt, and have demanded the opinion of the jury upon it. There can be no question which way they would have found, if that had been done.

LITTLEDALE, J. I think no rule ought to be granted. If there were doubt enough as to the fact of the agreement, the counsel should have required it to be put to the jury; whereas now, for the first time, it is suggested that there is something in the evidence which might have led them to negative that fact. The case, it is true, is different from that of *Sulston v. Norton*, 3 Burr. 1235, where the transaction was formal and complete at the time. The words of the act are "corrupt or procure;" and it seems to me that these two words mean different things. To procure is to get the thing done; the corruption is completed by effecting an agreement amounting to corruption. If the witness Garner had declared that he merely meant to get the money, and it had appeared clearly that he did mean that only, and not to vote, a question might have arisen; I will *not say what the effect of that would have been, nor whether there would or would not be corruption in such a case. But the evidence does not go far enough to raise that question. [*57]

PATERSON, J. I agree with my brother Storke, that there is a great difference between the two parts of the seventh section of this statute. The first part, which is applicable to the voter, contains the word "ask," which is not repeated in the second. From this it may be taken that, in an action against the party tendering the bribe, proof should be required of more than a mere solicitation. Then, in the first part, the words go on thus, "or agree or contract for any money, &c.;" the agreement, therefore, would subject the voter to the penalty. In the second part, the words are "corrupt or procure;" the question therefore is, whether this defendant has either corrupted or procured. As to procuring, I agree with my lord, that it may be necessary that the vote should be actually given. But as to corrupting, that is not necessary; and so it was held in *Sulston v. Norton*, 3 Burr. 1235. The corruption is complete without the vote being given. But then my brother Storke says that, if it should appear that the party does not take the money corruptly, his intention being not to give the vote, the penalty does not attach to the party giving the money. And he contends that it does so appear from the facts of this case. But, in the first place, it is not distinctly shewn, here, that Garner did not mean to give the vote. The point was never raised at the trial; and the judge's attention was not called to it, or he *might have put it to the jury. It appears that the defendant sought the voter out, and gave him money for the purpose of inducing him to vote, and that the other took it. At all events, whether the voter did or did not mean to perform the contract, he professed to enter into it, and took the money given by the defendant for the purpose of corrupting him. In the second place, if he never had such an intention, I should still hold the defendant liable. Whether or not the voter intended to perform his part of the contract [*58]

is immaterial; the defendant had done all that lay with him. If the agreement was made, that is enough.

COLERIDGE, J. It is true that this is a statute highly penal; yet, in construing penal statutes, we must not by refining, defeat the obvious intention of the legislature. The question here is, as to the meaning of the word "corrupt." My brother Storks argues as if corrupting and procuring to vote, or forbear to vote, were the same thing. *Sulston v. Norton*, 3 Burr. 1235, distinctly shews that that is not so, and that a person may be guilty of corrupting who has not been guilty of procuring. It is not unimportant to look to other circumstances which are parcel, as it were, of this statutable provision against bribery. Now it has been decided to be immaterial whether the party, to whom the money is given or promised, vote or not, and even whether he have or have not a right to vote. These decisions show how the courts have been used to interpret the provisions of this statute. It is perhaps never safe to define unnecessarily: but it *59] appears to me, *that the offence of corrupting is complete, whenever one party gives or promises money for the purpose of inducing the other to vote or forbear from voting, and that other professedly accepts for that purpose the promise or money so made or given. Thus the offence is complete, by the one giving with such intention, and the other professedly accepting with such intention. He who gives under these circumstances and with this purpose, appears to me to corrupt, and he who accepts, to be corrupted, within the meaning of this act. As respects the defendant in this case, his act was clearly complete. As to the other party, can any one doubt that there had taken place between the two that which, if legal, would have been binding upon him as an agreement? In that case, the defendant would have been safe as a contracting party: the offence is, therefore, in my opinion complete. I, however, am prepared to go the length of saying that, if it were clearly shewn that Garner never intended to give the vote, concealing the intention from the defendant, and being so far moved by the defendant's act, as to receive his money and conceal such intention, the defendant would still be liable. Rule refused. (a)

(a) The declaration was as follows:—

Whereas the borough of Cambridge is an ancient borough, and for a long space of time two burgesses of the said borough have been elected and sent, and have been used and accustomed, and of right ought to have been, and still of right ought to be, elected and sent, to serve as burgesses for the said borough in the parliament of this kingdom; and the plaintiff saith that heretofore, to wit on the 30th day of December. A. D. 1834, a certain writ of our lord the now king issued out of his majesty's Court of Chancery at Westminster, in the county of Middlesex, directed to the sheriff of the county of Cambridge, whereby &c. (setting out the writ); which said writ afterwards, and before the return thereof, to wit on the 31st day of December, in the year 1834 aforesaid, was delivered to *60] Richard *Huddleston Esquire, who then and there and from thence until and at and after the return of the said writ was sheriff for the said county of Cambridge, to be executed in due form of law; by virtue of which said writ, afterwards and before the return thereof, to wit, on the 31st day of December, in the year 1834 aforesaid, the said Richard Huddleston, then being such sheriff as aforesaid, made his certain precept in writing under the seal of his said office of sheriff of the said county of Cambridge, directed to the mayor of the said borough of Cambridge for the election there of two burgesses for the said borough, according to the said writ; by virtue of which said precept, afterwards and before the return of the said writ, to wit, on the 9th day of January, in the year 1835, the election of two burgesses for the said borough was had and made; and the said plaintiff says that before and at the said election, James Lewis Knight Esquire, was a candidate, that he might be elected and returned to serve as one of the burgesses for the said borough in the aforesaid then next parliament; and the said plaintiff in fact says that the defendant, not regarding the statute in such case made and provided, before the said election for the said borough, to wit, on the 7th day of January, in the year 1835 aforesaid, did corrupt one John Garner, who then and from thenceforth until and at the time of the said election had a right to vote in the said election, to give his vote in that election for the said James Lewis Knight, so being such candidate as aforesaid, by then corruptly giving to the said John Garner a large sum of money, to wit, the sum of 5*l*. and by then corruptly promising to give the said John Garner, after he should have so given his vote in the said election for the said James Lewis Knight, the further sum of 5*l*., which

*THOMAS against LAMBERT. Thursday, April 22d.

Where the record alleged an agreement that work was to be done "within a fortnight" before a given day, and the evidence was of an oral agreement that it should be done "a fortnight" before that day: Held, that a jury were justified in finding a variance.

ASSUMPSIT for work and labour. The defendant pleaded among other things, a contract between him and the plaintiff, that if the work was not done, &c. "within a fortnight" before the 29th day of September, 1834, the plaintiff should not be paid;" and he averred that the work was not done within a fortnight before that day. The replication denied that the doing of the work took place under the said supposed contract. Issue thereon. On the trial before Lord Denman, C. J., at the sittings at Westminster after last term, it was proved that the plaintiff had agreed in conversation that he was not to be paid "if the work was not done a fortnight before quarter-day," which was Michaelmas-day, 1834. The Lord Chief Justice left to the jury, whether the meaning of the parties was that the work should be completed before the commencement *of the fortnight preceding Michaelmas, or during the course of that fortnight; directing them to find, in the former case, for the plaintiff, on the ground of variance, and, in the latter case, for the defendant. Verdict for the plaintiff. [*62]

Platt now moved for a new trial. The expression proved means the same thing as the words in the plea. The words of the contract, as set forth in the plea, do not require that the performance of the work should take place during the fortnight, but that it should be actually complete at any time which could be spoken of as being within the fortnight before Michaelmas. The intention was, that on any day during that fortnight the work should be in a state of completion; and the evidence supported that view of the contract.

LORD DENMAN C. J. The defendant has brought the difficulty upon himself by using an expression which is ambiguous at best; but, as it seems to me, the natural and obvious meaning of the agreement proved is that which the jury has given to it; and there is therefore a variance.

said several and respective sums of 5*l.* and 5*l.* were so then respectively given and promised by the said defendant to the said John Garner as and for a reward to the said John Garner so to give his vote in the said election for the said James Lewis Knight, contrary to the form of the statute in such case made and provided, whereby and by force of the said statute the defendant forfeited for his said offence the sum of 500*l.*, and an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of 500*l.*: yet the defendant hath not paid the said sum above demanded, or any part thereof, to the plaintiff, and the same remains wholly unpaid, and therefore the plaintiff brings his suit, &c.

Plea, not guilty.

It seemed to be the opinion of the court in *Coppin qui tam v. Carter* (1 T. R. 462), which was an action upon 10 Ann. c. 26, s. 109 (against unlawful lotteries), that not guilty is a good plea on a penal statute; for as it is an action for an offence, the defendant by such a plea says he is not guilty of the offence. In *Downton v. Finch* (2 Inst. 651), which was an action of debt upon stat. 2 & 3 Ed. 6, c. 13, for the treble value of tithes, it was held that such action was not an action of debt within the stat. 23 H. 8, c. 15, (giving *costs to the defendant in debt, &c.), "because it is neither upon a specialty or by contract; neither is this action upon this statute any action for wrong personal immediately done to the plaintiff, for it is a nonfeasance, viz. a not setting out of the tithes, Trin. 42 Eliz., in communi banco adjudged in an action of debt for the treble value upon this statute, not guilty, or nihil debet are good uses," (pleas), "and so upon the statute of 5 Eliz." [c. 9,] "upon perjury." For other authorities, see Bac. Ab. Pleas, I. 1 (vol. 6, p. 284, 7th ed. 1832), Com. Dig. Pleader, (2 S. 17). The question, however, has not been discussed since the rules of H. T. 4 W. 4. *Pleadings in particular actions*, II. 2, 4, (5 B. & Ad. viii.) If the plea be sufficient, notwithstanding the new rules, it would seem that all the allegations in the declaration would be put in issue, as neither the rules cited, nor those at IV. 1, (5 B. & Ad. ix.) would apply. In the present case, evidence of the introductory averments was produced at the trial. [*61]

LITLEDALE, J. According to the common construction of the English language, "within a fortnight before Michaelmas" means, during the period which elapses in the fortnight immediately before Michaelmas. To say that it means, between the time of the expression being used and the commencement of that fortnight, would be inconsistent with the common interpretation of the words. There is therefore a variance.

*63] PATTESON, J. I can hardly make sense of the words in the plea; but we are bound, if we can, to give them a meaning. I should say they meant, that the completion was to take place in the course of the fortnight, during the fourteen days.

COLERIDGE, J. We do not know enough of the situation of the parties to argue from it as to their meaning. But one can suppose a case in which they may have meant that the work should be completed during the fortnight, or a case in which they might mean it to be finished before the fortnight commenced. That being so, the jury were justified in finding a variance.

Rule refused.

DOE dem. CORBYN *against* BRAMSTON. *April 23.*

A feme sole, seised in fee, married, and she and her husband ceased to be in possession or enjoyment of the land, and went to reside at a distance from it. They both died at times which were not shewn to be within forty years from their ceasing to occupy. The wife's heir-at-law, brought ejectment against the person in possession, within twenty years of the husband's death, and within five years of the passing of stat. 3 & 4 W. 4, c. 27, but more than forty years after the husband and wife ceased to occupy: Held, that the heir-at-law was barred by the seventeenth section of the statute, though it did not appear when or how the defendant came into possession, and though proof was offered that the wife had levied no fine.

EJECTMENT for lands in Northamptonshire. On the trial before Littledale, J., at the last Northampton assizes, it appeared that a person of the name of Whitwell was seised in fee of the premises in question, and died so seised in 1774, leaving no issue, but leaving his wife surviving, to whom he devised the premises in fee. In the same year, 1774, the widow married the father of the lessor of the plaintiff, who was the eldest son of this second marriage. The widow had continued in possession of the premises from the death of her first husband to the time of her second marriage, and she and her second husband *64] also continued in *possession for some years after the marriage. It appeared that they afterwards removed from the premises, to which they never returned, and came to London, and that they subsequently removed to St. Albans, where they both died, the wife in 1828, and the husband in 1832. No act of ownership or occupation of the premises was proved to have been done by them after their removing to London; the precise time at which this happened was not shewn, nor whether it was within forty years of Mrs. Corbyn's death; but it was clearly more than forty years before the commencement of the action. Evidence was offered on the part of the plaintiff to shew that no fine had been levied by Corbyn the father or his wife, but the learned Judge considered that the action was barred under stat. 3 & 4 W. 4, c. 27, s. 17, and nonsuited the plaintiff, but reserved leave to move to set the nonsuit aside.

Miller now moved accordingly. (a) The second section of stat. 3 & 4 W. 4, c. 27, directs that no action shall be brought but within twenty years after the time at which the right shall have first accrued; and the third section enacts that the right shall be deemed to have first accrued, in the case of a claimant,

(a) Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

these cases no more need be said on the present occasion, than that they were not brought within the late statute. Rule refused. (a)

(a) *DOE* dem. *ROBERT ROFFEY v. HARBROW. Tuesday, April 16, 1833.*

L. R. died seized of freehold premises, leaving a widow, and a son (by her) R. R., his heir-at-law, twelve years old. The widow entered into receipt of the rents, and two years afterwards married again, and went to reside on the premises, which she occupied with her second husband during his life, and from his death until her own, the whole period of such occupation by her being more than fifty years. During her occupation she frequently said that the premises, after her death, belonged to R. R.; but she left a will, devising the property to H., her son by her second husband, and describing it as having descended to her from her mother. After her death H., then in possession, promised that he would sign an agreement to rent the premises under R. R., but he never did sign it:

Held, that upon these facts, a jury was not bound to find an adverse possession by the widow during the fifty years.

EJECTMENT for premises in Surrey. At the trial before TINDAL, C. J., at the Spring assizes at Kingston, 1833, the following facts appeared:—The premises were freehold, and consisted of ten acres of land and one or two cottages. The lessor of the plaintiff claimed as heir-at-law of his grandfather, Lazarus Roffey. Lazarus, married Sarah Cripps in 1763. He died in 1776, having been for some time previously (but whether before his marriage or not did not distinctly appear), and until his death, in the receipt of the rents. He left his widow, and a son Robert (the father of the lessor of the plaintiff), then twelve years old, surviving him. The widow received the rents for two years afterwards, from the tenant who had held under Lazarus. She then married one Harbrow, and went with him to live upon the premises. The defendant was their son. Mrs. Harbrow survived her second husband, and died in 1830, down to which time she had never ceased residing upon the premises. During her lifetime and that of her son Robert (the father of the lessor of the plaintiff), who died in 1822, she had often said to her son Robert that *68] the premises *belonged to him after her death. She, however, made a will on the 20th of March, 1820, by which, describing the premises as having descended to her on the death of her late mother, she devised them in fee to the defendant. On the day after her burial the lessor of the plaintiff called upon the defendant, who then held possession of the premises, and said "do you mean to keep me out of my property?" upon which, after some conversation, the defendant agreed to pay the lessor of the plaintiff two guineas a year rent for the premises, and it was settled that the agreement should be put into writing; this was done, but the defendant refused to sign it. The Lord Chief Justice left it to the jury as the only point in the case, whether the property in question had belonged to Lazarus Roffey. The plaintiff had a verdict.

Platt, now moved for a new trial, on the ground of misdirection. The learned judge ought to have left it to the jury whether, assuming that the property had belonged to Lazarus, there had not been an adverse possession by the widow for more than twenty years. Supposing that question to have gone to the jury, the verdict was against the evidence. The declaration of Mrs. Harbrow, relied upon for the plaintiff, if uttered before she made her will (and there was no proof to the contrary), are consistent with the subsequent assertion of title by her will. If the property was hers, her son Robert would have been entitled in the event of her making no will. [PARKER, J. Her declarations were evidence, so far as they made against her own interest; and they shewed that her possession was not adverse. It may be that she was entitled to dower, and that her son allowed her to remain till it should be assigned. At all events she may have held on by his permission. The property was but small]. She had married again when she went there to reside. [PARKER, J. That might not have put a stop to her son's kindness. DENMAN, C. J. The defendant offered to enter into an agreement to hold under the lessor of the plaintiff. The same evidence applied to both the points mentioned. There is no ground for a rule].

PER CURIAM (DENMAN, C. J., LITTLERDALE and PARKER, Js).

Rule refused.

*69] **THE KING against THE INHABITANTS OF WHITNEY. Thursday, April 23.*

If a judge at Nisi Prius, being pressed to say whether, upon the evidence before him, a particular structure comes within the description of a bridge, gives his opinion on that

point, as upon a question of fact, the alleged inaccuracy of such opinion is no ground for moving to set aside the verdict on account of misdirection.

Upon a question, whether a particular structure be a bridge or a culvert, the fact of its being without parapets is not decisive.

Nor the fact that it is built over water flowing in a channel between banks; though nothing can be a bridge which is not built over such a flow of water.

INDICTMENT against the parishioners of Whitney, Herefordshire, for non-repair of a public horse and carriage-way, containing in length 374 yards, &c. The indictment was in the common form, stating, that the defendants ought to have repaired, &c. At the trial, before Park J., at the Herefordshire Spring assizes, 1835, the defendants contended that, assuming them to be liable, deduction was at all events to be made in respect of a bridge, and 300 feet of road at each end of it, which lay within the termini specified in the indictment. The fabric which the defendants called a bridge was a stone arch, nine feet wide, built across a mill-stream, and five feet and a half above the water; the date upon it was 1762. It was not proved that the bridge had ever had any parapets; it had none during the time referred to in the indictment; and on this account, surveyors, who were called for the defendants, gave their opinion that it was not a bridge, but a culvert. It also appeared that some years ago the defendants had been indicted for non-repair of the road between the same termini, including the part now in dispute, and had pleaded guilty: and it was contended that this was conclusive against them as to the whole length of road mentioned in the present indictment. These points were discussed before the learned Judge at the trial; and he, after adverting to the opinion delivered by the surveyors, and observing that if there had originally been a parapet, which had been thrown down, the *case would have been different, said to the defendant's counsel—"I should say this is a culvert, if you throw it on me to decide. I [*70 think that, in fact, a thing of this kind is not a bridge. And it seems to me that you have concluded yourselves upon the former indictment." The question which he left to the jury was, whether or not the road was out of repair. Verdict for the Crown.

Talfourd Serjt. now moved for a new trial on the ground of misdirection. The question, what constitutes a bridge is a matter of law, and was so treated in *Rex v. The Inhabitants of Oxfordshire*, 1 B. & Ad. 289, by Lord Tenterden, who said that it appeared to turn upon the meaning of "flumen," or "cursus aquæ," the words used in old indictments to denote that over which a bridge is built. And he construed those words as signifying "water flowing in a channel between banks more or less defined." The learned Judge, therefore, in this case, was mistaken in point of law, when he laid down that a structure, built across such a channel, was not a bridge because it wanted parapets. If the jury, under such direction, have found that to be a bridge which is not one in point of law, it is for this Court to rectify the finding. Nor was it correct to say that the defendants had concluded themselves by submitting to the former indictment. It is clearly shewn in 2 Wms. Saund. 159 c. note 10, to *Rex v. Stoughton*, 5th ed, that a submission, or verdict for the Crown, is not always conclusive of liability for the future. The defendants did not contend at the trial that the former judgment was no evidence, but only that it was *not conclusive [*71 as to the place now in dispute. It was clear that, on the former occasion, the parishioners were liable for some part of the road, and therefore judgment might have gone against them if that part was unrepaired, though they were not liable for the rest. If the structure in question was a bridge, and the parish liable to repair it, they must have been so by prescription; *Rex v. Hendon*, 4 B. & Ad. 628; and no prescriptive liability to repair a bridge was charged in the former indictment, or in this.

LORD DENMAN, C. J. I think there is no ground for the motion. If the learned Judge had said that, in point of law, a structure without parapets was no bridge, his ruling would have been quite wrong. But here he was called

upon to say whether this building was a bridge or not, and he said, "If you throw it upon me, I say, as a fact, that a thing of this kind is not a bridge;" not putting it as a matter of law, but as his view of the fact with respect to the want of parapets in a building *like this* which was in question. The want of parapets does not prevent a structure from being a bridge, nor does the mere fact of an arch passing over a stream necessarily make it a bridge. As to the circumstance of the defendants having submitted to a former indictment, that of itself was not conclusive; but the learned Judge appears only to have laid it down as a fact, the consequence of which it was difficult for the defendants to escape from.

LITLEDALE, J. The learned Judge did not lay down any proposition of law *72] as to the want of parapets, or *the consequences of the former indictment; what he said was merely that, taking the two things together, there was fair ground for saying that the place in question was part of the highway. There ought, therefore, to be no rule.

PATSON, J. I am of the same opinion. I take the decision in *Rex v. The Inhabitants of Oxfordshire*, 1 B. & Ad. 289, to be, not that, wherever such a stream exist as is there described, any thing thrown over it is necessarily a bridge; but that there must be such a stream for the structure to be a bridge.

COLERIDGE, J. concurred.

Rule refused.

EX PARTE CLARKE. *Friday, April 24.*

The clerk of an attorney in the country gave directions for putting up and entering his notices, pursuant to the rule, Trin. 31 G. 3, before Hilary Term, 1835, in order to his being admitted an attorney in Easter Term following. The person employed gave notices, which were in all respects regular, except that they named the wrong person as the attorney to whom the clerk had been articulated.

On affidavit that the inaccuracy proceeded wholly from mistake and inadvertence, the court allowed the notices to be amended in Easter Term, and the party to be admitted in the term following.

W. J. ALEXANDER moved, that James Smith Clarke might be at liberty to amend his notices of application to be admitted an attorney of this court, for the purpose of enabling him to be admitted on the last day of next Trinity term, under the following circumstances. Before Hilary term last, the clerk of a solicitor's house in London was instructed (verbally,) by his employers, to give the requisite notices that J. S. Clarke of Coleford, Gloucestershire, intended *73] applying to *be admitted an attorney of this court in Easter term 1835.

Clarke had been serving for some years in the office of Mr. Roberts, an attorney at Coleford; and the attorney's clerk in London knowing this, and believing him to have been articulated to Roberts, described him in the notices as having been so articulated. The notices were entered and affixed, according to the rule of court, (a) before Hilary term; and the clerk was not of a ware any error

(a) General Rule, Trin. 31 G. 3, (4 T. R. 379), the material part of which is as follows:—"And, to the intent that better information may be obtained touching the fitness and qualifications of persons applying to be admitted attorneys, it is further ordered, that from and after the same last day of Michaelmas term, every person who shall intend to apply for admission as an attorney in this court, and who shall not have been admitted an attorney or solicitor of any other court, shall, for the space of one full term previous to the term in which such person shall apply to be admitted, cause his name and place of abode and also the name or names, and place or places of abode of the attorney or attorneys to whom he shall have been articulated, written in legible characters, to be affixed on the outside of the Court of King's Bench, in such place as public notices are usually affixed, and also in some conspicuous place in the chambers of each of the judges of this court, and the King's Bench office; and that no person who shall not have regularly complied with this order shall in future be admitted as an attorney of this court."

till the 20th of the present month, when his employers received a letter from Clarke, saying that he had found himself incorrectly described, in the list of applicants for admission, as having been articled to, Roberts, whereas he had been articled and served his time to the solicitors whose clerk gave the notices. The clerk now deposed, that the inaccuracy had been entirely owing to his own mistake of the fact, and inadvertence in not making inquiries; and not to any intention on his or Clarke's part to evade the rule of court. *Alexander* now admitted that there was no reported case in favour of the present application, but stated, on the information *of the officers of the court, that the rule [*74 had been relaxed as now prayed; and he contended that, the intention being only that the notice should be published soon enough to give a whole term for inquiry as to the person claiming admissions, the spirit of the rule would be complied with if the amendment were allowed as proposed [PATTESON, J. It has been held, that the notice must be up for the term immediately preceding the application to be admitted. (a) COLRIDGE J. In *ex parte Lamuert*, 3 Mo. & P. 269, where one of the notices had, by mistake, been left at the chambers of the wrong Judge, the Court of Common Pleas relaxed the rule.]

THE COURT, (b) after referring to a manuscript note by Mr. Le Blanc, of a case decided in Easter term 1819, which they considered to be in point, granted the rule. Rule absolute. (c)

Ex parte JONES.

Amendment allowed in notice for admission of an attorney, by inserting his place of residence.

"EASTER 1819. John Lee Jones had stuck up a notice for admission, but had omitted to put in his residence, which the Rule Trin. 31 G. 3. requires. He came now for leave to insert it, and it was allowed, and he was ordered to be admitted the last day of the next term. Upon the motion of Nolan."

"Admitted in Trinity term."

The following case was decided in Trinity term, 1835:—

In the Matter of FREDERICK JOHN PARSONS. *Monday, June 15.*

An attorney cannot be admitted, whose notices have not been affixed, nor entry made, till the third day of the term in which he applies.

Though the notices were affixed, and entry made, before the last term but three, such notices continued so affixed and entered during the whole of that term, purporting that the application would be made in the next ensuing term, which was not done.

Byles applied to have an attorney admitted. The notices had been affixed, and entry made in the books, previously to the commencement of Trinity term 1834, and the notices remained during the whole of that *term; and it was stated therein to be his intention to apply for admission in Michaelmas term 1834. The attorney, in his [*75 affidavit, stated the reasons for his not so applying; and further, that the notices were affixed, and entry made, again, at eleven o'clock on the morning of the 29th of May last (third day of this term); and that he therein stated his intention to apply on the 13th of this June, or so soon after as counsel could be heard. *Byles* now urged that, even in cases where the notice had not been affixed during a whole previous term, the Court had permitted the admission, although the notice had not been affixed till the second day of the term; and that here the indulgence might be extended to one other day, in consequence of the notice having been affixed during the whole of Trinity term last; that the rule had been in substance complied with; and that parties desirous of objecting had in this case had more than the usual opportunity of doing so.

LORD DENMAN, C. J. We have gone too far already: this would be going still farther. We cannot assent.

LITTLEDALE, J. concurred.

(a) See note (a) to *Ex parte Stokes*, 1 Chitt. Rep. 556.

(b) Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

(c) The reporters are indebted to Mr. Le Blanc for the following note, which appears to be that above referred to:—

PATTERSON, J. The next application would be to allow a notice to be affixed on the fourth day only.

(WILLIAMS, J. had left the Court.)

Application refused.

See *Ex parte Gordon*, 2 Dowl. P. C. 470: *Ex parte Mosley*, 4 Dowl. P. C. 79.

AVERY *against* CHESLYN. *Friday, April 24th.*

An allegation, that A. is tenant for the life of M. is supported by proof that A. and B., being joint tenants for the life of M., conveyed their estate by lease and release to A., without an intermediate party.

Issue being joined on an allegation by plaintiff that a cornice was fixed to, and not of right removable from, the freehold, the Judge desired the jury to find for defendant if they considered that the cornice was ornamental merely, fixed during the tenancy, capable of removal without substantial injury to the freehold, and so removed in fact during the tenancy. The jury found for the plaintiff. Held no misdirection.

CASE. The declaration alleged that the plaintiff was seised *pur auter vie* of a messuage, &c., and that the defendant, being his tenant, wrongfully, &c., pulled down, tore down, and removed the cornices of divers to wit ten rooms: Pleas, 1. Not guilty. 2. That the plaintiff was not seised in manner, &c.

*76] 3. (Not material). 4. *As to pulling down a cornice in one room, that

the said cornice was a wooden cornice, and was the property of, and fixed up by the defendant during his tenancy and occupation, at his own expense, with screws only, and for the purpose of ornament; and that the cornice remained so fixed up and merely ornamental till the time next mentioned; and that the defendant, before the end of his tenancy, and whilst in occupation of the premises, at his own expense, carefully and skilfully unscrewed, pulled down, and removed the said cornice, (the same having been from the time when it was so fixed up to the time when it was pulled down and removed, and being at the last-mentioned time, removable by law and of right by the defendant as such tenant); that the defendant did no unnecessary damage, &c.; and that before the end of his tenancy and occupation he, at his own expense, repaired all damage which had arisen from the fixing up and pulling down of the said cornice. Issue was joined on the first three pleas. Replication to the fourth plea, that the said cornice, at the time when, &c., was fixed and plaistered to the wall of the said room, and, before the time when the same was so pulled down and removed, had become, and was at that time, affixed to the freehold of the dwelling-house, and was not at the time when the same was so pulled down and removed, removable by law and of right by the defendant as tenant in manner, &c. Issue was joined on this replication. On the trial before Coleridge J. at the last Monmouth assizes, it appeared that the plaintiff and a person named Davies, being seised jointly *pur auter vie* of the premises, conveyed their estate by lease and release to the plaintiff. Evidence was given as to the man-

*77] ner in which the cornice was fixed to and removed from the house, and as to its being ornamental or not. The learned judge was of opinion that the seisin of the plaintiff, as laid in the declaration, was sufficiently proved; but he reserved leave to the defendant to move for a rule to enter a nonsuit upon this point: and he then desired the jury to say whether the cornice was merely a matter of ornament, fixed during the tenancy, capable of removal without doing substantial injury to the freehold, and so removed in fact during the tenancy; and said that, in that case, their verdict should be for the defendant. Verdict for the plaintiff, damages 60*l*.

R. V. Richards now moved for a nonsuit to be entered upon the point reserved, or for a new trial on the ground of misdirection, and also on the ground of excessive damages. First, the conveyance is by two joint tenants *pur auter vie* to one of themselves, without the intervention of an intermediate party.

Unless the court shall consider this to amount to a release by the one joint tenant to the other, the seisin is not proved as laid. Then as to the cornice, the fact of its being removed without damage ought not to have gone to the jury: that was not a part of the traverse taken in the replication. The plaintiff was entitled to raise the question; but in fact he did not do so on the pleadings. The right to remove, which was the only question on this issue, cannot be impaired by any impropriety in the manner of removing, although such impropriety may be ground for a distinct complaint. In fact the plea alleges that the damage was repaired, and this is not traversed in the *replication. [*78 The replication amounts only to an issue of law.

LORD DENMAN, C. J. With respect to the point of the seisin, you may consider that the rule is refused, unless we inform you otherwise hereafter. (a) It does not appear to me that there was any misdirection. The fact of the removal without damage was put as a test of the way in which the cornice was fixed. It is true that the jury may have misunderstood this, and may have given damages for injury done in the removal; but that goes to the point of excessive damages, or, perhaps, it might be a ground for motion as upon a verdict against evidence.

LITLEDAL, J. The direction of the learned Judge appears to me quite correct. It was right to direct the jury to inquire whether the cornice was ornamental, whether it was capable of being removed, and whether it was removed during the tenancy. It was also correct that they should inquire whether it was removable without injury, and was so removed in fact. The jury were not told that, if injury was in fact done, the cornice was not removable.

PATTESON, J. It seems to me that there should be no rule as to the issue on the replication to the fourth plea. If it be a mere issue of law, that ought rather to be objected to in arrest of judgment. But it involves fact as well as law; and it seems to amount to an informal *issue of fact. It seems to me also, as to the direction, that the fact of the removal without injury [*79 was suggested to the jury only as a test of the way in which the cornice was fixed: and it formed a very good test.

COLERIDGE, J. concurred.

Rule granted, as to the point of excessive damages only.

The KING *against* The Inhabitants of ST. NICHOLAS, LEICESTER.
Saturday, April 25th.

An order of justices upon parish officers, for removing a person of unsound mind (not chargeable) to a house of reception for such persons under stat. 9 G. 4, c. 40, sects. 38, and 44, is good, although it state that the justices *have adjudged* (and not *do adjudge*) the settlement of such person to be in the parish of, &c.

Such order is correct if it recites that the person is "so far disordered in his senses that it is dangerous for him to be permitted to go abroad," though the form given by the schedule to stat. 9 G. 4, c. 40, and referred to by sects. 38 and 44, (which provide for the making of such order), speaks only of a person being "lunatic, insane, or a dangerous idiot."

An order upon the overseers of the parish in which the lunatic is found to be settled, for the expense of his maintainance, &c. at such house of reception, must be prospective only. If it be retrospective in part, such part will be quashed.

A RULE was obtained in Easter term, 1884, calling on the prosecutors in this case to shew cause why the two after-mentioned orders of justices (brought into this court by certiorari) should not be quashed for insufficiency. The orders were as follows:—

(a) No such intimation was afterwards given. See Co. Lit. 9 b., 193 a., 273 b.

"Leicestershire, to wit.—To the overseers of the poor of Barrow-upon-Soar in the county of Leicester.

"Whereas Henry Beaumont, of Barrow-upon-Soar aforesaid, who is deemed to be insane, and who hath been wandering about and at large there, hath this day been brought before us, Charles March Phillipps and Charles William Packe, esquires, two of his Majesty's justices of the peace in and for the said county, pursuant to an order under our hands and seals for that purpose: And

*80] *thereupon we, the said justices, having called to our assistance Storer Eddowes, surgeon and apothecary, of Loughborough in the said county, and upon examination had of him, the said Henry Beaumont, are satisfied that he is so far disordered in his senses, that it is dangerous for him to be permitted to go abroad, and having made inquiry into the circumstances and place of last legal settlement of him the said H. B., we have adjudged that his said settlement is in the parish of St. Nicholas, in or near the borough of Leicester: You are therefore directed to cause the said H. B. to be conveyed to the house of Joshua Burgess of Great Wigston in the said county, duly licensed for the reception of insane persons.

"Given," &c. (November 29th, 1832).

Signed and sealed by the two justices.

"County of Leicester to wit.—To the overseers of the poor of St. Nicholas in the borough of Leicester in the said county.

"Whereas we, Charles March Phillipps, esquire, and Charles William Packe, esquire, two of his Majesty's justices of the peace for the county of Leicester, did make an order under our hands and seals, bearing date the 29th day of November in the year 1832, to the overseers of the poor of the parish of Barrow-upon-Soar in the said county, to cause Henry Beaumont, of B. upon S. aforesaid, who was deemed to be insane, and who had been wandering about and at large there, to be conveyed to the house of Joshua Burgess of Great Wigston in the said county, duly licensed for the reception of insane persons: And whereas it appears to us, the said justices, that the said H. B. was, pursuant to our said order, forthwith conveyed to the house of Joshua Burgess,

*81] *where he now remains: We, therefore, the said justices, do hereby order and direct that you, the overseers of the poor of the parish of St. N. aforesaid, the legal settlement of the said H. B., being adjudged to be in your said parish of St. N., do and shall pay the weekly sum of 18s. unto the said Joshua Burgess for the maintenance, medicine, and care of the said H. B. during so long time as the said H. B. hath been and shall be under the care of the said Joshua Burgess, the said Joshua Burgess being willing to accept such weekly sum, and which appears to us, the said justices, to be a reasonable charge in that behalf.

Given," &c. (November 2d, 1833.)

Signed and sealed by the two justices.

Hildyard now shewed cause. Two objections are taken to these orders. First, that the order of November, 1832, contains no adjudication as to the settlement of the insane person. Secondly, that the order of November, 1833, for the payment of expenses, is partly retrospective. But both are sufficient, according to the statute 9 G. 4, c. 40, ss. 38, 44, (a) under which they were *made.

*82-3] As to the adjudication, if the act requires one to be made, it need *not

(a) 9 G. 4, c. 40, s. 38. "And be it further enacted, that upon its being made known to any justice of the peace of any county, that a poor person chargeable to any parish or place within such county is deemed to be insane, either by notice from the overseer of such parish or otherwise, it shall be lawful for the said justice, by an order under his hand and seal, if he shall so think fit, to require the overseer of the poor of the said parish or place to bring the said insane person before any two justices of the peace of the said county, at such time and place as shall be appointed by the said order; and the said justices are hereby required to call to their assistance a physician, surgeon, or apothecary, at the charge of the said parish or place; and if upon view and examination of the said poor

be stated in formal terms upon the order. *Rex v. Maulden*, 8 B. & C. 78, where it was assumed that such a statement ought to be made, was decided on a former statute for the care and maintenance of lunatic paupers, 5 G. 4, c. 71, which (by sect. 3,) expressly declared that it should be lawful for two justices "to adjudge the last legal settlement of such lunatic to be in such parish or place," &c. The present statute only enables two justices to make order on the overseer of the parish or place wherein the last legal settlement of the lunatic "shall be adjudged to be," which, construing the words favourably to the validity of the order, may mean only, "shall be found," or "ascertained" to be. And, at all events, the words "we have adjudged" are sufficient; the ordering part, not the determination of the settlement, is the essential part of the document. As to the second order, a direction of payment, retrospectively, is good, for several reasons. By sect. 38, one set of justices may order the lunatic to be conveyed to, and placed in the lunatic asylum or house of reception, and another set may make an order for the expenses of so conveying him, which latter order would, in all probability, be retrospective; more especially as it seems contemplated, that the persons to be charged with the conveyance of such *lunatic to the place of reception would be the officers of the parish [84 where he is found, whereas the order for payment may be upon the officers of a different parish, where he proves to be settled. The order to be made

person, or from other proof, the said justices shall be satisfied that said poor person is insane, the said justices shall make inquiry into the place of last legal settlement of such insane person; and it shall be lawful for them, if they shall so think fit, by an order under their hands and seals, directed to the said overseer of the poor, according to the form in the schedule (5) annexed to this act, to cause the said poor person to be conveyed to and placed in the county lunatic asylum" for the county, &c., for which they shall act; "and "if no such county lunatic asylum shall have been established, then to some public hospital or some house duly licensed for the reception of insane persons; and it shall be lawful for the said or any other two justices of the peace of the said county, from time to time, as occasion may require, to make order on the overseer of the parish or place wherein such last legal settlement shall be adjudged to be, for the payment of all reasonable charges of conveying such poor person to such county lunatic asylum, public hospital, or licensed house; and if such poor person"—"shall be conveyed to such licensed house, for the payment of such weekly or monthly sum to the keeper of such licensed house, for the maintenance, medicine, clothing, and care of such poor person, as such keeper shall be willing to accept, and as shall appear to the said justices to be a reasonable charge in that behalf."

Sect. 44. "And be it further enacted, that upon its being made known to any justice of the peace that any person wandering about and at large within his jurisdiction is deemed to be insane, it shall be lawful for such justice, by an order under his hand and seal, if he shall so think fit, to require the constable or churchwardens and overseers of the poor of the parish or place where such person is found, or some of them, to bring the said person before any two justices of the peace of the said county, at such time and place as shall be appointed by the said order; and the said justices are hereby required to call to their assistance a physician, surgeon, or apothecary, at the charge of the said parish or place; and if upon examination of such person deemed to be insane, or from other proof, the said justices shall be satisfied that such person is so far disordered in his senses that it is dangerous for such person to be permitted to go abroad, the said justices shall make inquiry into the circumstances and place of last legal settlement of such insane person, and it shall be lawful for such justices to proceed in such case in the same manner as has hereinbefore been directed in the case of a person chargeable to any parish within the jurisdiction of the said justices."

SCHEDULE, No. 5.

"Form of Warrant.

"Whereas it appears to us, of his Majesty's justices of the peace for the county of _____ having called to our assistance a physician, or surgeon, or apothecary (as the case may be), that chargeable to the parish of _____ in the said county, is lunatic, insane, or a dangerous idiot (as the case may be), you are hereby directed to cause the said _____ to be conveyed to the county lunatic asylum established at _____, or to the house of _____ situate at _____ in the county of _____ the said house being a house duly licensed for the reception of insane persons. Given under our hands and seals, this _____ day of _____

To the overseers of the poor of the parish of _____."

is for payment of a weekly or monthly sum to the keeper of the licensed house, &c. ; but it is not said that the payment shall be ordered in advance ; and if not, the effect of the order would be retrospective. Sect. 42 enacts that, when the settlement of any lunatic confined under an order of two justices shall not have been ascertained at the time of making such order, but shall be discovered afterwards, the justices may order the parish officers of the place of settlement to pay the expenses incurred for twelve months before. That period is the limit, and the only one, to a retrospective order.

Archbold, contra. Sect. 42 is not applicable to the present case. Neither of the orders in question can be sustained under sects. 38 and 44. The effect of the section (44), under which these orders are made, and which incorporates sect. 38, is merely, as to the weekly or monthly payments, that the justices shall fix a sum, prospectively, to be paid from time to time by the parish for the maintenance and care of the lunatic. [Lord DENMAN, C. J. We are inclined to think you are right as to the retrospective part of the second order.] Then as to the first order. The only power given to the justices by sect. 44, is to proceed as is directed by sect. 38, and that is by making an order in the form given in schedule No. 5. The present order was not in that form. [COLERIDGE, J. Suppose a person is neither lunatic, insane, nor a dangerous idiot, but only, according to sect. 44, "so far disordered in his senses that it is dangerous *85] *for such person to be permitted to go abroad," is the form in the schedule proper?] If the justices find that he is so far disordered, they must make the order as directed by sect. 38. [COLERIDGE, J. The form in the schedule contains no adjudication as to settlement.] The order must either follow the precise form referred to by sect. 38, whether consistent or not with the provisions there made ; or it must contain an adjudication, as directed by that section, though not prescribed by the schedule. But the order in question does neither. The justices only say that they "have adjudged." [Lord DENMAN, C. J. It is the same as saying that they adjudge. LITLEDALE, J. The words mean that the justices adjudge at that moment. It is like the form of words used in a lease. PATTESON, J. In *Rex v. Maulden*, 8 B. & C. 78, the words were only "having adjudged."] Lord Tenterden there said that the inhabitants, by their appeal to the sessions, had treated the order as an order of settlement. [Lord DENMAN, C. J. They could not, by so doing, have made that an adjudication which was not one.]

Lord DENMAN, C. J. I think this is quite a plain case, on reference to the act of parliament, and to the judgment delivered in *Rex v. Maulden*, 8 B. & C. 78. The second order, so far as it is retrospective, is not supported by the act, because that provides only for the future maintenance of the lunatic. But as to the other parts of the orders, I see no valid objection. They are made under the forty-fourth section of the act. (His lordship then read the section. The justices are directed in the case there described, to take the course pointed *out in sect. 38. That *86] section refers to a schedule, which comprehends three descriptions of persons ; lunatic, insane, and dangerous idiots ; the forty-fourth section adds another description, that of a person "so far disordered in his senses that it is dangerous for such person to be permitted to go abroad." The form of warrant given in the schedule does not comprehend this ; but when the forty-fourth section says that, in the case there contemplated, the justices may proceed "in the same manner as has herein-before been directed in the case of a person chargeable to any parish within the jurisdiction of the said justices," it must necessarily be taken to introduce the new description of persons into the form to be adopted under that section. And the schedule itself does not say that the description shall be given in every instance precisely according to the form there set out, but only "as the case may be." That may extend to such a description as might be given of the persons to be dealt with under the forty-fourth section. The order is good in other respects, so far as it regards future payments.

LITTLEDALE, J. The first order is made according to the form given in the schedule, except that it states the party to be "so far disordered in his senses, that it is dangerous for him to be permitted to go abroad." But the forty-fourth section sufficiently connects the person so spoken of with the description of persons mentioned in the thirty-eighth section, and whose treatment is there provided for. The magistrates state that they have examined the party, and are satisfied of his being "so far disordered in his senses," and that, having made inquiry into the circumstances, and the place of *settlement, they have [*87 adjudged that the party's settlement is in St. Nicholas, Leicester; they therefore direct him to be removed to the licensed house mentioned in the order. They have, then, in this order, exercised the jurisdiction which they possess under the forty-fourth section, not precisely according to the form given by the schedule, but as much so as the circumstances permitted. The chief difference between the two sects. 38, and 44, is, that the one relates only to persons who are chargeable; the other to any person wandering about and at large within the justice's jurisdiction.

PATTESON, J. I am of opinion that so much of the second order as is retrospective must be discharged, but that the first order is good. The objection to the words "have adjudged" is answered by the observations of Lord Tenterden in *Rex v. Maulden*, 8 B. & C. 81. Here, as in that case, it does not appear that any prior order had been made, and it must therefore be taken that when the justices say they "have adjudged," they then "do adjudge." The form of the order is objected to as not following schedule 5, of 9 G. 4, c. 40; but, upon comparing the forty-fourth and thirty-eighth sections, it is evident the legislature meant that, in cases under sect. 44, (which relates to persons not chargeable), the justices should proceed according to sect. 38, and that the form of the order should be such as applied to the circumstances of the case; the form given in the schedule not being very accurately penned. If the justices in this order had used the word "insane," I *think it would have been good, for the [*88 words "so far disordered in his senses," &c., seem to be used rather as the definition of a degree of insanity than with any other view; and in the same section, immediately afterwards, the justices are directed to inquire into the settlement of "such insane person." As to the retrospective part of the second order, no substantial distinction has been shewn between this case and *Rex v. Maulden*, 8 B. & C. 78, where a retrospective order was held not maintainable under the stat. 5 G. 4, c. 71.

COLERIDGE, J. I am of the same opinion. The forty-fourth section only directs that the justices shall "proceed" under it "in the same manner" as is directed in the case of a person chargeable to a parish, within sect. 38: it does not require them to use the particular form referred to there although the circumstances may be different. The form recites that the person is chargeable; that would not apply to a case within the forty-fourth section. The form gives the words "lunatic, insane, or a dangerous idiot;" the forty-fourth section introduces another description, that of persons "so far disordered," &c. As to the objection that the justices by the first order do not actually adjudge, the order is directed to the officers of the parish where the person is found, not of the parish in which the settlement is declared to be; and, therefore, even if the words "have adjudged" did not bear the meaning assigned to them by the rest of the Court (which I think they do), still, as the act does not say when or where the adjudication shall be made, it would be sufficient, for the purpose of this order, if *the magistrates had adjudicated any where or at any time. [*89 The retrospective part of the second order is bad, on the grounds already stated by the Court.

Rule absolute for quashing so much of the second order as is retrospective.

DOE on the several Demises of BARTLEY, and of HARTER, BARBOUR, and EVANS, *against* GRAY. *Monday, April 27.*

C. being seised in fee, granted to R. a term of 1000 years as security for a loan of 150*l.* After st. 3 G. 4, c. 117, came into operation, R., in consideration of W.'s paying him 150*l.*, and C., in consideration of the premises, and of W.'s advancing 200*l.* additional to C., assigned, by the same deed, the term to a trustee for W., to secure the 350*l.*: and C., by the same deed, released the fee and the reversion to W., to secure the same 350*l.*

Held, that this deed was not liable to stamp duty as a transfer, nor to a progressive duty of 1*l.* 5*s.* on every 1080 words after the first 1080, but was liable under the above statute and st. 55 G. 3, c. 184, sched. part 1., Mortgage, to an ad valorem duty (2*l.*) on the 200*l.*, and a progressive duty of 1*l.*: And that it was not liable to stamp duty as a fresh mortgage for 350*l.* by reason of the conveyance of the fee.

Quære, whether a common deed stamp was necessary?

EJECTMENT for lands in Lancashire. On the trial before Alderson, B., at the Lancaster spring assizes, 1834, the following facts appeared:—Francis Carter, being seised in fee of the lands in question, on the 3d of October, 1821, demised them for 1000 years to William Rowlands to secure 150*l.* and interest, with a power of sale to Rowlands. By indentures of lease and release, dated respectively the 23d and 24th of January, 1823 (after stat. 3 G. 4, c. 117, came into operation), the release being between Rowlands of the first part, Carter of the second, William Worsley of the third, and William Bartley of the fourth, reciting the previous mortgage, Rowlands, in consideration of 152*l.* 8*s.* 9*d.*, the principal and interest, paid to him by Worsley, assigned the term of 1000 years to Bartley; and Carter, in consideration of the premises, and of 197*l.* 16*s.* 8*d.* paid to him by Worsley, demised the lands to Bartley for the remainder of the *90] term. The trusts of the grants by Rowlands and Carter were *declared to be for Worsley, his heirs, executors, administrators, and assigns, to secure the 350*l.* with interest, and in the mean time in trust for Carter, his heirs and assigns, to attend the inheritance; and, by the same deed, Carter, for the considerations aforesaid, granted, bargained, sold, aliened, released, and confirmed the premises and the reversion therein to Worsley in fee, in trust to sell, and raise the 350*l.* Worsley died intestate in 1833, and Harter, Barbour, and Evans were his administrators. On the production of the indenture of release, of the 24th of January, 1823, it was found to contain four skins of 1080 words; on the first there was a stamp of 1*l.* 15*s.*, on the second a stamp of 2*l.*, on the third a stamp of 2*l.*, on the fourth a stamp of 1*l.*; in all 6*l.* 15*s.* The counsel for the defendant objected to the admission of this deed, on the ground that the stamps were insufficient; but the learned Judge received it, giving leave to move for a nonsuit, and the plaintiff had a verdict. In Easter term, 1834, *Crompton* obtained a rule nisi for a nonsuit.

Cresswell, Sir W. W. *Follett*, and S. *Martin*, now showed cause. (a) By stat. 55 G. 3, c. 184, sched. part 1, Mortgage, an original mortgage for 350*l.* would require a stamp of 4*l.* and a progressive duty of 1*l.* for each of the last three skins, in all 7*l.* In the same schedule, Mortgage, every transfer of a mortgage, "provided no further sum of money or stock be added to the principal money or stock already secured," is subjected to a stamp of 1*l.* 15*s.* But the proviso *91] takes the present case out of this enactment, as an additional 200*l.* *was secured on the transfer. The following clause in the schedule therefore would apply; viz. "and in all other cases such transfer or assignment, disposition or assignation, shall be charged with the same duty or duties as an original mortgage," &c. So that, under that statute, the stamps here required would amount to 7*l.* But the stat. 3 G. 4, c. 117, s. 1, repeals the ad valorem duties and other duties imposed by the previous acts on any transfer, assignment, dis-

position, assignation, or reconveyance of any mortgage. And sect. 2 charges (a) the transfer, if no further money be secured, with a duty of 1*l.* 15*s.* for the first 1080 words, and (where the instrument contains 2160,) a progressive duty of 1*l.* 5*s.* for every additional 1080. Then follows a provision under which the present case falls, and which enacts that, if any additional sum be secured, the ad valorem duty on mortgages payable under the former act shall be charged only in respect of the additional sum. Here, therefore, the stamp is to be paid as if there were simply a mortgage of 200*l.* under 55 G. 3, c. 184; that is, 2*l.* for the ad valorem *duty, with 3*l.* more for the progressive duty. On the other [*92 side, however, it is contended that the present case falls under both clauses of 3 G. 4, c. 117, s. 2, and that there ought to be a transfer duty of 1*l.* 15*s.*, with three additions of 1*l.* 5*s.* for the progressive duty on a transfer, besides the ad valorem duty of 2*l.* on the 200*l.*; that is, 7*l.* 10*s.* If that were a correct construction, the stat. 3 G. 4, c. 117, instead of relieving parties, as was intended, from being charged twice over with an ad valorem duty on the same sum, would really increase the charge in all cases where the whole sum did not exceed 500*l.*, the old charge would have been at the utmost 4*l.* ad valorem duty, with 3*l.* for progressive duty; but, for larger sums, 5*l.* and upwards, with 3*l.* progressive duty. The legislature cannot have intended to benefit parties in one case and not in the other. Besides, under stat. 55 G. 3, c. 184, the progressive duty was not charged on the transfer, but on the mortgage; but now, though the stat. 3 G. 4, c. 117, s. 2, connects the progressive duty with the transfer in cases only where no further sum is advanced, it is attempted to treat this as a transfer of the latter description, for the purposes of the transfer duty and the progressive duty, and as a mortgage, for the purpose of the ad valorem duty. If the statute be not explicit, the main transaction should be that on which the progressive duty is charged; and that is, in the present case, not the transfer of the security for 150*l.*, but the fresh advance of 200*l.* As to the transfer or deed stamp of 1*l.* 15*s.*, the ad valorem duty, and the deed duty, are never found to be charged at the same time. This stamp of 1*l.* 15*s.*, which is actually on the deed, was in fact unnecessary. It will be said that the plaintiff's *construction will lead to an absurdity, inasmuch as, if the additional [*93 sum advanced be not above 100*l.*, there will be a duty of 1*l.* 10*s.* only, ad valorem, and 3*l.* progressive duty, whereas a mere transfer of a mortgage for 100*l.* would require a duty of 1*l.* 15*s.* for transfer duty, and 3*l.* 15*s.* progressive duty. But such an anomaly is no reason for distorting an act of parliament from its obvious interpretation; and the construction contended for on the other side introduces greater inconsistencies with the intention of stat. 3 G. 4, c. 117. It will also be contended that the conveyance by Carter of the reversion in fee to Worsley makes this in effect a new mortgage for the whole 850*l.* But the substantial effect of the transaction is only to make the same land a security for an additional 200*l.*; and the stamp acts relate, not to the magnitude of the security, but to that of the sum secured. Besides, one of the exemptions, in stat. 55 G. 3, c. 184, from the ad valorem duty on mortgages, comprehends this case. (b)

(a) "Upon any transfer, assignment, disposition, assignation, or reconveyance of any mortgage,"—"provided no further sum of money or stock be added to the principal money or stock already secured, there shall be paid in Great Britain a stamp duty of 1*l.* 15*s.*"—"for the first skin or piece of vellum &c."—"and where any such transfer" &c. "hereby charged with the duty of 1*l.* 15*s.*, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall, contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, there shall be paid a further progressive duty of 1*l.* 5*s.*;"—"and if any further sum of money or stock shall be added to the principal money or stock already secured, the ad valorem duty on mortgages, payable under the said recited acts" [55 G. 3, c. 184, for Great Britain, 56 G. 3, c. 56, for Ireland,] "respectively, shall be charged only in respect of such further money or stock."

(b) Schedule, part 1. Mortgage. "Exemptions from the said ad valorem duty on

*94] *Crompton*, contra. First, this is an original mortgage of the fee simple for 350*l.*, the fee not having been *mortgaged at all by the previous deed: there should, therefore, have been an ad valorem stamp of 4*l.* and 3*l.* progressive duty. Otherwise, the original 150*l.* will be secured on the fee without any duty. It is as much a fresh mortgage for all the 350*l.*, as if additional land had been mortgaged. It is in fact a mortgage of the whole fee, subject to the incumbrance created by the old debt. If the original demise had been for one year only, could it have been said that the conveyance of the fee operated only as a transfer of the term of one year? The exemption in stat. 55 G. 3, c. 184, sched. part 1, Mortgage, (a) expressly excludes cases where further sums are advanced; and, as to the case where a fresh estate is subjected to the incumbrance, no provision is made; that case is purposely left on the footing of an original transaction. So stat. 3 G. 4, c. 117, which repeals the former act as to transfers, still leaves the case of the conveyance of a fresh estate on its former footing. And, again, in stat. 55 G. 3, c. 184, schedule, part 1, Mortgage, after the imposition of the transfer duty, it is said, "and in all other cases such transfer or assignment, disposition or assignation, shall be charged with the same duty or duties as an original mortgage," &c. But, secondly, if this be a transfer only, the transfer duty of 1*l.* 15*s.* and the progressive duty of 3*l.* 15*s.* should be charged, besides the ad valorem duty of 2*l.*, which stat. 3 G. 4, c. 117, s. 2, adds to the former, in cases where additional sums are secured upon the transfer. If there be any doubt, the burden of the argument lies upon those who insist upon the latter statute as taking the case *95] out of the operation of the *earlier one. It is said that the intention of stat. 3 G. 4, c. 117, was to relieve the transfer from the heavy duty; but the hardship it was intended to remedy, was, not the duty on the transfer, but the repetition of the ad valorem duty. Therefore, while the new ad valorem duty is confined to the sum newly secured, the transfer duty is imposed at a fixed charge; and it is not surprising that, in such a case, the legislature should, on the other hand, have increased the progressive duty. The argument on the other side compels the plaintiff to contend that the 1*l.* 15*s.* transfer stamp, which has been actually put on, was unnecessary. The deed consists of two parts, a transfer of the old security, and an additional security created for the new advance. And unless the progressive duty be referred to the transfer, stat. 3 G. 4, c. 117, s. 2, gives no progressive duty at all: it repeals the previous enactment as to transfers, and refers to stat. 55 G. 3, c. 184, only for the ad valorem duty, which cannot be construed to comprehend the progressive duty; and in all other cases the progressive duties are expressly mentioned. [LITTLEDALE J. That is not exactly so, in the third section of stat. 3 G. 4, c. 117.] The fallacy on the other side is in supposing that the two cases, contemplated in the second section of stat. 3 G. 4, c. 117, are incapable of co-existing: the natural construction is, that the transfer duty of 1*l.* 15*s.* and the progressive duty of 1*l.* 5*s.* are to be charged if there be no further sum secured; and if there be a further sum secured, then also the ad valorem duty on that. [PATERSON, J. If so, one would rather have expected the language to specify, more precisely, a charge of 1*l.* 15*s.* in all cases, with the progressive duty; and no

mortgages."—"Any deed or other instrument made as an additional or further security for any sum or sums of money,"—"already secured by any deed or instrument, which shall have paid the said ad valorem duty hereby charged, or the ad valorem duty on mortgages or heritable bonds, charged by the said act of the 44th or the said act of the 48th year of his Majesty's reign, to be exempt from the said ad valorem duty hereby charged, so far as regards such sum or sums of money"—"before secured, in case such additional or further security shall be made by the same person or persons who made the original security; but if any further sum of money or stock shall be added to the principal money or stock already secured, or shall be thereby secured to any other person, the said ad valorem duty shall be charged in respect of such further sum of money or stock."

(a) Ante note (a), p. 93.

more than that, if there were no additional sum secured; but an *additional ad valorem duty for any additional sum.] In general, under the stamp acts, when there is a general deed stamp, or an assignment stamp of 1*l.* 15*s.*, the progressive duty is 1*l.* 5*s.*; if, therefore, as the defendant contends, the assignment stamp of 1*l.* 15*s.*, which is here used, was necessary, it should seem to follow that the progressive duty ought to be 1*l.* 5*s.*, and the 1*l.* progressive duty seems more applicable to a case of a mere mortgage, not being an assignment. [*96]

In this term, May 9th,

Lord DENMAN, C. J. delivered the judgment of the Court. After recapitulating the facts, his lordship proceeded as follows:—The question was, whether these stamps were sufficient, and we think that they are. The deeds operate doubly; viz. by transfer of the original mortgage, and by conveyance of the fee as a further security.

As regards the transfer, the stat. 55 G. 3, c. 184, sched. part 1, title Mortgage, treats a transfer, where a further sum of money is added, as an original mortgage, and imposes a transfer duty of 1*l.* 15*s.* only in cases, “provided no further sum of money be added to the principal money already secured,” and here a further sum was added. The stamps, therefore, would have been, under that act, a 5*l.* ad valorem stamp and three progressive stamps of 1*l.* each, exceeding the stamps actually used by 5*s.*

But the statute 3 G. 4, c. 117, s. 1, repeals stat. 55 G. 3, c. 184, so far as regards the duties on transfers of mortgages, and enacts, by section 2, that in case of a transfer, “provided no further sum of money” “be added to the *principal money” “already secured,” there shall be paid 1*l.* 15*s.*, and a progressive stamp duty of 1*l.* 5*s.*; “and if any further sum of money” “shall be added to the principal money” “already secured, the ad valorem duty on mortgages, payable under the said recited acts respectively, shall be charged only in respect of such further money.” It is observable that by this act the transfer duty of 1*l.* 15*s.* is imposed with the same proviso as was contained in stat. 55 G. 3, c. 184, and we think that the effect is the same, viz., that the transfer duty is imposed in those cases only where no further sum of money is added. Here a further sum is added, and therefore the transfer duty is out of the question. The other part of the section requires an ad valorem duty on the sum added; and we think that the effect of that part of the clause is to make this transfer, as regards stamp duties, an original mortgage for securing 200*l.*: and that the ad valorem stamp duty of 2*l.* is charged upon it by the 55 G. 3, c. 184. It follows that the progressive duty is three sums of 1*l.* each: those stamps are actually on the deeds in question. [*97]

But it is said that this is an original mortgage by reason of the conveyance of the fee.

The third section of 3 G. 4, c. 117, does not apply to these deeds; for it is confined to cases where the original instrument on which the ad valorem duty was paid was a *bond*: here it was an *indenture*. This part of the question therefore turns on the exemption clause in 55 G. 3, c. 184.

That clause exempts from the ad valorem duty, but not from any other, any deed made as additional or further security for any sum of money already secured *by a deed which shall have paid the ad valorem duty, in case such further security shall be made by the same person who made the original security; but, if any further sum be added, the ad valorem duty shall be charged in respect of such further sum. Here the person conveying the fee is the same person who created the term, and a further sum is added. Therefore, if the deed had been simply a conveyance of the fee, and had not contained a transfer of the term, the duty would have been 2*l.* ad valorem, on account of the additional 200*l.*, and three progressive duties of 1*l.* each. Whether a common deed stamp also was necessary under either of the acts it is not material to inquire, because the 1*l.* 15*s.* stamp erroneously put on these deeds is sufficient to [*98]

cover that stamp, if necessary. But, as the deeds in question do contain a transfer of the original mortgage, it is plain that before the passing of 8 G. 4, c. 117, the exemption clause in 55 G. 3, c. 184, would not have applied, and on the whole this must have been treated as a new and original mortgage liable to the ad valorem duty of 4*l*. The act of 8 G. 4, c. 117, has however repealed that part of the 55 G. 3, c. 184, and substituted the same ad valorem duty of 2*l*. on the transfer in respect of the additional sum, as the exemption clause had already charged on the new security in respect of the additional sum; and as the ad valorem duty depends on the sum secured, and not on the value or number of the securities, and is only to be paid once, it follows that the case is the same in effect as if the ad valorem duty of 2*l*. had been charged on the transfer, and afterwards the fee had been conveyed as a further security for the whole sum of 850*l*., in which case a common deed stamp only would have been required.

For these reasons we are of opinion that the stamps are sufficient, and that the rule for a nonsuit must be discharged.

Rule discharged.(a)

ROPER against HOLLAND. *Monday, April 27th.*

Defendant held land in trust to receive the rents and pay 50*l*. half-yearly to plaintiff's wife, and the residue, deducting for repairs, land-tax, &c. to plaintiff. Defendant left word for plaintiff at a bank, where he had been accustomed to pay in such residue to plaintiff's use, that he would pay plaintiff 10*l*. on his giving defendant a receipt for 27*l*.; plaintiff did not offer the receipt, and the 10*l*. not being paid, he sued defendant for it as money had and received, and on an account stated. Defendant offered to prove that, at the time of his proposal to pay 10*l*., he had laid out more than 27*l*. in repairs, but the evidence was rejected. Plaintiff having obtained a verdict for 10*l*., and defendant moved to enter a nonsuit:

Held that, upon the evidence, defendant might be taken to have admitted a balance of 10*l*. in his hands to plaintiff's use; and if so, that he could not, in defence either set up his character of trustee, or offer evidence to shew that the balance did not exist.

DEBT for money had and received, and on an account stated. Plea, nil debet. On the trial before Patteson, J., at the Worcester Spring assizes, 1834, it appeared that the defendant was mortgagee in possession of a house and farm, upon certain trusts, under a deed of settlement; and that, in execution of those trusts, he received the rents and profits, of which he applied part to the repairs, insurance, land-tax, and other necessary expenses, and paid, half-yearly, 50*l*. to the plaintiff's wife, and the rest to the plaintiff. The clerk of a bank at which the defendant had several times made payments on the above account to the plaintiff's use, stated as follows:—"In the early part of November I proposed to pay the plaintiff between 10*l*. and 12*l*., on his giving me a receipt for 27*l*. I was directed to do this by the defendant." The clerk had, on former occasions, taken receipts from the plaintiff for such payments, and handed them to the defendant. The tenant also stated that, after he paid the defendant his last Michaelmas rent, the latter said that he should pay the plaintiff money (not saying how much), if he chose to have it, though he, the defendant, had laid out more in repairs. It did not appear that the plaintiff offered any receipt, and the 10*l*. was not paid him. The counsel for the defendant urged that he, being a trustee, was not liable at law for the 10*l*.; and they also

(a) The same point arose in a case of Doe dem. Williams v. Edwards, tried before Bolland B. at the last assizes at Ruthin, in which a verdict was found for the plaintiff, and leave given to move to enter a nonsuit, if the Court should think the stamps insufficient. Dunn moved accordingly, in this term (April 22d, before Lord Denman, C. J., Littledale, Patteson, and Coleridge Js.), and the Court took time to consider. On the last day of the term, Lord Denman, C. J. said that this case must follow the event of Doe dem. Bartley v. Gray. Rule refused.

proposed to give evidence of repairs done to an amount exceeding 27*l.*, and to which the sum now demanded was applicable. The learned Judge thought that the payment into the bank, with the direction proved to have been given to the clerk, precluded the defendant from insisting on his character of trustee, or from offering evidence of repairs in reduction of the plaintiff's demand. He gave leave, however, to move to enter a nonsuit, and the plaintiff had a verdict for 10*l.* A rule nisi was obtained for entering a nonsuit, in Easter term, 1834.

Ludlow, Serjt. and *Godson* now shewed cause. The defendant having received this money, and acknowledged that he had it ready to pay over, and having actually directed the banker's clerk to pay it on his behalf to the plaintiff, cannot now deny that he has received it to the plaintiff's use, or send the plaintiff into a court of equity to recover it against him as trustee. It is true, *the offer to pay was accompanied by the demand of a receipt, but the evidence clearly shewed that the defendant's duty, as trustee, was at an end as to the particular sum, and that he held himself accountable for it to the plaintiff. [*101]

R. V. Richards, contra. The rule is, that a balance of money received, and to be accounted for, by a trustee, cannot be sued for at law by the party entitled, unless such balance has been specifically adjusted, in which case it may become the subject of a count for money had and received, or upon an account stated; *Case v. Roberts*, Holt's N. P. C. 500. [Lord DENMAN, C. J. The law is clear; if this was an open account, it was a trust account.] The whole effect of the evidence was that, at the time in question, the defendant said that he was willing to pay the plaintiff 10*l.* if he would give him a receipt for 27*l.*; that did not show that the defendant actually had a balance of 10*l.* ready to pay over. To make it clear that he had not such a balance, he could have proved that he had laid out the sums of 10*l.* and 17*l.* in repairs; and that evidence should have been admitted. The meaning of the defendant's language was:—"I am willing to pay this party some money; he cannot claim any, but I am ready to accommodate him. If, however, he stands upon his right, I can show that I have paid more for repairs than any sum he can claim."

Lord DENMAN, C. J. The defendant, as trustee of this property, was bound to pay out of the half-yearly rent 50*l.* to the plaintiff's wife, and the residue (after *making the necessary deductions) to the plaintiff. He says to a witness, "I am willing to pay the husband 10*l.*, if he will give me credit for repairs by a receipt for 27*l.*" A difficulty seems to have been raised as to that, and the payment was not made. Then the question is, whether this 10*l.* was such a balance as could be recovered in the present action? It appears to me that the defendant has stated his account for himself. The question of fact was, what the defendant's intention was in expressing himself as he did. What the real state of the account may have been is immaterial. The rule must be discharged.

LITLEDALE, J. I am of the same opinion. The defendant, by what he said, admitted that he had 10*l.* in hand, and appropriated it to the plaintiff's use. He cannot then avail himself of his character of trustee.

COLERIDGE, J. concurred.

PATTESON, J. If the message given through the clerk had been, "Mr. Holland is willing to let you have 10*l.*, but you have no right to it," the case would have been different.

Rule discharged. (a)

(a) See *Remon v. Hayward*, 2 A. & E. 666.

*PATESHALL against TRANTER. *Monday, April 27th.*

The buyer of a horse warranted sound may recover in a special action of assumpsit for a breach of warranty, though he never returned the horse, and though he neglected to inform the defendant of the unsoundness for several months after it was discovered.

ASSUMPSIT on the warranty of a horse. There were special counts on the contract, and indebitatus counts for the value of the horse. On the trial before Park, J. at the Hereford Spring assizes, 1834, it appeared that, in November, 1832, the plaintiff bought the horse, warranted sound, of the defendant, who was a grocer: that the horse, when bought, was in bad condition, and required physic: that after the expiration of two months he was tried in a carriage, and found unfit for work; a farrier was then sent for, and various remedies administered for three months. The horse was found to be paralyzed in the spine, and it was not disputed, in argument on the motion for a new trial, that this unsoundness existed at the time of the sale. In July 1833, the plaintiff sent a message to the defendant, informing him that the horse was unsound, inquiring what the defendant wished the plaintiff to do, and stating that the plaintiff would send the horse back. The defendant refused to take him. No reason was given (except by the above evidence) for the delay in applying to the defendant, and it appeared that, between the time of the purchase and that of sending the message, the plaintiff had frequently passed the defendant's house, but had not called there. The learned Judge was of opinion that the plaintiff, in order to insist upon the breach of warranty, ought to have returned the horse at the earliest opportunity after discovering the unsoundness; more especially as the defendant, from the nature of his business, was probably

*104] acquainted with horses: and that the horse had been detained for a time which was clearly unreasonable under the circumstances. He therefore directed a nonsuit. *Ludlow*, Serjt. in Easter term, 1834, (April 17th) moved for a new trial, and referred to *Fielder v. Starkin*, 1 H. Bl. 17, and *Caswell v. Coare*, 1 Taunt. 566. [PARK, J. According to the judgment of this Court in *Street v. Blay*, 2 B. & Ad. 460, the purchaser of a specific chattel, having accepted it, not only is not bound to return it on the failure of warranty, but cannot do so.] A rule nisi having been granted,

F. V. Lee now shewed cause. The question is, whether *Fielder v. Starkin*, 1 H. Bl. 17, is not overruled, or at least qualified, by subsequent cases. Lord Loughborough there held that, if a horse sold with warranty of soundness be proved to have been unsound at the time of sale, it is not necessary, for maintaining an action on the warranty, that he should be returned to the seller. But in *Adam v. Richards*, 2 H. Bl. 574, the Court of Common Pleas said that "where there was an agreement to take a horse back, if on trial he should be found faulty, though it were accompanied by an express warranty, it was incumbent on the purchaser to return the horse as soon as the faults were discovered." That qualifies the proposition laid down by Lord Loughborough, in *Fielder v. Starkin*, 1 H. Bl. 17, that "no length of time elapsed after the sale will alter the nature of a contract originally false." There is not, for the present purpose, any essential distinction between a warranty with an agreement to

*105] take the horse back if found faulty, and a warranty without such agreement. In each case there ought to be a return in reasonable time. In *Street v. Blay*, 2 B. & Ad. 457, Parke, J. says, "According to the general rules on the subject of warranty, a vendee is bound to return the article as soon as he discovers the unsoundness." [Lord DENMAN, C. J. That is in cases where he is bound to return it.] The present cases comes within the principle of those in which it has been held, that a purchaser of goods under a contract that they shall be of a particular description cannot reject them, if he has disposed of them as his own, or detained them more than a reasonable time; Par-

ker v. Palmer, 4 B. & Ald. 387, *Okell v. Smith*, 1 Stark. N. P. C. 107. [Lord DENMAN, C. J. Is it not for a jury to say what is a reasonable time under the circumstances of the case?] There may be so clear a case that the judge ought not to leave it to the jury. In *Hunt v. Silk*, 5 East, 449, it is said, that where a contract is to be rescinded, it must be rescinded altogether, "and the parties put in statu quo." Here the plaintiff, by returning the horse at the time when he offered to do so, could not have put the seller in as good a situation as he was at the time of the sale.

Ludlow, Serjt., and *R. V. Richards*, contra. In *Gompertz v. Denton*, 1 Cro. & M. 207, the doctrine of *Street v. Blay*, 2 B. & Ad. 456, as to the rejection of articles purchased, on a failure of warranty, was recognized by the Court of Exchequer; and Bayley, B., adverting to the latter case, said, it is "there laid down, that a purchaser has no right to return the article, unless there has been a condition in *the original contract authorizing the return, or the vendor [*106 has subsequently consented to rescind the contract, or unless the case turn out to be one of fraud." Here the plaintiff at the trial proceeded entirely on the breach of contract, and did not rely upon the counts which supposed a contract rescinded.

PER GURIAM.(a) We think that *Filder v. Starkin*, 1 H. Bl. 17, is not overruled. The rule must be absolute. Rule absolute.

PHILPOT *against* ELIZABETH KELLEY. Tuesday, April 28.

To an action of trover for wine, commenced, October 1833, the statute of limitations was pleaded. The wine, in pipe, had been deposited by C. for the plaintiff, in the defendant's cellar, by her leave. C. became bankrupt, and, his assignees claiming the wine, the plaintiff's solicitors warned the defendant, by letter, in December 1826, not to give it up to any person unauthorized by them. The defendant kept the wine, and bottled part of it at, or soon after, the end of 1826, at which time it was becoming injured by remaining in the wood. Afterwards, but it did not appear when, she consumed part of the wine so bottled. In November 1827, the plaintiff's solicitors again wrote to the defendant, saying that they were instructed to proceed at law against her, and referring to a demand of the wine, stated in the letter to have been made upon her by them in the preceding March, but of which there was no further evidence. They also offered to indemnify her against the claim of any other person, if she would deliver the wine within a week; in default of which they stated that the proceedings would be commenced. The application was not noticed. A subsequent demand and refusal were proved. The jury having found for the plaintiff:

Held, on motion to enter a nonsuit, that on this evidence the jury were not bound to conclude either that there had been a demand and a refusal more than six years before action brought: or that the defendant had bottled the wine with intent to convert it to her own use.

Semle, by Pattenon and Coleridge, Js., that if a bailee of wine draws off and converts part of it without the owner's knowledge, and at the end of six years is sued in trover for the whole quantity, he cannot set up his conversion of part as a conversion of the whole, to support a plea of the Statute of Limitations.

TROVER for port wine, bottles, casks, &c. Pleas: Not guilty, and the Statute of Limitations. Issues thereon. At the trial before Lord Lyndhurst, C. B., at the Spring assizes for Kent, 1834, one Croasdill, son-in-law *of [*107 the defendant, was called on behalf of the plaintiff, and stated that in 1825 he took charge of a pipe of port wine for the plaintiff, to whom it belonged, and placed it in the defendant's cellar by her leave. Some proof was given that he at that time asked her to take part of it on her own account. It appeared further, that, in November, 1826, a commission of bankrupt issued against Croasdill, founded on acts of bankruptcy committed during that year, and an assignment was executed on the 6th of December, 1826. Before Christmas the wine was claimed of the defendant by the assignees, but she refused to

(a) Lord Denman C. J., Littledale, Pattenon, and Coleridge, Js.

deliver it. Messrs. Brooks and Co., solicitors for the plaintiff, wrote the following letter to the defendant, dated the 26th of December, 1826 :

"Madam,—We are informed by Mr. Philpott that a pipe of port wine, purchased and paid for by him, and in your custody, has been applied for under the pretence that it belongs to the assignees of Croasdill, who has been declared a bankrupt. We, therefore, as solicitors for Mr. Philpott, give you notice not to part with the same to any one but such person as shall be duly authorized to receive the same by Mr. Philpott, or by us as his solicitors."

The defendant did not give up the wine, and in December, 1826, or January, 1827 (more than six years before this action was commenced), she bottled part of it, which she afterwards used, but at what time did not appear. The wine was then becoming deteriorated by remaining in the wood. On the 22d of November, 1827, Messrs. Brooks and Co. wrote to the defendant as follows :—

"Madam,—Mr. Philpott of Canterbury has instructed us to commence the necessary proceedings for the recovery of the pipe of port wine, which for his convenience *was placed in your cellar, and was demanded of you so long *108] ago as the 12th of March last; but as Mr. Philpott has no wish to put you to any unnecessary inconvenience or expense, we have to propose to you, that in case you will deliver up the same to him within a week from the present time, he will indemnify you against any claim that might hereafter be set up by any other person to the same; and as the matter cannot be allowed to remain any longer unsettled, we shall commence proceedings against you without further notice, unless the same is delivered within the time above stated."

This application was not attended to. In April, 1833, the plaintiff formally demanded the wine of the defendant, with the consent of the assignees, but it was not given up. The present action was commenced on the 18th of October, 1833. The letters, and the bottling and consumption of the wine were proved at the trial by the defendant, who contended, that a cause of action had accrued more than six years before the commencement of the suit; for that, in the first place, the bottling of the wine was a conversion; and, secondly, the letters showed a demand and refusal more than six years before October, 1833. The Lord Chief Baron left the case to the jury, reserving leave to the defendant to move to enter a nonsuit, if the Court should think that the facts proved entitled her to it: and the plaintiff had a verdict. A rule nisi was obtained, in the next term, for entering a nonsuit, against which

Spankie, Serjt., and *Channell* now showed cause. There was a clear demand and refusal in April, 1833, but the answer attempted is, first, that there had *109] already been a demand and refusal, and that more than six years *before the commencement of the action. But in December, 1826, when Messrs. Brooks & Co. wrote their first letter, the assignees had at least a probable claim to the wine, and the letter then written was not a demand, but only a notice not to part with the property to any person not authorized by the plaintiff. Non-delivery of the wine, upon such a letter, could not be evidence of a conversion. The letter of November, 1827, was within the six years; but it is relied upon as shewing a previous demand and refusal. Supposing, however, that the letter did show some previous demand, there is no evidence what its nature was, nor of the circumstances which followed. It does not appear that the wine was ever sent for, and the defendant was not bound to send it. She may never have refused to deliver it; but may have kept it merely in order to make the necessary inquiries. To show a conversion, there must be such a refusal as implies an independent assertion of property in the person refusing; not that qualified denial which merely operates in delay of the claim. Instances of the latter kind are given in 2 Starkie on Evidence, p. 843, 2d ed. Then, secondly, it is said that there was an actual conversion by the bottling, followed by consumption, of the wine. But it does not appear when the wine was drunk; and there is no ground to assume that the bottling was done as an act of ownership. It may have been necessary for the preservation of the wine. And it was an act done without the

knowledge of the plaintiff. It is true that the plaintiff's want of knowledge has been held to make no difference in an action of trover, to which the statute was pleaded: *Granger v. George*, 5 B. & C. 149; but that has been in the absence of fraud. *It was admitted by Lord Mansfield, in *Bree v. Holbeck*, 2 Doug. 654. that there may be cases which fraud will take out of the [*110 Statute of Limitations: and the courts, in deciding subsequent cases, have not interfered with that position. [PATTESON, J. Although there may have been fraud in the act done by a defendant, is that sufficient unless there was fraud used to prevent the plaintiff's earlier knowledge of the act? *Howell v. Young*, 5 B. & C. 259. COLERIDGE, J. In *Brown v. Howard*, 2 B. & B. 75, Dallas, C. J., seems to consider that fraud in the act itself would be sufficient.

Thesiger and Platt, contra. The letter of November 1827, and the defendant's omission to answer it, joined to the fact of her having previously bottled off a part of the wine, were evidence of a conversion by her more than six years before action brought. Any claim on the part of the assignees to which she might have paid attention was disposed of by the letter of December 1826; and then the letter of November 1827 shews that there had been a previous demand of the wine on the plaintiff's behalf, and that, at the time of that demand, the defendant was refusing to give it up. It is not necessary to a case of conversion, that there should be direct proof of a demand and refusal; circumstances may raise a presumption of them; *Topham v. Braddick*, 1 Taunt. 572, *Watkins v. Woolley*, Gow's N. P. C. 69. [PATTESON, J. Are we to presume a refusal in favour of a person who sets up her own wrongful act? The offer of indemnity shows that the refusal, if there had been one, had been qualified by reference to the supposed right of the assignees; and if *there were conflicting claims, such a refusal to deliver to either party was not proof of a [*111 conversion.(a) Was it to be presumed that, between the letter of 1826 and the letter containing the offer to indemnify, there had been a positive refusal?] The threat of legal proceedings in the last letter implies such a refusal. But, further, the bottling of part of the wine was a conversion. It is said that that was done to preserve it. But if a perishable article is deposited for safe custody, it is not clear that the bailee has a right, for the sake of any supposed benefit to the commodity, to exercise such an act of ownership as this, which even affects the evidence of title. And it is a reasonable question here, whether or not the intent was preservation. The drinking of the wine afterwards is strong evidence that the intention in bottling was to convert it. [Lord DENMAN, C. J. That was for the jury, and they have found otherwise. As to the bottling, it was the treatment to which the wine was entitled, in whosoever hands it was. LITTLEDALE, J. I should not have concluded that the bottling shewed an intention to convert, considering the perishable nature of the commodity. PATTESON, J. It is consistent with the evidence, that it may have been done by consent of all the parties claiming.] In *Richardson v. Atkinson*, 1 Stra. 576, it was held, that drawing off part of the liquor was a conversion of the whole. [PATTESON, J. There the defendant filled up the vessel with water. It cannot be contended, that if a bailee draws off part of a butt of wine, a perfect cause of action arises in respect of the whole. Such a constructive *con- [*112 version is monstrous. And at all events the wrongdoer cannot set it up. COLERIDGE, J., referred to *Swayn v. Stephens*, Cro. Car. 245. 333.] To hold that a defendant in trover could not set up his own wrongful act under a plea of the Statute of Limitations, would repeal the statute as to this form of action. In *Clendon v. Dinneford*, 5 Car. & P. 13, where the defendant had obtained letters and two books belonging to the plaintiff, and, upon demand, gave up the letters and one book, but kept the other, it was held that the plaintiff might recover for a conversion of the whole. LITTLEDALE, J. There the question

(a) As to the case of an unqualified refusal by the bailee to one of such conflicting parties, see *Wilson v. Anderton*, 1 B. & Ad. 450.

arose on a demand and refusal. PATTESON, J. A conversion of part may, as against the wrongdoer, be a conversion of the whole, but it does not follow that he may set it up as such. And in that case it would have been different if the defendant had merely destroyed one of the books.] The question is such cases is, whether a defendant's treatment of part of the property has been such as amounts to a conversion of all. If a bailee has a butt of wine, and offers to deliver all of it to the owner, except five gallons, he may be sued for a conversion of the whole butt.

LORD DENMAN, C. J. I think it was not proved in this case that there had been a conversion more than six years before the action was brought. There was, indeed, some evidence of facts upon which an action might have been commenced earlier; whether a jury would have found for the plaintiff upon that evidence or not, I cannot say, but it would not have been satisfactory to me. *113] It appears that, on the bankruptcy of the person *who deposited this wine, there were two parties who claimed it. The first evidence which the defendant gives of her own wrongful conversion is a letter of the 22d of November 1827, speaking of a refusal given by her to a demand made in the preceding March. If that demand was by letter, the letter may be supposed to have been in the defendant's possession; but she did not produce it. And there was no evidence when the refusal, if there was one, was sent; it may have been the very day before the letter of the 22d of November was written. In the early part of the proceedings it is evident that the defendant considered herself as balancing between two claims adverse to each other. The circumstance of the wine having been bottled was one upon which the jury were to put their own construction; they have done so, and I think rightly. The question was merely one of fact.

LITTLEDALE, J. I think there was no evidence of a conversion at the distance of time alleged by the defendant. When the first demand is supposed to have been made, she appears to have been ignorant who was the party entitled; and it is not shewn that she gave any refusal as against the plaintiff. As to the bottling, there is no evidence who directed that to be done; but it appears that the wine was deteriorated by being kept in the wood; and the most obvious inference from the facts would be, that the plaintiff, for whom it was deposited, himself desired that it should be bottled. This, however, being done, some of the wine was afterwards consumed; but at what time that happened does not appear; and the fact, I think, is not available to show that the bottling was in *114] itself an act of ownership *amounting to a conversion. It was not such an act, if done by the direction of the party depositing, or if done for the best, with a view to preservation. The demand in November, 1827, refers to a previous one in March, in the same year; but at that time two parties were alleging a title to the wine; if there was a refusal then, it does not show that the defendant herself claimed to keep it. All that passed at that time may have been, that she may have said, "I will take care that the wine does not go out of my cellar," without, however, giving any absolute refusal to either party. But, in fact, we are in the dark as to this part of the case. I think the rule ought to be discharged.

PATTESON, J. The plaintiff makes a *prima facie* case by the demand in 1833: but the Statute of Limitations being pleaded, the defendant has to prove a conversion more than six years before the commencement of his action. A case of *Swayn v. Stephens*, Cro. Car. 245, 333, was cited by my brother Coleridge, in which, although the defendant had actually sold the ship for which the action was brought, more than six years before, the Court presumed, in favour of the plaintiff (who had been unable to sue the defendant by reason of his remaining abroad), that the ship had come to the defendant's hands a second time, and been converted anew. That decision was against the opinion of one of the Judges, and savours of subtlety; if such a question arose now, I should doubt if it would be decided in the same manner. The attempt here is to

establish a conversion in two ways. First, by a demand and refusal; but in that *I think the plaintiff fails. It is said that, from the construction to be put upon the letter of November, 1827, a previous refusal is to be inferred. That was for the jury; and if the point was not distinctly put to them, and we are to place ourselves in the situation of a jury, I should say that a different construction was the more reasonable one. The assignees at first claimed the wine. The defendant was ordered by the plaintiff not to deliver it to them. The fair presumption then is, that she retained it only till the rights of parties should be established. What the demand was, which is said to have been made in March, or how it was answered, is not shown by the evidence. The threat in the letter of November, 1827, that proceedings will be taken against the defendant may prove that the attorney thought there had been a demand and refusal; but the offer of an indemnity shows that the assignees were supposed still to keep up a claim, and supports the inference that the defendant was at that time holding the property only till the rights of the claimants should be ascertained. I do not say, under these circumstances, that there may not have been a demand and refusal before the commencement of the six years; but it was not proved, and the proof of it lay on the defendant. [*115]

Then, secondly, it is contended that the bottling of the wine was a conversion: and I do not say that it would not have been so, if the defendant had clearly done it on her own account, and adversely to the proprietor. But it appears to have taken place just when the assignee and the plaintiff were demanding the wine; and it is much more like an act done to preserve it until the right could be ascertained, than an exercise of ownership. It was urged, however, that the wine was *afterwards consumed by the defendant. But, in the first place, there is no proof when that happened, and we are not to make a presumption in favour of a party setting up his own wrong. And, secondly, even if a part of the wine was drunk more than six years before the commencement of the action, I think that the mere taking away or destroying a part of property which remains in the hands of a bailee is not such a conversion that the owner may sue in trover for the whole. In *Richardson v. Atkinson*, 1 Stra. 576, where part of the liquor was drawn off, it was held to be a conversion, but the defendant had filled the vessel up with water. I am not prepared to say that, if a person draws off part of the contents of a cask, and is ready to deliver the rest, his taking away such part is necessarily a conversion of the whole. No case has gone that length yet. If it were so held, a person with whom a cask of liquor was deposited, and who wished to convert all of it, might draw off a part of the contents, and, if the vessel remained with him for six years afterwards, refuse to deliver up the rest, and set up his conversion of a part so many years ago in answer to an action of trover. In *Clendon v. Dinneford*, 5 Car. & P. 13, which has been cited, the defendant had the books and letters, which were the subject of the action, in his possession when they were demanded on behalf of the plaintiff; and he refused them to the party making the demand, but offered to give them up to another person connected with the plaintiff. That person afterwards applied, but could only obtain the letters and one of the books, which the plaintiff, for the sake of the letters, consented to take. This was not a destruction of part, but a delivery of *part only, after a promise to deliver the whole. And if a person, having in his possession several things [*117] belonging to another, all of which it is in his power to deliver up, refuses to let the owner have more than a part of them, that may be a conversion; but the present is a different case.

COLERIDGE, J. The statement of the question almost disposes of this case. The burden of proof, upon the plea of the statute, lay on the defendant; and the question is, not whether, upon the acts done, a jury, or this Court, putting itself in the place of a jury, would have been warranted in finding a conversion, but whether the facts are so clear that the Judge should have put it to them almost as a conclusion of law, that a conversion was proved; or so clear at all

events that they ought to have found a conversion. As to the acts themselves, the bottling, particularly when coupled with the consumption of the wine afterwards, might, if it had been ascertained when and by whose direction the bottling took place, have been evidence of a conversion of the whole. But this must depend upon the circumstances, and some of those, we know lead to a contrary conclusion; as, for instance, the state of the wine while remaining in the wood. The drinking may have been intended when the wine was bottled, or may have been thought of afterwards: that was for the jury. As to the legal effect of the consumption of part of the wine, I agree with my brother Patteson; I should be sorry if it could ever be held that taking a part of the property under such circumstances amounted to a conversion of the whole; that the fraud so committed, and the ignorance of the party against whom it was practised, could *118] protect the wrongdoer from an action; and that a person who had been for a long time bailee for a quantity of wine, and who had drunk six dozen, or one dozen, of it six years ago, might set that up as a defence against the claim of the owner. I say this as to the law, but it lay on the defendant to make it clear in fact, which it is not, that the wine had been drunk six years before the action was brought. With respect to the alleged demand and refusal, that would only be evidence of a conversion; and as to the fact of demand and refusal, we do not know enough from the case before us to say that the conclusion insisted upon for the defendant is the only proper one. There is no ground, therefore, to disturb the verdict. Rule discharged.(a)

PARRY v. ROBERTS. *Wednesday, April 29.*

Plaintiff employed defendant, without reward, to carry 45*l.* for him to a person at Liverpool. Defendant did not deliver it, and afterwards told plaintiff that he had lost it in a brothel, but would repay it to him. There was no other evidence how the loss had happened. Plaintiff sued defendant for 45*l.* had and received to his use.

Held, that the action lay, independently of the promise, defendant not having paid over the money or returned it to plaintiff: that if a loss, in the manner alleged, had been proved, the action should have been for gross negligence, and not for money had and received; but that the defendant's assertion was not satisfactory proof of his own gross negligence.

ASSUMPSIT for money lent, money paid, money had and received, and on an account stated. Plea, the general issue. Particular of demand, for 45*l.*, "being money delivered by the plaintiff to the defendant, to be paid by the defendant to a certain person at Liverpool, and to whom the defendant did not pay the same." At the trial, before Bolland, B., at the Spring assizes for Flintshire, 1884, it appeared that the plaintiff had requested the defendant to take *119] 45*l.*, for him to a person at Liverpool; that the defendant received it for that purpose gratuitously, but did not pay it; and that, being questioned afterward on the subject, he said he had "lost the money among the whores." It was also proved that he had on another occasion told the plaintiff he would repay him the money out of certain funds, which he described. Upon this evidence it was objected that the plaintiff could not recover as for a debt, but should have declared specially for damages arising from the defendant's gross negligence. The learned Judge gave leave to move to enter a nonsuit, and the plaintiff had a verdict for 45*l.* A rule nisi was obtained in the next term.

John Jervis now shewed cause. It may be taken as proved that the money was delivered to the defendant for the specific purpose of his paying it to a

particular person at Liverpool. (a) He lost it, and promised to reimburse the plaintiff. The case stands as if the defendant, after receiving the money to pay over, had come back to the plaintiff and merely stated that he had not paid it: the account he gives of the loss places him in no better situation. His employment to carry the money was determined by his own act; he had omitted paying it to the party entitled; he had not substituted himself for the plaintiff as debtor to that party; and he did not return the money to the plaintiff. There was, then, a complete cause of action for money had and received, independently of the promise to repay.

Miller, contra. The case is in substance, that the plaintiff asked the defendant to carry a sum of money *for him, and deliver it to a person at Liverpool; the defendant got into loose company and lost it, and then [*120 said he would replace it. No part of the present declaration applies to such a case. No debt has been incurred. The ground of action is negligence, and the question whether or not the defendant (a bailee without reward) was guilty of gross negligence, cannot be raised on a count for money had and received. *Lightfoot v. Creed*, 8 Taunt. 268, (Littledale J. referred to *Lindon v. Hooper*, Cowp. 414,) shews that such collateral questions are not to be tried on the money counts. Money had and received lies only for a liquidated sum; *Harvey v. Archbold*, 3 B. & C. 626. As to the subsequent promise in this case, that was merely an undertaking to pay damages; the sum lost would be the measure of those damages. [PATTESON, J. You must contend that, even if the money had not been lost, but the defendant had not chosen to return it, the action must have been for not returning it, and money had and received would not have lain.] If the defendant had used the money, it might. The particular of demand here shews that the ground of action is not money had and received, or an account stated.

Lord DENMAN, C. J. This action is not grounded upon the alleged gross negligence. The defendant had money to pay for the plaintiff, and has not paid it. The *prima facie* case, therefore, against him is, that he has it still to pay. He is to extricate himself from that. He endeavours to do so by saying that it is true he received the money, but he has lost it in such and such a manner. Is that sufficient? The case is something *like one which was before us [*121 yesterday, (*Philpot v. Kelly*, ante, p. 106.) The party is clearly responsible for the money, but seeks to excuse himself by saying that he has lost it, and under such circumstances that he is only chargeable in an action for gross negligence. If he is to avail himself of his own wrong to defeat an action which otherwise would lie, he must give clear proof of it. His own admissions are not such proof. The promise made by him to reimburse the plaintiff was not wanted to render this action maintainable.

LITTEDALE, J. The money did not come to the defendant's hands originally as money had and received by him to the plaintiff's use, but as a sum entrusted to him for a specific purpose. It appears that that purpose was not carried into effect. How did that happen? By misappropriation? If so, money had and received would lie. But the question is, whether that conclusion can be come to. The defendant says he lost the money in a brothel. If we believe that, the action should have been brought, not for money had and received, but for negligence. But we are not bound to believe the excuse which he alleges; and if we do not, and the rest of the case raises so much suspicion that the jury might infer a misapplication of the money, there cannot be a new trial.

PATTESON, J. It appears that a sum of money was entrusted to the defendant for a particular purpose, but was not applied by him to that purpose. If the sum remained in the defendant's hands, and the plaintiff *upon [*122 inquiry found that it had not been applied, he was entitled to say,

(a) The purpose for which the money was to have been delivered to the person at *Liverpool* did not appear by the evidence as reported to the Court.

"Give me back the money; I countermand the direction to pay it:" and, if the defendant refused, his remedy was by action for money had and received. But here the defendant says that he has not the money, and the only account he gives of it is, that he has lost it in a very negligent manner. I think that it did not lie in his mouth to say that he no longer had the money because he had lost it in a brothel. The verdict, therefore, is right.

COLERIDGE, J. I agree that if the ground of this action had been a negligent loss, money had and received was not the proper form. But the fallacy of the defendant's case is, that he seeks to throw an issue on the plaintiff where he has no right to do so. He admits that he has not delivered the money, but says he has lost it in the manner described. The plaintiff is entitled to say that the money was received to his use, and that the defendant is bound to account for it. The answer attempted by him does not disturb the plaintiff's case.

Rule discharged.

123*] *DOE dem. HERBERT HERBERT *against* JOHN THOMAS and JOHN LEWIS. *Thursday, April 30.*

Tenant in fee simple devised land to his wife, her heirs and assigns, for ever, "with the intention that she may enjoy the same during her life, and by her will dispose of the same as she thinks proper." Held, that the wife took a fee; though, in a later part of the will, the deviser limited lands in fee by using the words "heirs and assigns for ever," without any additional words.

EJECTMENT for messuages in Brecknockshire. On the trial before Gurney, B. at the Brecknockshire Lent assizes 1884, a verdict was found for the plaintiff, with leave reserved to move to enter a verdict for the defendants. In Easter term last, John Evans obtained a rule accordingly. Several questions arose upon the argument, but the only point upon which the Court decided was the construction of the will of Herbert Herbert, deceased, who had died seised in fee of the premises in question. The will was as follows:—"I give and bequeath to my dear wife Margaret, her heirs and assigns for ever, the house in which we now live and all the furniture therein, and all other the property of which I die possessed, with the intention that she may enjoy the same during her life, and by her will dispose of the same as she thinks proper: and whereas my father did by his last will give and bequeath to my sister Susanna Lewis the house next to mine" (not being part of the premises in dispute,) "and in which she now lives, now, in case the said will should not be sufficient for the purpose of giving her the said house as aforesaid, I do hereby, as far as in me lies, give and bequeath to her the said Susanna, her heirs and assigns for ever, the said house in which she lives, relinquishing all right and title to the same which I *124] may have." The defendants claimed under a conveyance in fee made to them by the wife after H. Herbert's death; and it was admitted, on the part of the lessor of the plaintiff, that the defendants were entitled to the verdict if the wife took a fee under the will in the property bequeathed to her.

John Wilson and Cooper now shewed cause. The wife took an estate for life, with a testamentary power of appointment as to the remainder. The earlier words "to my wife, her heirs and assigns, for ever," would, of course, give a fee simple, were it not for the words which follow, "with the intention that she may enjoy the same during her life, and by her will dispose of the same as she thinks proper." The latter words shew that the deviser did not intend to give the absolute fee: and such a construction must be put upon the will as will give effect to all the words. It is clear that the deviser knew that the words "heirs and assigns for ever," if not followed by qualifying words, would give a fee, for these words are used simply, and by themselves, in the part of the will relating

to Susanna Lewis. In an Anonymous Case, 3 Leon, 71, Pl. 108, A., devised in fee, devised to his wife for life, and, after her decease, she to give the same to whom she would; and it was held to be an estate for life only in the wife, with authority to give the reversion by will. In the Year Book, Tr. 15 H. 7, 12, (The case is put by Fineux C. J. of K. B., arguendo, (cited in Jen- nor and Hardie's Case, 1 Leon. 283, a case is put of a devise, than A. shall have lands in perpetuum during his life; and it is said that this would give but a life estate, though there can be no doubt that the *words "in perpetuum" would, by themselves, have given a fee. [*125 (Br. Abr. Estates, 21, (referring to Fineux, C. J. ut sup.); Litt. s. 586.) The devisor's intention in the present case probably was to give the property completely to the wife, subject only to the restriction of not being able to alien during her life. This intention might have been fulfilled, by giving the estate to the wife and her heirs, to the use of herself for life, and, after her death, to such uses as she should by will appoint. The will, as it now stands, is only a less formal expression of the same intention. The words in the Statute of Uses are, "to the use, confidence, or trust;" (27 H. 8, c. 10, s. 1,) these words are as general as those in the will, "with the intention;" this may therefore be construed to be merely a formal limitation of an use. Much latitude has been given as to the expressions which imply an use; thus *et c.* conditions, *et c.* intentions, have been held to mean so even in a deed. (See 1 Sand. Uses and Trusts, c. 2, s. 2, p. 98, 4th ed. 1824.) The Anonymous Case, in 3 Leon. 71, was indeed denied to be law in *Goodtitle dem. Pearson v. Otway*, 2 Wils. 7; but it was confirmed by *Tomlinson v. Dighton*, 1 P. W. 149, 154; S. C. 10 Mod. 31, and by *Doe dem. Thorley v. Thorley*, 10 East, 438, 439. In *Goodtitle dem. Pearson v. Otway*, 2 Wils. 7, the devise was to P. for life, and after her death, to her lawful issue, and, if she should have no issue, that she should have power to dispose of the lands at her will and pleasure; and, although the first words gave the estate for life expressly, it was held that, in default of issue, P. took a fee by the later *words: (a) the later words, [*126 there, were much less definite than those in the present case. In *Doe dem. Thorley v. Thorley*, 10 East, 438, the devise was to the wife during her natural life, and also at her disposal afterwards to leave it to whomsoever she pleased: and the estate was held to be for life only, with a testamentary power of appointment by virtue of the latter words, which are less strong than those in the present case; for there the word "leave" was held to confine the exercise of the power to a testamentary appointment, whereas here the "will" is expressly designated. A case, (Tr. 30, H. 6,) before the Statute of Uses, given in *Fitzherbert's Abridgment*, Devise, 22, is referred to in *The Earl of Bedford v. Russell*, Poph. 4, and again in 1 *Powell on Devises*, p. 209, 8 ed., by *Jarman*, 1827, as follows:—"If a man devise lands to another in fee, he hath the use and title of it; but if it be limited to his use for his life only, the use of the fee shall be to the heir of the devisor; for, by the limitation, his intent shall be taken to be otherwise than it would have been taken if this limitation had not been." This shews that the words "heirs and assigns" here do not necessarily give a fee. If there be any inconsistency between these words and the words which follow, the former may be rejected. In 1 *Sugden on Powers*, ch. iii. s. 1. (11) &c., (P. 121, &c., ed. 6, 1836,) there is a discussion upon some of the cases above referred to; and, among others, upon the two cases cited from *Leonard*. And the author lays it down, (P. 125,) that, "wherever a power is clearly intended to be given, the *devisee cannot be holden to take a fee:" and it is also [*127 said, (P. 124) that the "rule is more inflexible where a specific mode of exercising the power is pointed out;" which is the case here. It is, besides, a

(a) P. was heir-at-law also; but *Gundry, J.* said that she took an estate tail and a fee upon contingency by the will, and had a fee by descent.

general rule, that the heir is not to be disinherited unless the intention be plain. *Timewell v. Perkins*, 2 Atk. 102, is a strong instance of this rule.

John Evans and *E. V. Williams*, contra, were stopped by the Court.

LORD DENMAN, C. J. We all think it perfectly clear that the wife took a fee. We should otherwise have to reject the words "heirs and assigns," for the purpose of giving effect to other words which are not inconsistent with them, inasmuch as, if the wife had a fee, she would enjoy the estate during her life, and might dispose of it by will as she thought proper. The only doubt which I felt arose upon the Anonymous case, from 3 Leon. 71. But it is clear that that case is not an authority in favour of the plaintiff: there the devise was merely for life, in the first instance, and, after the death of the devisee for life, the remainder was to go to whomsoever she gave it to; the Court held this to give an estate for life, with power to appoint the remainder; and they concluded by saying that, if an express estate had not been appointed to the wife, a fee simple would have passed by the other words; and this, though the words "heirs and assigns" did not occur.

LITTLDALE, J. I am of the same opinion. The case in Leonard is to be understood as my lord has explained *it. In the will now before us, *128] the latter words are not inconsistent with the earlier. By the earlier words the wife had that power which the later words profess to give. If the later words abridged the estate given by the earlier ones, the effect might be different; as, for instance, if the later words showed an intent not to give the fee. This inference might be made, if there were a limitation over, as there was in Chycke's case, reported in Dyer, (8 Dyer, 357 a.) and the cases cited in Treby's note there, two of which are *Chamberlayne v. Turner*, Cro. Car. 129, and *Whiting v. Wilkins*, 1 Bulst. 219. There might therefore be a doubt, if there were first a limitation in fee, and afterwards a devise over. But, in the present case, the later words amount only to a permission to do what the devisee might have done without the permission. I have no doubt whatever on the point.

PATTERSON, J. I am of the same opinion. The cases cited in argument go no further than to show that, where there is a devise for life in the first instance, a power to dispose of the property after the death of the devisee may in some instances not expand the devisee's estate into a fee. If, in this case, the first part of the devise gave a life estate only, that would be so. But the words in the first part are "heirs and assigns," and the lessor of the plaintiff must cut down the effect of these words by subsequent ones. No doubt some words would do so; as was the case, for instance, in *Barker v. Barker*, 2 Sim. 249, where the devise was to A. and her heirs, and, if she died leaving issue, then to the issue: and it was held that A.'s husband could not be tenant by the courtesy, because *129] the wife had not the inheritance. But no subsequent words occur in the present case capable of having such an effect. There is no devise over, no abridgment of the estate: there is merely an intention expressed that the wife should have power to do that which she would be entitled to do without any such expression.

COLERIDGE, J. I am of the same opinion. We should so construe the will, as to give effect to the deviser's intention by giving effect to all the words used by him. Now, first, there is clearly, *prima facie*, an estate in fee-simple devised. I do not say that words might not come afterwards which would shew that this was not the intention of the deviser. But here the later words only express his intention that the wife should enjoy for her life, and have the power of devising as she pleased. If we held that these words cut down the meaning of the earlier ones, we should be introducing, in one part, a meaning inconsistent with the other part. We are bound to see whether the two parts do not admit of a consistent meaning; and they may be construed consistently by holding that the deviser meant to give a fee, and to mention all the incidents of a fee

which occurred to him at the time. This I believe to be all that he did mean. Rule absolute.

***NECK against HUMPHERY and PEEK. Thursday, April 30th. [*130**

In an action against a sheriff for escape of a prisoner arrested on mesne process, the plaintiff proved the arrest by producing the sheriff's return of *cepi corpus et paratum habeo*: Held, that the latter words of the return produced by the plaintiff did not conclude him from proving the escape by parol evidence that the prisoner was at large after the return, and no bail bond lodged with the sheriff.

THIS was an action against the sheriff of Middlesex for the escape of a prisoner arrested on mesne process. On the trial before Lord Denman, C. J. at the sitting in Middlesex, May, 1834, the plaintiff, in order to prove the arrest, put in the sheriff's return to the *capias*, made on the 3d of September, that he had taken the party and had the body ready; and evidence was given that the prisoner was at large on the 10th of September; and that on the 10th and 11th of September the sheriff's office was searched and no bail bond found. The defendant's counsel then contended that the plaintiff must be called, on the ground that, without the return, there was no evidence of an arrest, that the return must be taken altogether, and that, if so taken, it shewed that the prisoner was in the sheriff's custody at the time of the return: that the plaintiff might have ruled the sheriff to bring in the body, or have brought an action for a false return: (a) but that he could not insist upon the caption as proved by the return, without admitting that the sheriff had the prisoner ready if called on. The Lord Chief Justice refused to nonsuit, but reserved leave to move. Evidence was then given for the defendants to shew that in fact there was a bond in the office on the 11th of September. The Lord Chief Justice left [*131 the case to the jury on the conflicting evidence, and they found for the plaintiff. In Trinity term last Platt obtained a rule nisi for entering a nonsuit upon this point, or for a new trial upon affidavits of fresh evidence.

F. D. M. Dawson on this day shewed cause, and *Platt* was heard in support of the rule.

PER CURIAM. (b) The effect of this return is not to assert that the defendant is in the sheriff's actual custody; it enables the plaintiff to rule the sheriff to bring in the body; and to that rule the sheriff makes his answer as the case may be. This became merely a question of evidence; and as evidence was given each way, it was a question of credit.

The affidavits being considered insufficient, the Court

Discharged the rule.

***JOHN EVANS and JAMES THOMAS against DAVID EVANS. [*132 Thursday, April 30th.**

In an action for use and occupation of lands by the sufferance and permission of the plaintiffs, it appeared that the lands were let by auction by the plaintiffs, E. and T., who were auctioneers, to the defendant, under conditions which stated the letting to be "By E. and T., auctioneers." One of the conditions was, "The rent is to be paid into the hands of E. or T., auctioneers, or to their order, at two payments," &c. At the foot of the document was written, "Approved by me, David Jones." Jones was the

(a) In *Re x v. The Sheriff of Middlesex*, 1 Chit. R. 393, Abbott, C. J. and Holroyd, J. considered that bringing an action for an escape, after a return of *cepi corpus*, was in effect denying the truth of the return. See *S. C. as Borwick v. Walton*, 2 B. & Ald. 623.

(b) Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

tenant at the time of the sale. Nothing else appeared in the conditions to shew on whose behalf the letting was. The plaintiff gave evidence to shew that Jones, being indebted to them, had authorised them to let the lands as above, pay the rent due to Jones's landlord, and retain any surplus in satisfaction of their own debt. Evidence to a contrary effect was given for the defendant. The judge, in summing up, left it to the jury, whether the plaintiffs had let the lands on their own behalf and as creditors of Jones, or merely as his agents. The jury found a letting by the plaintiffs on their own behalf:

Held, that the conditions imported a letting by Jones, E. and T. acting as his agents; and that the document ought to have been so explained to the jury. And the judge not having so explained it, a new trial was granted.

DEBT. The declaration stated the defendant to be indebted to the plaintiffs in the sum of 85*l.* "for the use and occupation of certain lands with the appurtenances by the defendant at his special instance and request and by the sufferance and permission of the said plaintiffs for a long time before then elapsed, had held, used, occupied, and enjoyed;" also in 85*l.* for the use and occupation of lands with the appurtenances of the said plaintiffs, by the said defendant at his special, &c., and by the sufferance and permission of the said plaintiffs, for a long time, &c., (as before;) also in other sums in moneys lent, paid, had and received, and on account stated. Plea, the general issue. At the trial before Gurney, B. at the Cardigan Spring assizes, 1834, the case for the plaintiffs was as follows:—David Jones, being tenant of the lands in question, and being indebted both to the plaintiffs and to the defendant, made an arrangement with the plaintiffs, who were auctioneers in partnership, that they should let the lands by auction upon the conditions aftermentioned, should pay Jones's land-
*133] lord the rent then coming due and the rent for the next year, should also pay the rates and other charges on the farm, and, after such payments, should retain to their own use the overplus of the rent at which the lands might be let, and should have a certain allowance for collecting. The lands were let by auction. The conditions, which were read at the letting, were in these words:—

"Fields let by auction at Veniog, in the parish of, &c., on the 16th day of October 1832 (being the farm of Veniog,) subject to the following conditions:—

"By Messrs. Evans and Thomas, auctioneers.

"First, the fields are let from to-day till Michaelmas next, free from all rates (tithes excepted).

"Secondly, the rent is to be paid into the hands of John Evans or James Thomas, auctioneers, or to their order, at two moieties or payments, that is to say, one half on the 10th day of July next, and the remaining half on the 29th day of September following.

"Approved of the above conditions

"By me,

David Jones."

After which followed a description of the lots. The defendant took the lands and occupied them. The plaintiffs received rent from him in respect of them, and paid it over to the landlord. At the close of the plaintiffs' case the defendant's counsel contended that there must be a nonsuit, for that the plaintiffs, who let as auctioneers, could not maintain an action for use and occupation; and *Jarvis v. Chapple*, 2 Chitt. Rep. 387, was cited. The learned Judge overruled the objection, saying that in the present case there was an express con-
*134] tract between the plaintiffs and the defendant. Evidence was then given on the defendant's part, to shew that no such arrangement existed between Jones and the plaintiffs as above stated; that they let the premises and received the rents merely as his agents, and that the defendant took the lands upon an understanding with Jones (previous to his supposed arrangement with the plaintiffs), that he should make a deduction from the rent in respect of the sum which he owed the defendant. The learned Judge left it to the jury whether the plaintiffs had disposed of the land as agents for Jones, or on their own behalf as creditors, and to reimburse themselves for money which they had

advanced; adding that, in the latter case, the defendant could not, after having heard the conditions of sale read, and agreed to pay the rent to the plaintiffs, avail himself of an alleged private arrangement between himself and Jones to defeat the plaintiffs' claim; and that, even if such arrangement existed, it made no difference, as the defendant had agreed to pay the plaintiffs. The jury found for the plaintiffs, and said they thought that the plaintiffs had let to the defendant under the agreement between them and David Jones, on their own account as creditors, and not as agents. In the ensuing term John Evans obtained a rule nisi for a nonsuit to be entered upon the objection above stated, or for a new trial. (a)

Maule now shewed cause. There is no reason that the plaintiffs, supposing that they let the land as auctioneers, should not maintain an action for use and *occupation, if the defendant has in fact occupied by their permission, [*135 and engaged to pay them. It is not necessary that the party bringing such a suit should have an actual title to the land, and the declaration does not in both counts state the lands to have been lands of the plaintiffs. If a defendant has, at his request, been permitted to do a thing which the plaintiff might permit or refuse, that is sufficient consideration for a promise. In *Lewis v. Willis*, 1 Wils. 314, it was held that *nil habuit in tenementis* was no answer to an action for use and occupation; and that case is recognised as authority in *Curtis v. Spitty*, 1 New Ca. 17. *Hull v. Vaughan*, 6 Price, 157, shews that this action may be maintained, though the plaintiff have not a complete legal right to the premises, and though there may not have been a distinct relation of landlord and tenant between the parties. [COLERIDGE, J. The question here is, whether the "sufferance," which is the ground of action, was in fact the sufferance of the plaintiffs? You assume that it was.] There was an agreement between Jones and the plaintiffs that the plaintiffs should allow such persons to occupy as they thought fit, and receive the rents; and it was evident that the defendant must have been cognisant of that engagement. And in fact the plaintiffs had, by that contract, such an interest in the lands as entitled them to let upon their own account: it is not correct to say that they let as auctioneers. The transaction between them and Jones amounted nearly, if not altogether, to an assignment. [PATTESON, J. If they were to let as principals it is strange that the condition should make the rent payable not to, but into the hands of, Evans or Thomas, and *should mention them as "auc- [*136 tioneers."] That is merely a description added to the names. The payment is not to be made to them "as auctioneers." And it is to them "or to their order," which is not usual in the case of agents. [LITLEDAL, J. If you put the case as that of a contract made with persons not having title, for a mere permission to occupy, should not the plaintiffs have declared specially on that contract?]

Sir *W. W. Follett* (with whom was *Evans*) contra. To render this action maintainable, there should have been such a contract as would place the plaintiff and defendant in the relation of landlord and tenant. Mere sufferance and permission, in the strict sense, is insufficient: otherwise a steward or bailiff might bring an action for use and occupation against any person whom he had permitted to occupy under his employer. [He was then stopped by the court.]

Lord DENMAN, C. J. If it clearly appeared that the defendant was aware of such an arrangement as has been suggested, between the plaintiffs and David Jones, that might vary the case. But it is manifest that the defendant took under the conditions of sale. Now the conditions merely import that fields are to be let by auction by the plaintiffs, auctioneers, and it cannot be doubted that the defendant knew that David Jones was owner. Then come the words, "the rent is to be paid into the hands of John Evans or James Thomas, auctioneers,

(a) It was denied, on shewing cause, that leave had been reserved to move for a nonsuit. The rule was also for reducing the damages, on a ground not material here.

or to their order," in certain instalments; and then follows "approved of the above conditions, by me, David Jones." Looking at these conditions, which in fact constituted the agreement, there is no proof whatever that the defendant *137] considered that he should hold *from the plaintiffs. On the contrary, the signature of David Jones shewed that he was not to hold from them.

LITTLEDALE, J. I am of the same opinion. The words "by Messrs. Evans and Thomas, auctioneers," shew that they represented themselves as the mouth-piece of the person really letting. Then, "the rent is to be paid into the hands of John Evans or James Thomas, auctioneers, or their order," and at the end is added, "approved of the above conditions, by me, David Jones." It was known, therefore, that he was the owner; and the meaning was "I, David Jones, authorise you to let." That is the only authority given. It is true that he goes on to say, "pay the rent into the hands of John Evans or James Thomas," and payment to them would have been a discharge. But they are merely agents. The lessor is David Jones: he is therefore the only person to sue.

PATTESON, J. The question here does not turn upon the objection stated as a ground of nonsuit. There must be a new trial on the question of fact, not on any point of law. The question of fact is, By whose permission did the occupation take place, and by whom was the contract made? That is in general a matter to go to the jury; but if the question depend upon the construction to be put on a document which is in evidence, then it rests with the Court. Here the conditions of sale constitute the only document, and upon that I can see no doubt. If the plaintiffs let for themselves, why is David Jones's name added? The plaintiffs would in that case have been the persons to sign. The document does not say by whom the premises are let. It is true that the rent *138] "is to be paid into the hands of "Messrs. Evans and Thomas, auctioneers:" but this amounts only to an authority given by Jones to pay into their hands; indeed, it is more than authority; it is an express direction. This was not put to the jury by the learned Judge. He has, therefore, not explained to them the proper construction of the document.

COLERIDGE, J. At first I thought that the fact was properly left to the jury. But as it was to be determined by the construction of a document, the effect of that document should have been properly explained to them by the Judge. Here the letter was, professedly, by the plaintiffs as auctioneers, and Jones signed the conditions. There may have been an understanding between the plaintiffs and Jones, that the plaintiffs should pay themselves out of the rents. But as to the contract of the defendant, there was clearly a misdirection. Rule absolute for a new trial.

BROOKS *against* COCK. *Friday, May 1.*

The proprietor of a print cannot sue for an invasion of his copyright in it, under stat. 17 G. 3, c. 57, unless the date of publication be engraved upon it, pursuant to stat. 8 G. 2, c. 13, s. 1.

CASE. The declaration was on the stat. 17 G. 3, c. 57, and stated that the plaintiff was proprietor of a certain print, invented, designed, engraved, &c. in Great Britain, and was entitled to the sole right and liberty of printing, reprinting, publishing, and selling the same; and that the defendant, while the plaintiff was such proprietor, &c., copied, and published and sold copies of the said print without the plaintiff's consent, &c. Plea, that the plaintiff on the several *139] days and times, &c., "had *not, and was not lawfully entitled to, and is not so entitled to, the sole right and liberty of printing and reprinting

the said print, and publishing and selling," &c. "in a manner and form as in the said declaration is alleged, by reason that no date is marked, printed published or engraved on the said last-mentioned print, according to the force and effect of the statute in such case," &c. Demurrer, assigning for cause that the plea raised an immaterial issue. Joinder.

Platt, in support of the demurrer. It is true that the statute 17 G. 3, c. 57, on which this action is brought, must be read in conjunction with stat. 8 G. 2, c. 13, s. 1, and that this latter act gives the copyright of such prints as are there described, to the inventor "for the term of fourteen years to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." (a) But *these words do not make the engraving of the name [140] and date a condition precedent to the vesting of the property, or to the right of suing for an invasion of it. Those rights accrue "from the day of the first publishing" of the print; they are not modified by the subsequent words of direction, "which shall be truly engraved with the name of the proprietor on each plate." *Newton v. Cowie*, 4 Bing. 234, is indeed a contrary decision, and the Court of Common Pleas there must have construed the words as conditional. The judgment, grounded on such a construction, may require to be reconsidered. In this court no decision to the same effect has been given upon these statutes. [*Thesiger* contra, mentioned *Thompson v. Symonds*, 5 T. R. 41. Lord Denman, C. J. Lord Ellenborough, in *Roworth v. Wilkes*, 1 Camp. 98, differed from the opinions expressed in that case.] The views taken of this and similar acts have been various; (b) the Court will not incline to that which is unfavourable to property. [Lord DENMAN, C. J. It is the proprietor's own fault if he suffers a hardship. It is easy for him to comply with a regulation which is very simple and useful, and which makes the date part *of the description of the plate to be protected.] At all events the statute 17 G. 3, c. [141] 57, which was passed for the purposes of enlarging the privileges of the artist, gives him a right of action for injuries to his copyright, without any such restriction or condition as is supposed to attach under the previous statute. [PATTERSON, J. That statute was under consideration in *Newton v. Cowie*, 4 Bing. 234. Lord DENMAN, C. J. The statutes are evidently connected with each other.] *Beckford v. Hood*, 7 T. R. 620, is an analogous case, and favourable to the plaintiff.

Thesiger, contra, was stopped by the Court.

Lord DENMAN, C. J. The last-cited decision turned upon the words of a

(a) The section then goes on to impose penalties for pirating "any such print or prints."

The stat. 7 G. 3, c. 38, passed "to amend and render more effectual" the former, gives "the benefit and protection of the said act and this act," subject to the restrictions and limitations which are afterwards mentioned, to the engravers, &c. of original prints, (s. 1,) and also of prints taken from any picture, drawing, sculpture, &c. (s. 2). Section 5, enables to proceed for penalties "in like manner, and under the like restrictions and limitations," as by the former act is appointed; and s. 7, enacts, "that the sole right and liberty of printing and reprinting intended to be secured and protected by the said former act and this act, shall be extended, continued, and be vested in the respective proprietors, for the space of twenty-eight years, to commence from the day of the first publishing of any of the works respectively hereinbefore and in the said former act mentioned."

The stat. 17 G. 3, c. 57, "for more effectually securing the property of prints to inventors and engravers," &c. after referring to the former statutes, enacts, that if any engraver, &c., "shall, within the time limited by the aforesaid acts, or either of them, engrave," &c. "or in any other manner copy," &c., "or shall publish, sell," &c., "any copy or copies of any historical print," &c., "or any other print or prints whatsoever, which hath or have been, or shall be, engraved," &c., "in any part of Great Britain, without the express consent of the proprietor or proprietors thereof," such proprietor or proprietors shall and may in a special action on the case, recover such damages as a jury shall assess, with double costs.

(b) See the cases collected in *Newton v. Cowie*, 4 Bing. 234; and the notes to 1 Chitty's Statutes, tit. Copyright—Engravings, and Prints, p. 192—5.

statute differently framed from those in question. It is unnecessary to say more than that *Newton v. Cowie*, 4 Bing. 234, was decided on great consideration, and must govern the present case.

LITTLEDALE, J. I think that the judgment of the Court of Common Pleas in *Newton v. Cowie*, 4 Bing. 234, was perfectly correct. The words "which shall be truly engraved on each plate" are not merely directory, but make such engraving part of the thing to be protected. The stat. 17 G. 3, c. 57, was intended only to give the proprietors of plates a further remedy. Before that act, the person infringing the copyright was liable only to forfeit his plate and prints, and five shillings for each print. As many engravings are published at a great expense, this was an insufficient remedy for their being pirated; and therefore *142] the act of 17 G. 3, c. 57, was passed, *enabling the proprietor to recover damages in an action on the case.

PATTESON, J. *Newton v. Cowie*, 4 Bing. 234, is expressly in point. The judgment must be for the defendant.

COLBRIDGE, J. concurred.

Judgment for the defendant.

THACKER *against* CHRISTOPHER WILSON WILSON. *Friday, May 1.*

Under stat. 14 G. 3, c. 78, (Building Act) s. 41, where a party wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises, is liable to contribution out of such rent, though he be no otherwise owner than as an executor or administrator.

And this, although there be a judgment outstanding, of a date prior to the pulling down of the wall, and no sufficient assets to meet it.

For the portion of the rent claimable in respect of such contribution is not assets.

ASSUMPSIT. The declaration (January 18th, 1834), stated that after the passing of stat. 14 G. 3, (c. 78), an old party wall had been pulled down and another built in lieu thereof, by and at the expense of the plaintiff, agreeably to the act, between a message of the plaintiff, situate, &c., and a message of the defendant adjoining thereto, situate, &c., being of a higher class of building than that of the plaintiff; that the defendant, at the time of the pulling down, &c., and building, &c., was the owner of, and entitled to, the improved rent of the said adjoining message, and that he upon that occasion made use of the party wall so built by the plaintiff, whereby and according to the statute he became liable to reimburse and pay the plaintiff 33*l.*, being a moiety of the ascertained expense of building so much of the said wall as the defendant made use of, together with certain other expenses, which the declaration specified; and that, being so liable, the defendant promised to pay on request. The declaration then stated an account (described *according to sect. 41, of the act) *143] to have been left by the plaintiff at the defendant's house, and payment demanded more than twenty-one days before the commencement of this action. There was also a count for moneys paid, moneys had and received, and on an account stated.

Pleas. 1. Non assumpsit. 2. To the first count, that, before and at the time of the making of the supposed promise in that count mentioned, the defendant was administrator (by letters granted February 1st, 1830) of the goods and chattels of Thomas Newberry, and that before and at the time of the pulling down, &c., and building, &c., and until the making of the supposed promise in the first count mentioned, the defendant was such owner of and entitled to the improved rent of the said message as therein mentioned, as administrator as aforesaid, and in right of the said Thomas Newberry, under and by virtue of an indenture of demise, (25th of March 1818), for a term of years (still unexpired) from Cook to Newberry, and of a demise or underlease (21st of June, 1827) for a term still unexpired, of the same message from Newberry to Ebsworth. The plea

then went on to state a plea recovered by Henry and William Wilson against the defendant as administrator of Newberry, before the pulling down of the party-wall, for a just debt due from Newberry in his lifetime, which judgment was still unsatisfied, and that the defendant had fully administered, &c., except as to goods of the value of 10*l*.

Replication to the second plea. That the said improved rent, before and at the time of such pulling down, &c. "was, and from thence hitherto hath been, and still is, a certain annual rent of a large amount, to wit of the amount, of 210*l*. by the year, due and payable *under and by virtue of the said demise or under lease in the said plea mentioned, for and during the said [*144 term thereby granted, and that the same was of such a sufficient value and amount that the said defendant, before the commencement of this suit, by and out of and with the same, over and above and besides all rent and moneys due and payable from or by the said defendant under or by virtue of the said indenture in the said plea mentioned, or in respect of or in relation to the premises by that indenture demised, could and might and ought to have paid and satisfied the said plaintiff the said sums of money in the said first count mentioned." Verification. General demurrer and joinder.

Cowling in support of the demurrer. First, this action does not lie against an executor or administrator. Sect. 41. of the Building Act^(a) directs that the person *at whose expense any party-wall shall be built according to the act, "shall be reimbursed by the owner or owners who shall be intitled [*145 to the improved rent of the adjoining building or ground," and who shall make use of such wall. The word "owner," there must mean owner in his own right, not as executor or administrator. The statutes (23 H. 8, c. 15, s. 1, 4 Jac. 1, c. 3, s. 2, 8 & 9 W. 3. c. 11. s. 2,) on the construction of which it has been held that an executor against whom judgment has been given on demurrer, is not liable for costs (*Tattersall v. Groote*, 2 B. & P. 253,) contain words as general as those of the present act. It will be said that, if an administrator be not liable, there is no owner of the improved rent who can be resorted to in a case like this. But it is not necessary that there should be such an owner, for, by sect. 41., the builder of the party wall has a lien upon the whole wall, and upon the land till he is repaid; and that should have been the remedy taken here. Secondly, if the action lies against an executor or administrator, he is liable only in that character, and want of assets is a defence. It is suggested by the replication that an administrator is bound to apply the improved rent to a payment of this kind. But the administrator has no lien upon the rent, as a landlord has. If he pays out of his own funds, there being no assets, he has no means of recovering back the amount. An executor or administrator

(a) Stat. 14 G. 3, c. 78, s. 41, enacts, "that the person or persons, at whose expense any party-wall or party-arch shall be built agreeably to the directions of this act, shall be reimbursed by the owner or owners who shall be intitled to the improved rent of the adjoining building or ground, and who shall, at any time, make use of such party-wall or party-arch, a part of the expense of building the same, in the proportion after mentioned," &c. "And, in the mean time, and until such moiety" &c. "be so paid, the sole property of such whole party-wall or party-arch, and of the whole ground whereon the said party-wall shall stand, shall be vested entirely in the person or persons at whose expense the same shall be built." And that within ten days," &c. "such first builder or builders shall leave, at such adjoining house or building, a true account, in writing, of the number of rods in such party-wall or party-arch, for which the owner or owners of such adjoining building or ground shall be liable to pay," &c. "whereupon it shall be lawful for the tenant or occupier of such adjoining building or ground to pay one moiety, or such proportioned part, as aforesaid, to such first builder or builders for the same," &c. "and to deduct the same out of the rent which shall become due from him or her to such owner or owners, under whom he or she holds the same respectively, until he or she shall be reimbursed the same: and in case the same be not paid within twenty-one days next after demand thereof, then the same shall and may be recovered, together with full costs of suit, of and from such owner or owners, by action of debt, or on the case, in any of his majesty's courts of record at Westminster."

of a termor cannot waive the term; and, supposing it to be but a short one, it *146] would be hard if the owner of the neighbouring premises, by *pulling down the party-wall, could subject him to an expense for which he might not be able to reimburse himself. There is no direction in the statute, that an executor shall apply the improved rent in this manner. Rent, when received by him, becomes assets, and is to be disposed of as they ordinarily are. Here, if there had been assets not administered, the plaintiff might, perhaps, have maintained his action. But, as the case stands, the tenant in possession was the only person to whom he could have recourse, if he did not choose to enforce the lien, given by the statute, upon the land. It is true that, in *Tremeere v. Morison*, 1 New Ca. 89, an administrator was held liable for non-repair during his own time, although he pleaded that he held only as administrator, and had derived no profits from the premises. But there the administrator had entered and was in possession. Here, there is a tenant who is the occupier, and an occupier is an owner for the purposes of the clause in question. A landlord may be entitled to treat an administrator as assignee with respect to rent or repairs, but a third person cannot do so unless the administrator is in possession.

Holt, contra. The defendant is liable, not as administrator, but as owner. The second plea is bad on several grounds. First, it does not state that the improved rent was of no value, or of insufficient value to satisfy the demand in question, or of any value in particular. The defendant is sued as the owner of, *147] and entitled to, the improved rent, and by the plea he *admits himself to be so. Then the character in which he became such owner is immaterial. If there was any surplus of rent in his hands after payment of the rent due to the original landlord, the rebuilder of the party-wall had a lien upon it. For if the premises be in the hands of an under-tenant, according to sect. 41 of the act, the under-tenant may pay the moiety of expense in respect of the party-wall, and deduct it from his rent. A fortiori, the owner, if the premises are in his own hands, will be bound to pay the moiety of this expense, in preference to the demands of other creditors. The portion of rent, therefore, which would have been applicable to this claim, is not to be placed upon the common footing of assets. The plea, here, ought to have shown that the improved rent was insufficient to satisfy any part of the demand for the party-wall, after paying the rent to the original landlord. The case is like that of executors of a lessee, who are liable for so much of the rent as the premises are worth: *Rubery v. Stevens*, 4 B. & Ad. 241; and the plea should have been like that which was there pleaded. If any portion of the rent remains in the hands of the executor, he is liable for so much. He cannot get rid of a charge imposed by law in respect of that out of which the improved rent issues. Secondly, this may be considered as a disbursement for repairs. The executor of a lessee is liable for repairs as assignee, though the premises yield no profit; *Tremeere v. Morrison*, 1 New Ca. 89; where the law is thus laid down by BOSANQUET, J., page 99: "The general rule is, that the executor of a lessee is liable as assignee, except *148] that, with respect to rent, his liability does not exceed what the *property yields. No such exception applies to the covenant for repairs." But an owner of improved rent, under this statute, has the same indulgence extended to him with regard to repairs, as an executor has in respect to rent; he is liable only to the extent of what the property will yield. To that extent, however, the claim in respect of the party-wall is, by this statute, equivalent to a lien.

The obligation imposed by the act is, in terms, upon the owner entitled to the improved rent; and as that ownership renders him liable, his executor is also liable by virtue of that office. There is nothing in the act to exempt him, or oblige the tenant in possession to pay in the stead. And this is no hardship on the executor, since he is not required to advance anything out of his own funds if the improved rent be insufficient.

Cowling, in reply. The plaintiff should either have kept possession of the

whole wall till it was ascertained who would pay him, or have called upon the tenant in possession to pay, to the amount which his rent would cover. [PATERSON, J. The act only says that it shall be lawful for the occupier to pay, not that he shall be obliged.] The defendant receives the improved rent, not in his own right, but as executor; and as soon as it comes to his hands it is in a course of distribution as assets. The second plea, therefore, is a sufficient answer.

LORD DENMAN, C. J. I am of opinion that the defendant is the person who, by the act, is bound to pay this demand. As the case is put on behalf of the defendant, the question is whether he or the party who *did the repairs [*149 is to lose the money; but I do not see that the defendant, if he pays, will lose it, because the portion of rent applicable to this purpose is not to be considered as assets.

LITLEDAL, J. The defendant has not, by his plea, denied being owner of the improved rent, but he says that the improvement does not affect him in his own character, but as administrator of Newberry, who made the under-lease. If he meant to insist that he was not the owner of an improved rent within the statute, he should have alleged that the rent now received upon the under-lease was less than that paid to the original landlord. The plea suggests nothing to that effect. And as to the ownership, I think an administrator is as much owner for the purposes of this act as if he held by a regular conveyance. A man may have held as administrator for forty or fifty years, and may have let for 200l., himself paying a rent of only 100l. Can it be said that such a person is not the owner of an improved rent? His title is as good, for this purpose, as it could be under any other circumstances. The defendant here had held as administrator for several years. An outstanding judgment is pleaded, and it is true, the assets are applicable to that. But the question is, whether the portion of rent claimed for the rebuilding of this party-wall be assets. The plaintiff contends that his claim is a lien upon so much of the rent, and I think it ought to be so, because it is by means of such liability on the part of the adjoining owner that the wall is kept in repair, which otherwise might go to ruin. The charge is a necessary one. But for the maintenance of the party-wall the premises would not continue *to bring an improved rent. And if the charge be a lien, the judgment [*150 pleaded is no answer.

PATERSON, J. If Newberry had been alive, he, having underlet, would be chargeable as the owner of the improved rent; and so is his administrator, he being dead. Then it is said that there is a judgment unsatisfied. But it is clear that if the tenant, who is the actual occupier, had paid this moiety of expenses, which he might have done, he could, by the act, have deducted the amount from the rent payable to the administrator; and the administrator could only have been answerable for the rent as assets, minus the amount so deducted. It makes no difference that the administrator himself pays the sum, and receives the whole rent from the under-tenant.

COLERIDGE, J. The defendant admits, by his plea, that he was owner of the improved rent, but says that he was so as administrator. There is no ground for such a distinction. The act was passed for a great public purpose; and it does not, in the clause in question, warrant any inquiry as to the characters in which persons are charged. It imposes the liability generally, and makes no provision for the case of an executor or administrator. An administrator, then, is chargeable, in respect of the improved rent, as an assignee would be for repairs. If that be a legal consequence of his situation, it follows, as another legal consequence, that he would be protected in paying the sum now claimed.

Judgment for the plaintiff.

*The KING v. The Inhabitants of NEWMARKET ST. MARY.

Saturday, May 2.

The manor of B. was one of five manors within the town of F., which town was co-extensive with the parish of F. The homage of the court baron of B. appointed a pinder for the town of F. for a year, who executed the office accordingly for the year, residing in F.: Held, that he gained no settlement in F. under stat. 3 W. & M. c. 11, s. 6, though there were several instances of appointments by the homage in the rolls of the court; and though the inhabitants of F. enjoyed right of common in B.

ON appeal against an order of two justices, whereby John Porter was removed from the parish of Fordham in Cambridgeshire, to the parish of Newmarket St. Mary in Suffolk, the sessions quashed the order, subject to the opinion of this Court upon the following case:—

The appellants relied upon a settlement in the respondent parish, derived from the pauper's father, residing who whilst in that parish, served there for two years the office of pinder. He was appointed at a court baron held for the manor of Fordham Biggen on the 5th of September, 1787, the appointment being entered on the court rolls in the following words:—"And lastly the said homage did elect John Porter pinder for the town of Fordham for the year ensuing, and until another person be chosen in his stead. And the said John Porter came into Court, and was duly sworn to execute the said office." The first entry on the court rolls of the manner of Fordham Biggen, which can be found, of the appointment of any officer, is at a court baron held on the 1st of November 1693. From that period to the year 1810, when the parish of Fordham was inclosed, there were four courts leet with courts baron, and a great majority of courts baron without a leet; at which the pinders, and other officers of the manor were appointed and sworn in. In the other instances of courts leet *152] and courts baron being held together (except one, *where the pinder was appointed by homage only,) the pinders and other officers of the manor were elected by the jury of the leet. From 1739 to 1794 there were eight consecutive courts baron, at which certain persons were, in like manner as the pauper's father, elected pinders by the homage, and sworn in; and there was not one instance on the court rolls of any such appointment at a court leet held as such only. There are in all five manors in the respondent parish, of which the manor of Soham and Fordham is the most extensive; but there is no paramount manor. There were, previous to the inclosure of the parish, three commons in the manor of Fordham Biggen, over which the inhabitants of Fordham had common rights. There were also two pounds, one belonging to the manor of Fordham Biggen, the other to the manor of Soham and Fordham. The only question for the opinion of the Court was, whether the pauper's father was legally placed in the office of pinder, under the above-mentioned appointment by the homage of the court baron in 1787, so as to acquire a settlement in the respondent parish.

The case, stated as above, was argued in Easter term, 1832, when this Court sent it back to the sessions, to find whether the town of Fordham were co-extensive with the parish of Fordham, and more or less extensive than the manor of Fordham Biggen. At a subsequent session, the justices found that the town of Fordham, was co-extensive with the parish of Fordham, and was more extensive than the manor of Fordham Biggen; and it confirmed the order of removal, subject as before to the opinion of this Court.

*153] *Biggs Andrews* (with whom was *Gunning*), in support of the last order of sessions. The appointment is illegal. The homage of a court baron of the manor could not appoint a pinder for the town, which is more extensive than the manor, even if such court could appoint at all; for the manor and the town have no connection; and the mere fact of such appointments having been entered on the rolls of the court does now shew the right. But, fur-

ther, the homage have no power of appointment at all: the appointment is with the court leet; the reason of which is, that the office is derived from that of the reeve, who is an officer of the court leet; Com. Dig. Leet. (M. 3.) The office of pinder is not named in any old authority; but it is referred to in some cases which will be cited. [PATTERSON, J. Do you find any thing about the homage? What business have they to appoint? The lord of a manor may have such a right, or the jury of a court leet.] The homage have no such right. And, again, if they had, the office would confer no settlement. The manorial appointment confers no settlement, any more than the office of hog-ringer to the lord of a manor. (a) [LITLEDALE, J. The office of hogringer to a parish would give a settlement.] That was so decided in *Rex v. Whittlesea*, 4 T. R. 807, where the office was parochial, and the appointment was made by the leet. The words of the statute, 3 W. & M. c. 11, s. 6, are, shall "execute any public annual office or charge in the said town or parish, during one whole year;" which are quite inapplicable to the present case. In *Rex v. Clixby*, 4 B. & Ad. 158, the appointment to the office of pinder was by the occupiers of the land in the parish; yet it was held to give *no settlement. [LORD DENMAN, C. J. No regular appointment was shewn in that case.] At any rate, [*154 the service was performed; and the case therefore shews that the execution of the office is insufficient, unless the appointment be regular. A public office should be derived from the crown mediately or immediately; and this shews why the appointment of the lord of a manor, or his homage, gives no public office. The office of master of a workhouse is not within the statute; *Rex v. Mersham*, 7 East, 167, (Compare *Rex v. Ilminster*, 1 East, 83: nor that of organist; *Rex v. St. George*, Hanover Square, 5 B. & Ad. 571. No indictment would lie for not serving the office of pinder; such an officer is not bound to suit and service: nor is there such an office in all parishes or manors; in fact there appears nothing beyond a personal contract of service. In *Jasper v. Eadowes*, 11 Mod. 28, (see S. C. as *Vaspor v. Edwards*, 12 Mod. 658, Lord Holt said, "the law has not appointed any such thing as a *common pound*; they are only by the agreement of lords and tenants; and so are *haywards* and *keepers of pounds*." [LITLEDALE, J. Does not *parco fracto* lie in the case of cattle pounded in the pound of the lord of the manor?] (See *Vaspor v. Edwards*, 12 Mod. 661, 664.) That is for a breach of the peace. [LITLEDALE, J. That view is not quite consistent with there being only a contract between landlord and tenant.] Perhaps the appointment of an officer by the leet might be a foundation for an action. [LITLEDALE, J. Then you would distinguish between different sorts of pounds.] An officer appointed by the leet would have the power in all the commons under the jurisdiction of the leet. If this is to be considered a manorial appointment, there ought to have been five appointments, one for each manor. *The distinction, as to the publicity of office, between appointments by a court leet, and a court baron, [*155 was taken, on an application for a mandamus, in *Rex v. Houlston*, 1 Str. 621. In the case of an office in which the parishioners were interested, they would take care either not to appoint, or to remove, a person likely to become chargeable. A manor might extend through several parishes; the court might be held in one, and the duty be exercised, and residence completed in another. Other inconveniences might be shewn to arise from considering this a public office within the statute.

[The Court here asked the counsel on the other side if they were prepared to maintain the legality of this appointment.]

Kelly (with whom was John Smith,) contra. The question is, whether a custom to appoint in the manner found by the case can be supported; for, if it can, the Court will either infer the custom, or, if that cannot be done, will send the case back to the sessions to find the fact. But the ancient appoint-

(a) See Lord Kenyon's judgment in *Rex v. Whittlesea*, 4 T. R. 808.

ments furnish sufficient ground for inferring the custom; it cannot be assumed that every person appointed committed a trespass by acting under the appointment. [Lord DENMAN, C. J. The Court clearly thought, on the preceding argument, that they had decided this case, subject to the question of fact as to the extent of the town, parish, and manor; and it is to be regretted that it was not expressly so decided.] There can be no doubt that the appointment is good, *156] as far as regards the manor; and it is *not necessary that it should run through the whole parish.(a) [Lord DENMAN, C. J. But the office conferred is professedly one running through all the town; if such an office cannot be conferred by the homage of this manor, how can you support the settlement?] The appointment, as a manorial one, is not impeached. Now the inhabitants of Fordham had rights over the commons in the manor before the inclosure, which took place long after the appointment; so that the notoriety, which has been acknowledged as the proper criterion of the publicity of an office, is established.

PER CURIAM.(b) The rule for quashing the last order of sessions must be discharged. Order of sessions confirmed.

The KING *against* The Inhabitants of the Township of MIDDLEWICH.
Saturday, May 2.

An office, to confer a settlement under stat. 3 W. & M. c. 11, s. 6, must be annual in its nature.

Therefore where an act of parliament authorised justices to appoint constables for such period as they should judge expedient, at a salary not exceeding 20l. per annum, it was held, that the person appointed gained no settlement, whether the appointment was or was not in fact for a year.

ON appeal against an order of two justices, whereby Matthew Currey Yarwood was removed from the township of Church Hulme, in the county of Chester, to the township of Middlewich in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case.

*157] Both townships support their own poor. The pauper, *two years before the date of the order, being then settled in Middlewich, was duly appointed, under the Cheshire Constabulary Act,(c) assistant petty constable

(a) See *Fittleworth v. Pulborough*, Burr. S. C. 238. 2 Bott. 187. pl. 252, (6th ed.) *Rex v. Wingham*, Burr. S. C. 223. *Rex v. Whitchurch*, Burr. S. C. 365.

(b) Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

(c) Stat. 10 G. 4, c. xevii. (local and personal, public,) entitled, "An act to enable the magistrates of the county palatine of Chester to appoint special high constables for the several hundreds of divisions, and assistant petty constables for the several townships, of that county."

By sect. 2, the justices at quarter sessions, upon certain recommendation, may appoint an assistant petty constable for any one township, or for two or more adjoining townships within any hundred or division, "for such period as the said justices, assembled at any quarter sessions," &c. "shall think expedient (except as hereinafter mentioned); and upon any vacancy in the office of any such assistant petty constable, by death, resignation, efflux of time, or otherwise," the quarter sessions are authorised to appoint afresh; "provided always, that no assistant petty constable appointed under this act shall resign his said office until he shall have given to the justices" at petty sessions, "one calendar month's notice at the least of his intention to resign the same office."

By Sect. 4, the assistant petty constable is to take an oath that he will well and truly serve the king, in his office, &c. "and that while I shall continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law."

By sect. 10, the justices in quarter sessions are authorised to remove any assistant petty constable from his office for any misconduct or incapacity, "or in case they shall at any time think that the necessity for the continuance of such an officer has ceased."

for fourteen townships in the county of Chester, of which Church Hulme was one; and, under that appointment, *he served the office fifteen months, [*158 during the whole of which time he resided in Church Hulme.

The question for the opinion of the Court was, whether the pauper gained a settlement in Church Hulme by serving an office.

Waddington, in support of the order of sessions. This, by the provisions of the statute, was clearly a public office; but it does not appear that it was an annual one within stat. 3 W. & M. c. 11, s. 6. The case states only that the pauper was "duly appointed;" that does not shew an appointment even for a year, in fact, if there could have been a due appointment for a less time, as there clearly might, under the local act. The justices, by sect. 2, may appoint for such period as they think expedient, the exception referring to the power of removal afterwards given. By the same section, the constable may not resign without a month's notice; it follows that, on giving such notice, he may resign. Again, by sect. 10, the quarter sessions have a power of removal. It cannot be said, in answer to this, that a constable, though removeable, is still entitled to continue in office during the current year; for the eleventh section gives the petty sessions the power of immediate suspension. It is true that there might be, under this act, an appointment in fact for a year, subject to the power of removal; but, as there is a discretion, it cannot be assumed that the appointment was for a year. The oath is for faithful service during the continuance of the office, by sect. 4; in annual offices, it is for service during the ensuing year. [He was then stopped by the Court.]

**Evans*, contra. It must be assumed that this was a general appointment. [Lord DENMAN, C. J. Would that be a good appointment under [*159 the act? PATTESON, J. Would it be more than an appointment during pleasure.] By sect. 22, the salary is to be annual. In *Rex v. Lew*, 8 B. & C. 655, an assistant overseer, appointed at an annual salary, was held to gain a settlement by his office; and there Bayley, J., said, "the pauper was to receive a yearly salary for exercising the duties of it; and although he might be removed within the year, he would continue in the office for a year, unless something was done to determine it within that period." [COLERIDGE, J. The salary is not to exceed a certain annual sum.] Under those words none but an annual salary could be given. [LITLEDAL, J. If you hire a man at an annual salary, it means at the rate of so much per annum. COLERIDGE, J. Would an appointment for three months be bad? if not, how can the party have an annual salary, as you interpret the words?] The argument suggested, as to the power of discharge, is answered by *Rex v. Lew*, 8 B. & C. 655. The offices of parish clerk, (see *Rex v. Stogursey*, 1 B. & Ad. 795,) and sexton give a settlement, though they are not confined to the year. As to the attempted inference from the power of resigning or giving a month's notice, such an argument would destroy every settlement by yearly hiring.

Lord DENMAN, C. J. If this office were annual in its nature, we should have wished to see the appointment. But we think that it is not annual in its nature, and that it may last for such time as the justices think *proper. The [*160 case of *Rex v. Lew*, 8 B. & C. 655, seemed at first to present a difficulty in the way of this view. But, first, the assistant overseer's office corresponds

By sect. 11, any three justices, at petty sessions, of the hundred or division for which an assistant petty constable is appointed, may suspend him, and appoint another, till the next quarter sessions; and the justices, at such quarter sessions, may reinstate or remove him.

By sect. 22, the justices at quarter sessions, on the recommendation of three justices at petty sessions acting for any hundred or division, may order a salary for any assistant petty constable appointed for any township within such hundred or division, "provided that such salary shall in no case exceed the annual sum of 20*l.* for each township."

By sect. 23, the justices in quarter sessions, on like recommendation, and with the consent of certain persons therein mentioned, may order, in lieu of the above salary, "any salary not exceeding 50*l.* per annum."

with that of overseer, which is annual, and by the statute (59 G. 3, c. 12, s. 7,) it is to continue till the appointment is revoked, or till the officer resign. Secondly, the salary is to be annual, by the same section. Thirdly, in *Rex v. Lew*, 8 B. & C. 655, the salary was, in fact, annual. The case is, therefore, easily distinguishable from the present, where the duration of the office depends on the discretion of the justices.

LITLEDALE, J. I am of the same opinion. In *Rex v. Lew*, 8 B. & C. 655, the officer was an assistant overseer, appointed under the statute 59 G. 3, c. 12, s. 7, which directs that he shall execute all such duties of overseer of the poor as shall be expressed in the warrant of appointment, in like manner and as fully, to all intents and purposes, as the same may be executed by an ordinary overseer. Now the office of an ordinary overseer is annual. The person appointed assistant overseer is to continue in office till he shall resign, or till his appointment shall be revoked: it is, therefore, an annual office defeasible. *Rex v. Lew*, 8 B. & C. 655, is, consequently, applicable. By the words in the act now before us, the appointment is to be for so long as the justices think expedient; it is, therefore, not an annual office.

PATTESON, J. In *Rex v. Lew*, 8 B. & C. 655, the appointment, if for less than a year, would not have been valid.

COLERIDGE, J. I am of the same opinion. If the office were annual in itself *161] we should recur to the appointment, *in order to see whether it was annual in fact. But here, even if the appointment were in fact for a year, there is nothing to shew that it would be an annual office. I have always understood that the office must be such that, if the appointment were general, it would be assumed that the tenure of it was to be for a year.

Order of sessions confirmed.

The KING against The Inhabitants of NORTON BAVANT. Saturday, May 2.

A question arising at sessions, as to an alleged settlement by hiring and service in a third parish, the sessions quashed the order of removal, subject to a case, in which the contract of hiring was set out, and the question for this court was stated to be, whether the pauper gained a settlement by hiring and service in the third parish: Held, that this left the question, whether the contract of hiring was exceptive or not, open to this court.

Pauper was hired to work for a year, at 6s. a week, to work ten hours a day, from five in the morning till six in the evening; and afterwards it was agreed that he should receive additional pay for over-work: Held to be an exceptive hiring; though the pauper never in fact refused to work over-hours when requested.

On appeal against an order of justices, whereby John White was removed from the parish of Norton Bavant to the parish of Frome Selwood, the sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper's birth settlement was in Frome Selwood: the pauper, about eight years ago, went to one Gutch, in the parish of Corsley, to hire himself as a colt shearman: Gutch asked the pauper if he liked to work for him for a twelve-month, and offered him 6s. a week, to work ten hours a day, from five o'clock in the morning till six in the evening, and to leave off in the middle of the day on Saturdays, so as to make up the ten hours a day. The pauper served the year, and slept in the same parish, sometimes at his master's, and sometimes at home. About a month after the pauper entered into the service, it was agreed

*162] between him and the master, *that the pauper was to receive 1d. per hour for over-hours; and he continued to receive the same to the end of the year. Sometimes he looked after the master's horse, and sometimes he worked in the garden. At the end of the year, the pauper agreed with the master to stay on upon the same terms, with the addition of 6d. a week more

wages. The pauper served a second year, doing nearly the same work as before. The pauper during both years worked over-hours at his master's request, and never refused when he was wanted. He was sometimes employed on Sundays, and was paid for so doing. The pauper kept an account of his over-time by the direction of his master, and was asked by his master if he would sooner do the over-work in his own time or in his master's. The pauper chose to work his over-hours in the evening. The question for the Court was, whether the pauper gained a settlement by hiring and service in Corseley; if so, the order of sessions is to be confirmed; if not, then quashed.

Bingham, in support of the order of sessions. It is a question of fact, whether this was or was not an exceptive hiring; and the sessions, by quashing the order, have decided that it was not exceptive. The Court will not now interfere with that decision; *Rex v. St. Andrew the Great Cambridge*, 8 B. & C. 664, *Rex v. Roalston*, 8 B. & C. 668, *Rex v. St. Martin, Leicester*, 8 B. & C. 674. In *Rex v. Ardington*, 1 A. & E. 260, the Court certainly reversed a decision of the sessions as to the hiring; but there only one of the preceding cases, *Rex v. St. Andrew the Great, Cambridge*, 8 B. & C. 664, appears to *have been cited. In *Rex v. Dunsford*, 2 A. & E. 568, this Court sent [*163 a case back to the sessions, in order that they might find, as a fact, whether a particular excavation was a mine or not. Supposing the question open, there may be a difficulty, as the Courts have themselves said, in ascertaining any fixed principle for determining whether a hiring be exceptive or not. The latest authority is therefore the highest; and that is *Rex v. Ossett-cum-Gawthorpe*, 4 B. & Ad. 216, (see *Rex v. St. Helen's Auckland*, 4 B. & Ad. 718,) where a hiring was held not to be exceptive, though, by the original contract itself, the hours of working were limited, with an allowance for overwork; whereas, in the present case, the allowance for over-work was not introduced till a month after the original contract was entered into. It is true that *Taunton, J.*, differed from the rest of the Court. The test laid down by *Bayley, J.*, in *Rex v. Byker*, 2 B. & C. 120, whether the time be "only mentioned as the measure of the wages," is the safest and shews that here the hiring was not exceptive. The law requires a reasonable time only for work, though the relation of master and servant continue.

Barstow contra. The sessions have set out the terms of the contract, to be interpreted by this Court: they have not found the fact at all. The hiring is exceptive unless the contract gave the master dominion over the servant for an entire year, and this the original contract clearly did not do: neither was it enlarged by what took place afterwards: the servant might still have refused to work the over-hours; and this state of things continued throughout. This right of option on the part of the *servant shews an exceptive hiring, as appears [*164 from *Rex v. Birmingham*, 9 B. & C. 925, where *Bayley, J.* distinguishes the case of *Rex v. Byker*, 2 B. & C. 114, on this ground.

Lord DENMAN, C. J. The first argument urged in support of the order of sessions is, that they have found the fact. I cannot assent to that. They have merely found, in effect, that the settlement was gained in Corsley if there was a hiring and service for a year, which is a question left to be determined by this Court. Certainly there is some difficulty in reconciling the decisions, as has often been said. But this case is precisely the same with *Rex v. Birmingham*, 9 B. & C. 925, which *Bayley, J.* distinguishes from *Rex v. Byker*, 2 B. & C. 114. By the offer of the master, the pauper was to work for a limited number of hours during the twelvemonth, and was not bound to give any more time to his master. There is, therefore, an exception in the original contract, of which that which took place afterwards formed no part. We have been pressed with the decision in *Rex v. Ossett-cum-Gawthorpe*, 4 B. & Ad. 216. We did not mean, by that decision, to overrule *Rex v. Birmingham*, 9 B. & C. 925, which indeed we expressly distinguished. I do not deny that the distinction was rather refined; and one of my learned brothers thought that the two cases could

not be distinguished. In *Rex v. Ossett-cum-Gawthorpe*, 4 B. & Ad. 216, there was, in the first place, a hiring for five years; and then came what we considered as merely a definition of the service and wages. Here the actual contract is for ten hours only in the day, beyond which the master could not command the *165] services of the servant. Therefore, without *interfering with *Rex v. Ossett-cum-Gawthorpe*, 4 B. & Ad. 216, we must hold the order of sessions to have been wrong.

LITTLEDALE, J. concurred.

PATTESON, J. I am of the same opinion. The sessions cannot be said to have found a hiring and service for a year. In *Rex v. Ossett-cum-Gawthorpe*, 4 B. & Ad. 216, I did not feel so much pressed by *Rex v. Birmingham*, 9 B. & C. 925, as by *Rex v. Frome Selwood*, 1 B. & Ad. 207, which came nearer to the case then before us. But I thought in *Rex v. Ossett-cum-Gawthorpe*, 4 B. & Ad. 216, that the master could have compelled the service during the additional hours. That was the only point as to which there was a difference of opinion: we agreed as to the principle.

COLERIDGE, J. I think it would be trifling to say that the fact is found by the sessions. They find the settlement in Corsley, unless the hiring be exceptive; and that question they leave open. It is difficult to reconcile all the decisions; yet there is no class of cases in which the principle is more fixed. The difficulty is this; that, assuming the principle, the Court appears to have come to contradictory opinions as to the application. Perhaps, therefore, it would be better that the sessions should find the fact; for, when the question of fact is sent here, and we are put to judge of it, we are liable to inconsistencies. But, taking this case by itself, can we doubt that the hiring was exceptive? It is for so many hours a day, making up so much in the week. If so, can it be *166] said that no time is excepted? I put *the case, therefore, upon this test: if the servant had been called upon to serve for more time, could he have refused? If he could, then the hiring was exceptive, and the sessions were wrong. The distinction between the master's time and the servant's time was afterwards recognised by the master.

Order of sessions quashed.

DEWAR *against* PURDAY. *Monday, May 4.*

At the close of plaintiff's case leave was reserved to defendant to move to enter a nonsuit. Defendant offered evidence, and the jury retired, and were unable to agree upon their verdict. The judge, being pressed to discharge them, no counsel on either side being present, directed a nonsuit on the point which had been reserved.

On motion by plaintiff for a new trial: Held, that the nonsuit was irregular, and that defendant, in shewing cause, could not argue the point reserved at the close of plaintiff's case.

CASE for infringing the plaintiff's copyright in the music of a song. At the trial before Lord Denman, C. J., at the sittings in Middlesex after Trinity term, 1834, the plaintiff endeavoured to prove that he was the original composer; and, upon this part of the case being closed, Sir J. Scarlett, for the defendant, applied for a nonsuit, contending that there was no evidence to go to the jury. The Lord Chief Justice inclined to this opinion; but he refused to nonsuit, taking, however, a note of the objection. Evidence was then offered for the defendant, to shew that the composition was not original. The Lord Chief Justice left the question of originality to the jury, who retired about four o'clock in the afternoon, and remained shut up all night. At the sitting of the Court the next morning they stated to the Lord Chief Justice that they were not agreed, and requested to be discharged. His lordship sent them back; but they afterwards informed him again, by message, that they were not likely to agree. The Lord Chief Justice then desired them to attend in Court, and

directed inquiry to be made for *the plaintiff's counsel; but, they not appearing, his lordship, acting upon the opinion he had entertained on the preceding day, directed a nonsuit, no council on either side being present. [*167]

Sir *John Campbell*, Attorney-General, in the ensuing term, moved for a rule to shew cause why the nonsuit should not be set aside and a new trial had. He contended that, under these circumstances, the Lord Chief Justice had no authority to direct a nonsuit. The only regular course would have been to call upon the parties to consent that the jury should be discharged. Where a plaintiff is nonsuited, the supposition is that, the jury having agreed upon their verdict, he is called upon to hear it, but does not appear. He may appear, and in that case the Judge cannot nonsuit. A nonsuit may take place upon the proof given by the plaintiff: it is then supposed that the Judge, upon the evidence as it stands, would direct a verdict for the defendant, and that they would find according to that direction, were it not that the plaintiff, being called upon to hear the verdict, absents himself. But when the jury have withdrawn, and are actually in deliberation on their verdict, and are not agreed, the Judge cannot call the plaintiff to hear the verdict, nor is there any reason for his appearing in Court. Besides, no one has a right to demand the plaintiff but the defendant. The Judge cannot, of his own mere motion, direct a nonsuit. The law on this subject is stated, with the authorities, in 2 *Tidd's Practice*, 867—9, 9th edit.(a), and is illustrated by the form of entering a nonsuit on the *postea*, *Tidd's Forms*, p. 323, ed. 1828. Here the record could *not, with truth, [*168] have been made up according to that precedent.

A rule nisi having been granted, and the case being now called on, Sir *W. W. Follett*, who shewed cause, was asked by the Court if he could support the proceeding which had taken place at the trial, and

Lord DENMAN, C. J. said, I think it necessary to state that I should not, under such circumstances, pursue the same course again. I should either say that the time was come when it was necessary to discharge the jury, or, if that were not so, keep them together. I think that what I did was done unadvisedly. The question, therefore, now comes to be, whether the parties appear here in the same situation as if, after the objection had been raised at the trial on the insufficiency of the plaintiff's case, and the point reserved by me, a verdict had been taken for the plaintiff, with leave to the defendant to move to enter a nonsuit. And if so, the further question is, whether, upon the plaintiff's case, there was evidence to go to the jury.

Sir *W. W. Follett* and *Crompton* now shewed cause. There was no evidence of title, to go to the jury, and it is now competent to the defendant to insist upon that ground of nonsuit. Where a point is reserved at the trial of a cause, there is always an understood agreement that the parties shall take the opinion of the Court, and that the Court shall stand in the same situation as the Judge did at the trial when the point was taken. If the defendant was at that time entitled to have the plaintiff called, the proceeding afterwards does not take away that right. If the jury had found for the plaintiff, the defendant clearly might have moved. *He is not to be in a worse situation because the jury have not so found. If there had been a verdict for the plaintiff, [*169] the defendant would have made the motion; as the case stands, the plaintiff makes it. There is no essential difference. (The argument upon the evidence is omitted.)

Sir *J. Campbell*, Attorney-General, and *Thesiger*, *contra*. The nonsuit was wrong, because the plaintiff did not make default by failing to appear when there was no right to call him. Then, does it make any difference that, in a previous stage of the trial, liberty had been reserved to move to enter a nonsuit? The power to reserve such liberty is founded on the consent of parties, and must be limited by it. A plaintiff, instead of agreeing to this course, may tender a bill of exceptions. Here the plaintiff consented, on condition that the trial

(a) And see 3 Bl. comm. 376.

should proceed, and upon the understanding that his consent would not be acted upon unless he obtained a verdict. But, as the case now stands, the plaintiff has lost the advantage which he would have had, if the verdict had been given for him. If he had had a verdict, and the Court had decided in his favour upon the motion to enter a nonsuit, he would have had judgment and execution. But now, if the defendant may proceed upon the reserved point, the plaintiff, on the one hand, runs the risk of a judgment of nonsuit, while, on the other, if the Court decides with him, he can only have a new trial. [PATTESON, J. If our judgment were for the plaintiff, how could we put him in the same situation as to damages, as if a verdict had been found for him?]

Lord DENMAN, C. J. I am satisfied that this rule must be made absolute. *170] I at first thought the *plaintiff would have been in no better situation if a verdict had originally been entered for him, than he is now. But on consideration I find that this is not so. A party when called to hear the verdict may appear or not, as he thinks proper; he need not be nonsuited. That which took place here, was the ordinary mode in which parties agree to be bound, as to the entry of a nonsuit, by the opinion of the Court. The plaintiff may be considered as having said:—"The condition of my agreeing to this course is, that the cause do now proceed: in that case I have no objection to submit to a nonsuit, if the Court, at a future time, should think it proper." A plaintiff has a right, in making such agreement, to insist upon the chance of a verdict in his favour; and here, the circumstances under which the liberty to move was reserved, entitled the plaintiff to that chance. Having lost it, he may withdraw the consent which he gave at the trial.

LITLEDALE, J. I am of the same opinion. The plaintiff's consent was given on the supposition that he obtained a verdict.

PATTESON, J. When leave is reserved, by consent of parties, to move to enter a nonsuit, it is on the understanding that the cause will go on and plaintiff obtain a verdict. If by any circumstance he loses that benefit, the consent does not hold. That was the case here. If, from necessity, the jury had been discharged, the consequence would have been the same.

COLERIDGE, J. I am of the same opinion. When leave was reserved to *171] move to enter a nonsuit, the *plaintiff, in consenting to that course, waived his common law right of having the facts submitted to a jury. That waiver was upon a condition which failed. Rule absolute.

RIDGWAY *against* The HUNGERFORD Market Company. *Tuesday, May 5.*

A servant, discharged for improper conduct, cannot recover any part of the salary current from the last pay day at the time of his dismissal.

A master, who has dismissed a servant, may justify the dismissal by shewing that at the time of the dismissal he knew the servant to have committed an act which justified it; and a jury ought not to be asked whether the master was induced to dismiss him by that act or by some other cause.

A clerk employed by a company to enter proceedings in their minute book, entered on the margin of the minute book a protest in his own name against a summons for appointing a successor to himself: Held, that a jury were justified in finding this to be a sufficient cause of dismissal.

A plaintiff declared that the defendants, a company, had employed him at a quarterly salary; the minute book of his appointment shewed an annual salary only, but several quarterly payments were proved, and no annual one. Semble, that no variance appeared.

Quære, per COLERIDGE, J., whether, if a servant, hired for a year, be improperly dismissed in the middle of a year, he can sue in assumpsit for the wages for that year, or is confined to a special action for an improper dismissal.

DEBT. The declaration stated that the plaintiff, on the 10th of June, 1830, was nominated, appointed, and retained by the Hungerford Market Company
VOL. XXX.—7

to be, and became, clerk of the company, at a salary of 200*l.* per annum, which it was agreed should be paid quarterly on certain days mentioned in the declaration; that the plaintiff continued clerk from thenceforth to the commencement of the action; and that 150*l.* became and was due to him on the 25th of December, 1833, for three quarters' salary. Plea, *nil debet*. On the trial before Lord Denman, C. J., at the sittings in Middlesex, June, 1834, admissions, signed by both parties, were read, to the effect that, at the court of directors of the company held on the 10th of June, 1830, the plaintiff was appointed clerk of the company by a minute made in the minute book of the company's proceedings, expressing *the annual amount of the salary, but not the times of [*172 payment: and it was proved that up to the 25th of March, 1833, the salary was paid quarterly. It was then objected that there was a variance, the declaration described the contract to be for a quarterly payment, while the minute showed only a yearly salary. The Lord Chief Justice refused to stop the case. Evidence was adduced on the part of the plaintiff to show that he continued to act as clerk till the 17th of April 1833, and that he subsequently offered and was willing to remain in the service. For the defendants it was proved that the directors, having determined to dismiss the plaintiff, came to a resolution, which was entered by him as clerk in the minute book, on the 11th of April 1833, to call a court of directors for the 17th to elect his successor; that they directed him to summon the directors accordingly, which he did; and that, to the entry of the resolution in the book, he subjoined a protest in his own handwriting against the proceeding. At the meeting on the 17th he was dismissed, and was not afterwards suffered to serve. It was contended that the plaintiff, having been dismissed for sufficient cause, was not entitled to any portion of his current salary. The Lord Chief Justice desired the jury to say whether the fact of the plaintiff having entered the protest justified his dismissal without notice. The jury, under the direction of the Lord Chief Justice, found a verdict for the plaintiff, with 12*l.* damages, being the portion of salary due rateably, on the 17th of April, since the preceding quarter day. And they found expressly, in answer to a question from his lordship, that the defendants were justified in dismissing the plaintiff after his entry of the protest. Leave was given to move *to increase the verdict to 150*l.*, being the salary due [*173 to the end of the year current at the time of the dismissal; with leave also to the defendants to move to enter a nonsuit. Rules were obtained accordingly, in Michaelmas term last; and both rules now came on together.

Sir *W. W. Follett* and *J. Henderson* for the plaintiff. The alleged variance, if it were admitted, is immaterial; and the Court would, if necessary, exercise the power of giving judgment after verdict, according to the very right and justice of the case, under st. 3 & 4 W. 4, c. 42, s. 24. The Judge at *nisi prius* might have amended, under section 23. But there is no variance. The minute was not the contract; and the declaration does not assume to describe any instrument of agreement. It is true that the statute (11 G. 4, c. lxx., local and personal, public,) which incorporates the company enacts (by s. 29.) that all acts, orders, resolutions, and proceedings of the company shall be entered in a proper book or books; but this does not show that the directors, who, under sect. 46, have power of appointing and displacing the clerk, cannot exercise that power except by writing. [*Kelly*, for the defendants, here intimated that he should not insist that the appointment must be in writing.] Then the acting proved the appointment as clerk, and the fact of quarterly payment sufficiently proved the agreement to pay quarterly. The plaintiff is entitled for the year's salary current at the time of the dismissal, unless he was dismissed for sufficient cause; *Fawcett v. Cash*, 5 B. & Ad. 904, *Beeston v. Collyer*, 4 Bing. 809: and his readiness and liability to serve during the residue of his term are equivalent to actual service: *Gandell v. Pontigny*, 4 Camp. 375. Assuming that [*174 dismissal for a sufficient cause would bar the right to any current salary, according to the cases of *Spain v. Arnott*, 2 Stark. N. P. C. 256, and *Turner v.*

Robinson, 5 B. & Ad. 789, the answer to the objection in this respect is, that the entry in the minute book was not the cause of dismissal. The dismissal it is manifest, was previously determined on, and the justification now set up for it is the act of complaining against it. [Lord DENMAN, C. J. The dismissal originally intended would have been no more than an exercise of a master's right to determine the service, paying whatever salary would have been in law due and payable in the absence of misconduct: here the plaintiff after writing the protest, issued the summons, and remained and acted as clerk till the 17th. The misconduct was during the service.] The dismissal would have taken place at the same time, even if the protest had not been made; and the defendants never till the trial assigned that as the cause. Suppose a servant guilty of misconduct in June, and that the master knowing it retains him till November, would the right to current salary be destroyed? [Lord DENMAN, C. J. In that case a condonation might be presumed.] Or suppose a master, in ignorance of misconduct, dismisses a servant, can the misconduct be set up as determining a contract which was deliberately determined on another ground? [Lord DENMAN, C. J. In the present case the misconduct was known; and we cannot say that the employers were bound to allege it at the time as the reason of dismissal, nor can we inquire as to their motives: if a sufficient cause of dismissal *175] existed, they had a right to use it.] It should at least have been put to the jury as a distinct question, whether, in fact, the plaintiff was dismissed for the cause which they found to be sufficient. But that finding cannot itself be supported. The act now complained of, if it can be considered the cause, is not a sufficient cause. A fault, which is to operate so as to deprive a party of the right to remuneration even for past labours, must be of a serious kind, and must involve moral misconduct, wilful disobedience, or habitual neglect; *Callo v. Brouncker*, 4 C. & P. 518. In *Turner v. Robinson*, 5 B. & Ad. 789, the act complained of was the inducing the master's apprentice to run away and go to America. In the present case, there was merely the writing of a few lines in a rough minute book. [Lord DENMAN, C. J. That point was not taken; and the jury have found that the cause was sufficient.]

Kelly, for the defendants. There was material variance. This point has been argued as if the minute was not the contract. The admissions made by both parties, and read at the trial, expressly state that the plaintiff was appointed clerk by a minute of the court of directors, at a yearly salary, which implies a yearly payment. [Lord DENMAN, C. J. Why might not the directors have afterwards agreed that the salary should be paid quarterly?] There is no proof that they did. The agreement to pay quarterly should have been proved, and not left to inference, in opposition to the legal effect of a written contract. The statute constituting the company requires the presence of five directors to give validity to their acts, (stat. 11 G. 4, c. lxx, (local and personal, public) sects. *176] 39, 53); and it should have been expressly proved that this was complied with at some meeting at which an agreement for a quarterly salary, as described in the declaration, was made. The declaration alleges that the plaintiff remained clerk. The jury have not found that he did so: and the relation of master and servant does not continue after dismissal. The action is, therefore, misconceived; it should have been brought for dismissing without sufficient cause; *Hulle v. Heightman*, 2 East, 145. The finding of the jury is, in effect, a verdict for the defendants. It is not necessary that the jury should have said that the dismissal was founded on the act of writing the protest, or that the master should state every ground of objection. Evidence of sufficient ground justifies the dismissal. Then, if the dismissal be justifiable, the plaintiff can recover no salary for the current quarter; *Spain v. Arnott*, 2 Stark. N. P. C. 256.

Lord DENMAN, C. J. One of the grounds upon which the rule for a nonsuit was granted was, that the contract was not proved as laid: the salary being stated in the declaration to be payable quarterly, and the proof being, as was con-

tended, only of a yearly hiring. On the other hand, the plaintiff contended that he was entitled to have the damages increased to the full salary for the remaining three quarters of the year, inasmuch as he was improperly dismissed. I think that the difference between the contract set out in the declaration, and the entry in the minutes, is immaterial; and that there is no variance. It is quite possible that, after the contract described in the minutes had been effected, the plaintiff might have insisted on the payments being *made every [*177 quarter. But the rule for a nonsuit must be made absolute on another ground, namely, that the plaintiff must be held to have been properly discharged; so that the discussion of any other argument urged in favour of the nonsuit becomes unnecessary. *Turner v. Robinson*, 5 B. & Ad. 789, and many other cases, have shown, that if a party, hired for a certain time, so conduct himself that he cannot give the consideration for his salary, he shall forfeit the current salary, even for the time during which he has served. Now it is not necessary that a master, having good ground of dismissal, should either state it to the servant, or act upon it. It is enough if it exist, and if there be improper conduct in fact. Suppose a servant had heard that his master intended to dismiss him without notice, and were to insult him in consequence: it is clear that the insult would justify the master in dismissing the servant; and yet, if he intended to dismiss him independently of the insult, the motive for the dismissal would be different from such ground of justification. It is unnecessary to discuss how it would be, if the master, at the time of the dismissal, had no knowledge of the fact which was to justify it; yet I think the justification would be good, even if the fact, existing at the time, were not known to the master. Here the jury have found the existence of a cause justifying the dismissal. Although, therefore, it has been ably argued for the plaintiff, that it was necessary for the dismissal to be traced to that cause, yet, as I think the existence of the justification sufficient, whether that was or was not the motive of the dismissal, I hold that the plaintiff has incapacitated *himself from com- [*178 plaining, and that the rule for a nonsuit must be made absolute.

LITTLDALE, J. I think the plaintiff can recover nothing. The question was put to the jury, whether his making the entry of his protest was a sufficient ground of dismissal, and they found that it was. Then, there being a sufficient ground, the counsel for the plaintiff say that such a cause will not justify the dismissal, unless acted upon in fact. It seems to me that the law is otherwise. It is sufficient if the cause exist: the plaintiff is not entitled to object that that is not the cause for which he was dismissed. Again, if his dismissal be justifiable for his misconduct, he cannot recover any of the current salary. I need not, therefore, discuss the question of variance; but, if it were necessary, I should say, that the fact of quarterly payments was sufficient to warrant a jury in inferring that an agreement for a salary, to be paid quarterly, took place after the minute was made.

PATTERSON, J. If it were necessary to decide upon the ground of variance, I should say that there was none. I think the contract for quarterly payment may be presumed on these facts. But the other ground renders it unnecessary to determine this question. The jury found that there was a sufficient cause for dismissal existing in fact. Neither the Court nor the jury can discuss the ultimate motive. If a justifying cause exist, the master may assign it, whenever the action is brought; and whether any other cause exist, is not material. It may be that a master dislikes a servant, and chooses to take advantage of some improper act. It was put, at *one time, as if the cause arose after the dismissal; but that was not the fact. The plaintiff himself sends out [*179 the notice for the meeting of the 17th, and he enters his protest, as clerk. He was, therefore, by his own showing, clerk on the 11th of April. By his own act, he gives the defendants the power of displacing him, if they had it not before. If we were to hold that it was necessary to trace the dismissal to the act which is to justify it, it would follow that a master, who had made up his

mind to dismiss a servant, would give a servant, if he discovered his master's intention, license to act just as he pleased afterwards. We cannot dive into the meaning of parties. If the cause exist, and the master know of it (for on this occasion we need go no further than that), it is a good ground for the dismissal.

COLERIDGE, J. This rule for a nonsuit was obtained on three grounds. The first was, that of variance; and I agree that the application must have prevailed if there had been one: but there was abundant evidence to support the statement in the declaration. The second ground was, that the action was misconceived, and that the declaration should have contained a special count for discharging the plaintiff from the service. If it were necessary, I should have wished for time to consider how far this question is determined by the doctrine laid down by Lord Tenterden in *Archard v. Horner*, 3 C. & P. 349. But that need not be discussed, if the third ground urged for the nonsuit be tenable; and I think it is. Although a party be hired for a given time, the master is *180] justified in dismissing him for misconduct, and in that case he cannot *recover pro rata. As to the existence of a sufficient cause, the jury have found it; and they were right in so doing. The act of entering the protest on the minute book was inconsistent with his service; a servant of this kind if allowed to do such acts, would be useless. But then it is said that it should have been put to the jury, whether this cause was the operating motive for the dismissal. I own that I was impressed for a considerable time with the weight of this argument. But I think that when a master, sued for wages, defends himself upon the ground that he had dismissed the servant, and that there was in fact something which justified the dismissal, that presents an intelligible issue to a jury: whereas, if the inquiry were to be, whether this justifying cause operated in the master's mind, a jury, in the great majority of cases, could not pronounce a satisfactory verdict. I think it is enough to shew a justification existing in point of fact.

Rule for a nonsuit absolute. (a)

Rule for increasing the damages, discharged.

*181] *LEMPRIERE *against* HUMPHREY. *Wednesday, May 6.*

Declaration, in trespass, described the locus in quo by abutments on the north, east, south and west, severally: and it was said to abut, on the south and west, "towards" certain places named. The defendant pleaded only a justification, in respect of his seisin of the locus in quo which he averred to be parcel of the manor of H., and to have been demised to him by copy of court roll. The plaintiff denied that it was parcel, &c. On the trial, the plaintiff applied his evidence to a triangular piece of land, not continuous on all sides to the places mentioned in the abutments, but situated within their limits:

Held, first, that the statement of abutments could not be objected to, on the trial, as insufficient in itself.

Secondly, that the plaintiff might apply it, though not with strict correctness, to the triangular piece of land.

Thirdly, that the defendant could not prove his justification in respect of another piece of land, also situated within the limits of the several places named in the abutments, but not contiguous to them on all sides.

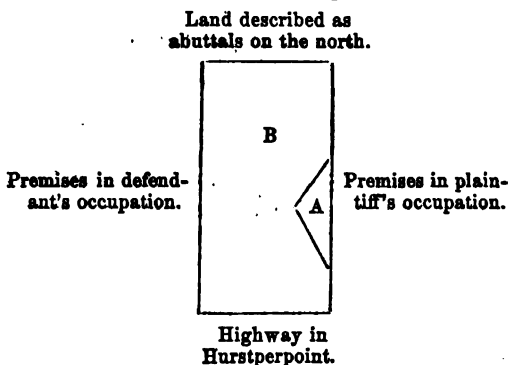
TRESPASS for breaking and entering plaintiff's close, described in the declaration as "abutting on the south towards a certain highway in the parish of Hurstperpoint, in the county of Sussex; towards the north on certain land; on the east on premises in the occupation of plaintiff; and on the west towards certain premises in the occupation of the defendant, and situate in the county aforesaid." Plea, that the said close in which &c., was, and from time immemorial has been, within and parcel of the manor of Hurstperpoint in the county of Sussex, and a customary tenement of that manor, demised and demisable

by copy of the court rolls in fee-simple or otherwise, at the will of the lord, according to the custom, &c.: the plea then went on to state a grant by copy of court roll, to the defendant, of the close in question, his entry, and that he thereby became seised in fee: and it justified the alleged trespass in respect of such grant and seisin. Replication, traversing that the close in question was parcel of the manor of Hurstperpoint: and issue thereon.

At the trial before Littledale, J., at the summer assizes for Sussex, 1834, the defendant's council objected, before any evidence was given, to the description of the abutments in the declaration; but the learned Judge permitted the trial to proceed, giving leave to the defendant to move *to enter a nonsuit. The defendant proved that he held of the lord of the manor of Hurstperpoint a customary tenement called The Reeves, to which the description of the close set out by the plaintiff was applicable. Contradictory evidence (of acts of ownership, &c.) was given, on the following question; viz. whether The Reeves comprehended a triangular portion of the ground, to which, taken by itself, the statement of abutments, as far as it went, was applicable as well as to the larger close; there being, in fact, within the abutments mentioned in the declaration, two contiguous portions of land, of which the triangular piece was one: but this latter piece was not actually contiguous, on all sides, to the places mentioned in the description of abutments, neither was The Reeves so contiguous on all sides, unless it comprehended this portion: but, if it did, it was actually bounded on all sides by the abutments mentioned in the declaration. (a) The learned judge directed the jury to find for the plaintiff, if they thought *that the triangular portion of ground, as to which the contradictory evidence had been given, was not shewn to be a part of the customary tenement. Verdict for the plaintiff. In Michaelmas term last, *Platt* obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered.

Thesiger now showed cause. The general issue not being pleaded, no objection to the abutments can be raised. There is no doubt of the identity: all the evidence was applicable to it. The plea admits the correctness of the abutments. [PATTESON, J. The words "abutting towards" are perfect nonsense: the place mentioned might be thirty miles from the locus in quo. "Abutting upon" would be a different thing.] The defendant is not now at liberty to raise this question. By his plea he admits that he understands the declaration sufficiently to plead to it; but at the trial, for the first time, he makes the objection. The word "towards" is not very definite: yet abutments are not to be construed with great strictness. Thus Heath, J., in *Roberts v. Karr*, 1 Taunt. 501, said that, if premises be described as abutting on a house to the east, it may be the north-east or south-east. Under the new rules, Pleadings in particular actions, V. 1, 5 B. & Ad. ix., the defendant, if dissatisfied with the statement of abutments in

(a) The annexed plan shews the situation of the lands. A is the triangular piece of ground; B that land which was not denied to be a portion of the Reeves.



the declaration, should have demurred : or he might have applied to a judge. If it be objected that the defendant was not prepared to meet the evidence relating to the portion claimed by the plaintiff, *Cocker v. Crompton*, 1 B. & C. 489, shows that the defendant could not have established a defence by showing *184] his title to another close, which would answer to *the description given in the declaration. Here both parties fully understood what they came to try.

Platt and Hollist, contra. The question raised upon the pleadings, and that which alone the defendant came prepared to try, was, whether certain land was copyhold or not. The abutments set out, if they amount to a statement of abutments at all, applied to a close of the defendant, forming part of *The Reeves*, his copyhold ; and he justified the alleged trespass accordingly. The spot to which the plaintiff applied his evidence is a portion adjoining to that admitted to belong to the defendant. The abutments, which manifestly refer to four sides, are inapplicable to a triangular piece of ground. The real abutments might have been given clearly and precisely. The plaintiff, therefore, cannot contend that "abutting towards," which might equally apply to a place many miles distant, is a sufficient description at all. In *Cocker v. Crompton*, 1 B. & C. 489, the plaintiff named his close ; and the defendant, therefore, though he likewise had a close of the same name in the same parish, must have known which of the two closes the plaintiff meant.

Lord DENMAN, C. J. The abutments given are by no means satisfactory. The defendant, however, goes to trial, and claims to show that the description in the plaintiff's declaration applies to land of him, the defendant ; and he proves that a customary tenement, capable of a similar description, belongs to him. I think that, under the new rules, the defendant, if he does not demur, is bound by the *185] description he has *adopted, and in respect to which he feels certainty sufficient to enable him to plead a justification of the alleged trespass : and *Cocker v. Crompton*, 1 B. & C. 489, shows that, under the old practice (which as to this point is not disturbed by the later rules), the defendant is precluded from applying the plaintiff's complaint to another close, answering the description in the declaration.

LITTLEDALE, J. I am of the same opinion. Suppose the defendant had land, bounded on the north by arable land, belonging to A. ; on the east by meadow, belonging to B. ; on the south by pasture, belonging to C. ; and on the west by wood, belonging to D. If the locus in quo, as described in the declaration, had exactly corresponded with this, and the defendant had pleaded as he has done in this case, and had gone to trial in this state of things, and the plaintiff, at the trial, had given evidence respecting another close, to which the description applied, as well as to the close of the defendant, the rule in *Cocker v. Crompton*, 1 B. & C. 489, would have prevented the defendant from applying the complaint to his own close. This is however, rather a different case ; for it seems that the plaintiff's close, being triangular, does not quite answer to the description. But the defendant must be taken to have admitted that the plaintiff was in possession of *such* a close as that described in the declaration ; and, if the plaintiff proves a trespass on such a close, he is entitled to recover.

PATTESON, J. On the authority of *Cocker v. Crompton*, 1 B. & C. 489, I *186] think the plaintiff entitled to recover. I am *not sure that he has not succeeded from a cause which ought rather to have operated against him :—I mean the use of the absurd words "*abutting towards*," to which the defendant ought to have objected at the proper time. The defendant might have had a better description given, by applying to a Judge ; but he has adopted this. The close certainly does abut *towards* the places mentioned, though it is a very improper description. It is true that the piece of ground in question could not have four sides ; but we know, from the authority cited by Mr. *Theisiger*, that abutments are not to be construed very strictly. The literal description ap-

plies to both closes. If the description had been abutting *upon*, and the defendant had traversed the possession, the plaintiff must have failed; but on a traverse of possession, as the declaration now stands, I do not know that there would have been a variance. Here the defendant in fact says, the close which you have described in your declaration is my soil and freehold. *Cocker v. Crompton*, 1 B. & C. 489, therefore applies. The plea of *liberum tenementum* does not admit a right of possession; but it admits the fact of possession, though wrongful, of the close described in the declaration.

COLERIDGE, J. *Cocker v. Crompton*, 1 B. & C. 489, governs this case. The principle there established has since been acted upon in *Cooke v. Jackson*, 9 D. & R. 495, which is rather more applicable to the present facts. Each party there had a close of the name stated in the declaration: so far the case was the same as *Cocker v. Crompton*, 1 B. & C. 489. But they were parts of the same district, which brings the *case nearer to the present. It was attempted to distinguish the case from *Cocker v. Crompton*, 1 B. & C. [*187 489; but Lord Tenterden said, "Here the plaintiff has a part of the district called Broadmead, and he has a right to call his close by the name of Broadmead. The defendant also has a close called Broadmead in the same district, and he also has a right to call his close by that name; but that will not prevent the plaintiff without a new assignment from going into evidence to show that the two closes are not connected one with another." If the plaintiff give an accurate description by name, the defendant is not to put him to inconvenience by pleading *liberum tenementum*. Then what difference does it make, that the description is accurately given by abuttals, and not by name? If, therefore, this were an accurate description by abuttals, there could be no question. But the defendant says, it is inaccurate. We cannot, however, try the question of accuracy between the parties, as they are now placed. The defendant cannot deny the plaintiff's possession, as described. To-day he says, that the abuttals did not give him full information: on the record he says, *that* close is parcel, &c. He cannot then deny the correctness of the description: he is in the same situation as if it were accurate; and the same consequences must follow.

Rule discharged.

*EX parte NUTTALL. Wednesday, May 6.

[*188

An attorney, who was off the rolls from his agent having neglected to take out his certificate, gave notice to the stamp office, before Easter term, that he should move for re-admission in Trinity term, Trinity being mentioned in the notice by mistake for Easter. On affidavit of the fact, and by consent of the stamp office, the court allowed the re-admission in Easter term.

N. R. CLARKE applied for the re-admission of an attorney who was off the roll in consequence of his agent having neglected to take out his certificate. Notice had been given, on or before the first day of this term, to the Stamp Office, of the attorney's intention to make the application; but, by mistake, the notice stated that the application would be made in Trinity term. The Stamp Office had instructed counsel to consent to the re-admission in this term. *N. R. Clarke* stated that, by the usual practice, the application could not be made before the term for which the notice was given: but he submitted, that the consent by the Stamp Office cured the irregularity.

THE COURT(a) granted the rule.(b)

(a) Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

(b) See *Ex parte Dent*, 1 B. & Ald. 189.

DOE dem. MARY ANN JOHNSON *against* BAYTUP. *Wednesday, May 6.*

Lessor of the plaintiff being in possession of a house and premises, defendant asked leave to get vegetables in the garden; and, having obtained the keys for this purpose, fraudulently took possession of the house, and set up a claim of title: Held that, having entered by leave of the party in possession, she could not defend an ejectment, but was bound to deliver up the premises before she proceeded to contest the title.

A mere licensee is, in this respect, on the same footing as a tenant.

EJECTMENT for a messuage, cottage, garden, and orchard. At the trial before Littledale, J. at the Summer assizes for Sussex, 1834, the material facts *189] appeared to be as follows. The lessor of the plaintiff was the widow of one Johnson, who, in 1815, took a piece of land belonging (according to the plaintiff's case) to W. S. Poyntz, Esquire and built a house upon it, which he occupied for some time and then left. It was afterwards occupied by other persons, and then Johnson, about a year before his death, returned to it, with his wife, the lessor of the plaintiff, and held it till 1832, when he died. The widow remained in the house till November 1832, when she quitted it, putting up a notice that the premises were to let, with a reference to one Mary Batscomb, with whom she left the keys, in order that the house might be shewn to any person applying to see it. The defendant, Johnson's daughter by a former wife, lived in the neighbourhood, and sometimes asked leave of Mary Batscomb to get vegetables from the garden, which she permitted her to do, and for that purpose lent her the key of the garden, having the key of the house tied to it. One day in March 1833, the defendant obtained the keys in this manner, to get vegetables, but returned to Mary Batscomb in the course of the day, and told her that she had not brought back the keys, as she was going to open the house to air it, and should make a fire in it, and sleep there all night. Mary Batscomb remonstrated, and demanded the keys back; but the defendant kept them, moved her goods into the house, and retained possession. In May following, Mr. Poyntz granted a lease of the premises in question to the lessor of the plaintiff; a lease to the husband having been prepared for execution in his lifetime, but never executed. The defence was, that the house had been Johnson's own; that Mr. Poyntz had no right to grant a lease of it; and that *190] Johnson's widow shewed no title, there being no will produced. Littledale, J. left the case to the jury upon the question of title, and they found for the defendant. The learned Judge then, at the instance of the plaintiff's counsel, who cited Doe dem. Hughes v. Dyeball, M. & M. 346, asked the jury whether they thought that the possession had been obtained fraudulently or not; and they found "that the possession was fraudulently obtained, under colour of going to collect vegetables." Leave was given to move to enter a verdict for the plaintiff, and a rule nisi was granted in last Michaelmas term.

Platt now shewed cause. The jury have, in effect, found that the lessor of the plaintiff had no title. Then the question as to the alleged fraud is as if a man had wrongfully obtained the goods of another, and the owner, by a false representation, got them back again. He might say, "I have recovered my property, and will keep it:" and the wrongdoer could not maintain trover. Here, the lessor of the plaintiff herself committed a fraud in obtaining a lease of premises to which she had no title, for the purpose of this action. [PATTERSON, J. referred to Doe dem. Bullen v. Mills, 2 A. & E. 17 4; Nev. & M. 25, and Lord DENMAN, C. J. to Doe dem. Knight v. Lady Smythe, 4 M. & S. 347, on the authority of which the preceding case was decided.] In each of those cases, the party coming in had assumed to take a legal interest from the lessor of the plaintiff or some one holding under him. [PATTERSON, J. I see no distinction in the present case.]

Thesiger, contra, mentioned an action of trover tried before *Lord Tenterden, where a person had got possession of title-deeds for a particular purpose, and then refused to deliver them up, alleging title in himself, but Lord Tenterden said that, having been obtained by fraud, they must be restored. He was then stopped by the court.

LORD DENMAN, C. J. The rule must be made absolute. In this transaction the defendant waived any title which she might previously have been able to assert. She held possession through a license, whether for a longer or a shorter time is immaterial. She cannot claim against the party by whom she was let in; that party, as between them, has the title. And this is more especially the case where possession has been obtained through fraud, by an opportunity which accident has given.

LITLEDALE, J. Possession having been fraudulently obtained, if the title is to be disputed, the lessor of the plaintiff may insist upon being first put into the situation in which she was before the possession was taken.

PATTESON, J. In the case of a person who has become tenant, there is no doubt as to the law. Doe dem. Knight *v.* Lady Smythe, 4 M. & S. 347, shows that he must first give up possession to the party by whom he was let in, and then, if he, or any one claiming by him, has a title aliunde, that title may be tried by ejectment. It was *held in that case, not that the party claiming as landlady to the tenant was altogether estopped from trying the right, but that the tenant must first restore possession. If the defendant here has any right, she might, in the first instance, have brought ejectment; or have entered on Mrs. Johnson and disseised her, and maintained the possession. But she takes neither course. She fraudulently obtains possession to go upon the premises, and then turns upon the lessor of the plaintiff, and insists upon holding the land. The rule, as to claiming title, which applies to the case of a tenant, extends also to that of a person coming in by permission as a mere lodger, or as a servant. On this ground I think that a verdict ought to be entered for the plaintiff.

COLERIDGE, J. It is best for the interests of justice that the rights of parties should be disputed in a fair and regular way. There is no distinction between the case of a tenant and that of a common licensee. The licensee, by asking permission, admits that there is a title in the landlord. Suppose that under the license an undisturbed possession were enjoyed for some considerable time, and an action were brought for use and occupation;—could the licensee dispute the licensor's right of action? The law would imply a tenancy under such circumstances. Then, if there be no distinction between the cases of a licensee and a tenant, do the circumstances here present an irresistible case of license? Here is a party quietly in possession. The defendant comes and asks for the key. If she had intended to make a claim of title, she might have come as a trespasser to disseise, and, having entered, might *have stood upon her right. But here that was not done; and under the circumstances of this case, the defendant, before she could dispute the title, was bound to put the lessor of the plaintiff in the situation in which she stood before the leave was granted.

Rule absolute.

CHAPMAN *against* KEANE. Thursday, May 7.

The holder of a bill is entitled to avail himself of notice of dishonour given by any party to the bill.

Therefore an indorsee, who has indorsed over, and is not the holder at the time of the maturity and dishonour, may give notice at such time to an earlier party, and, upon afterwards taking up the bill and suing such party, may avail himself of such notice.

ASSUMPSIT by indorsee against drawer of a bill of exchange, averring in the usual form, presentment to the drawee, nonpayment by him, and notice to the defendant. Plea, that the defendant had not due notice of nonpayment by the drawee, tendering issue thereupon. Joinder. On the trial before Tindal, C. J., at the Guildford Summer assizes, 1834, it appeared that the plaintiff had endorsed the bill, before it was due, to one Wiltshire, who left it with the plaintiff's clerk in order that it might be presented at maturity to the drawee. It was dishonoured upon presentment, whereupon the plaintiff's clerk gave notice to the defendant; the notice was regular in all respects, except that the clerk gave it in the name of the plaintiff, the indorsee, and not of Wiltshire. The plaintiff afterwards took up the bill from Wiltshire. It was objected that notice ought to have been given by the holder of the bill, whereas the holder at the time of the notice, was Wiltshire. His lordship, being of this opinion, nonsuited the plaintiff. In Michaelmas term last, *Law* obtained a rule to shew cause why the *194] nonsuit should not be set aside, and a verdict be entered for the plaintiff.

Thesiger and *Platt* shewed cause (May 6th) (a). In *Tindal v. Brown*, 1 T. R. 167, 2 T. R. 186, it was held, that notice of dishonour must be given by the actual holder; and the reason is, that the party to whom the notice is given ought to know where the bill is, that he may take it up; and he is entitled to warning that the holder looks to him. Lord Eldon laid down the same rule in *Ex parte Barclay*, 7 Ves. 597. The decisions in *Hartley v. Case*, 4 B. & C. 339, and *Solarte v. Palmer*, 7 Bing. 530, which establish that information of the fact of dishonour must be given in the notice, shew the importance of the rule, that the party, in whose hands the bill was then dishonoured, should be the party to give the notice. In *Stewart v. Kennett*, 2 Campb. 177, Lord Ellenborough ruled to that effect. His words are, "the notice must come from the person who can give the drawer or indorser his immediate remedy upon the bill; otherwise it is merely an historical fact." It is true that, in *Rosher v. Kieran*, 4 Campb. 87, it was held that notice by the acceptor to the drawer was enough; and, in *Jameson v. Swinton*, 2 Camp. 373, and *Wilson v. Swabey*, 1 Stark. N. P. C. 34, it was ruled, at nisi prius, that notice by any party to a bill was sufficient; but it appears that no reference was made, at the time of these decisions, to the earlier authorities. In *Gunson v. Metz*, 1 B. & C. 193, the *195] defendant was not proved to have had any notice, except from a party not then holding, and he was considered nevertheless to be liable: but there the defect was supplied by proof of an agreement on the part of the defendant, which amounts to an admission of his liability, and was considered evidence of due notice having been given. If the notice here was good in favour of the plaintiff, Wiltshire, on the same principle, may avail himself of it, and sue upon the same bill. A party is not liable to be sued till he has had the opportunity of paying; and, for this purpose, he ought to have notice from the party to whom he is to pay. It may be observed, that in *Jameson v. Swinton*, 2 Campb. 373, the defendant, as *Lawrence, J.* puts it, was enabled to take up the bill if he pleased. So in *Rosher v. Kieran*, 4 Campb. 87, the notice stated where the bill was.

Adolphus, contra. The decisions are certainly inconsistent; and it will be necessary for the Court to elect between the two doctrines which have been laid down. *Stewart v. Kennett*, 2 Campb. 177, however, does not make against the plaintiff: for there the notice was given by a person not connected with any party to the bill; and all that is contended for by the present plaintiff is, that a notice by any party to the bill is sufficient. And this is the principle laid down in *Jameson v. Swinton*, 2 Camp. 373, and *Wilson v. Swabey*, 1 Stark. N. P. C. 34. The object of the notice may be considered to be, that the party re-

(a) Before Lord Denman, C. J., Littleale, Patteson, and Coleridge, Js.

ceiving it may withdraw his effects from the hands of the party who has refused payment. In *Chitty on Bills*, p. 526, (8th edit. 1833), the doctrine, that the notice imports that the holder intends to call *upon the party receiving [*196 notice, is mentioned; but the author afterwards says, (p. 527,) "However, according to more recent decisions, it is not absolutely necessary that the notice should come from the person who *holds* the bill when it has been dishonoured, and it suffices if it be given *after* the bill was dishonoured, *by any person who is a party to the bill*, or who would, on the same being returned to him, and after paying it, be entitled to require reimbursement, and such notice will, in general, *enure to the benefit* of all the antecedent parties, and render a further notice from any of those parties unnecessary, because it makes no difference who gives the information, since the object of the notice is, that the parties may have recourse to the acceptor:" and *Shaw v. Croft* is cited from a MS. note. [Lord DENMAN, C. J. Mr. Justice Bayley says, (*Bayley on Bills*, ch. vii, sec. 2, p. 255, (5th ed. 1830), that it is "prudent in each party who receives a notice, to give immediate notice to those parties against whom he may have right to claim; for, the holder may have omitted notice to some of them."]

Cur. adv. vult.

Lord DENMAN, C. J. Now delivered the judgment of the Court.

On the trial of this action by the indorsee against the drawer of a bill of exchange, the Lord Chief Justice of the Common Pleas directed a nonsuit, for want of due notice of dishonour. The bill had been indorsed by the plaintiff, by the desire of Wiltshire, who had discounted it, and left it in the hands of the plaintiff's clerk, with instructions to obtain payment, or give *notice [*197 of dishonour. He did give notice to the defendant, but in the name of the plaintiff, not in that of Wiltshire, the then holder, who had deposited the bill with him.

The objection to the plaintiff's recovery was founded on the case of *Tindal v. Brown*, 1 T. R. 167, 2 T. R. 186, in which all the Judges of this Court, except Lord Mansfield, considered a notice given by one who was not the holder as no notice, on the ground that the drawer was not thereby apprised of the holder's intention to look to him for payment; and this case was distinctly recognized, and its principle adopted, by Lord Eldon, in *Ex parte Barclay*, 7 Ves. 597.

Notwithstanding these high authorities, it is clear, from *Jameson v. Swinton*, 2 Campb. 373, *Wilson v. Swabey*, 1 Stark. N. P. C. 34, and also from the learned treatises on bills of exchange, that the contrary doctrine has prevailed in the profession, and we must presume a contrary practice in the commercial world. It is universally considered that the party entitled as holder to sue upon the bill may avail himself of notice given in due time by any party to it. In the *Nisi Prius* cases just referred to, no express allusion was made to *Tindal v. Brown*, 1 T. R. 167, 2 T. R. 186, or *Ex parte Barclay*, 7 Ves. 597, but we can hardly conceive that they were not present to the recollection of Lord Ellenborough and Mr. Justice Lawrence, or the counsel engaged. These learned Judges, indeed, decided them at *Nisi Prius*, but without question. We are now compelled to determine whether the case of *Tindal v. Brown*, 1 T. R. 167, 2 T. R. 186, as to this point, be good law. We think that it is not. If it were, the holder might secure his own right against his immediate *indorser by regular notice; [*198 but the latter, and every other party to the bill, would be deprived of all remedy against anterior indorsers and the drawer, unless each of those parties should in succession take up the bill *immediately* on receiving notice of dishonour, a supposition which cannot be reasonably made. We may add that this point was not necessary for the decision of the case, as this Court, including Lord Mansfield, granted a new trial on a different ground.

Rule absolute.

MADDOCK, Executor of HOWELL, *against* PHILLIPS. *Thursday, May 7.*

In an action brought by an executor, if the defendant has obtained a verdict, and the judge who tried the cause has, upon summons, but without hearing any affidavit, certified to deprive the defendant of costs under stat. 3 & 4 W. 4, c. 42, s. 31, the court will not review his order.

Quære, whether they have authority to do so.

DEBT by executor, in right of his testator, for money lent. The cause was tried at the last Spring assizes for Pembrokeshire, before Williams, J., and the defendant had a verdict. At the same assizes, the plaintiff applied to the learned Judge for an order to exempt him from paying costs, under stat. 3 & 4 W. 4, c. 42, s. 31. Williams, J., refused to grant the order then, saying that it need not be done at the assizes; and in the ensuing term a summons was taken out by the plaintiff to shew cause why a certificate should not be granted to deprive the defendant of costs. At the hearing before Williams, J., no affidavit was produced on behalf of the plaintiff. The defendant's attorney contended that the application ought to be made to the Court, and, at all events, that it should be supported by some specific statement on affidavit. The learned Judge took time to read over his notes, and, on a subsequent day, certified without any further hearing.

*199] *Chilton* now moved for a rule to shew cause why the certificate should not be set aside. Since the statute, executors are liable to costs unless they shew some special ground for exemption; *Southgate v. Crowley*, 1 New Ca. 518: and that ought to appear by affidavit. It cannot have been intended that this question should be decided by the Judge's notes.

Lord DENMAN, C. J. I think the rule ought not to be granted. The act says that the executor shall be liable to costs, "unless the Court in which such action is brought, or a Judge of any of the said superior Courts, shall otherwise order." In *Southgate v. Crowley*, 1 New Ca. 518, the application was made to the Court of Common Pleas, and they exercised their discretion; in the present case a Judge has been applied to, who has exercised his, with full knowledge of the facts. Unless he had been deceived, I do not know that he could himself discharge the order.

LITTLEDALE, J. This is not an application to set aside the order of a Judge acting merely as a part of the Court. The statute gives the Judge an authority of his own, and here he has exercised it, according to his discretion. I think there should be no rule.

PATTESON, J. concurred.

COLERIDGE, J. I do not know what power the Court has to grant this rule more than to review the certificate of a Judge at Nisi Prius for a special jury.

*200] Suppose the statute had said nothing of an order to be made by the Court, could we then have been applied to to set aside the Judge's order? Rule refused. (a)

BOODLE *against* DAVIES. *Thursday, May 7.*

Under the rule of court, Easter T., 2 G. 4, it is not sufficient to state in the rule nisi for setting aside an award, "that the arbitrator has exceeded his authority;" at least if there be no affidavit stating the particular excess. It must be shewn how the authority has been exceeded.

By an agreement of reference, reciting (among other matters of dispute) that there was a controversy between B. and D. respecting the property in a certain pump, and the right

to use it, and also respecting the alleged removal by D. of a boundary hedge between his lands and those of B.; and reciting further, that B. had commenced an action against D. for alleged trespasses upon the said pump and hedge; the cause and all matters in difference were referred to an arbitrator, who was empowered to award how and by whom the said pump and hedge, and the ditch adjoining the said hedge, should in future be enjoyed and occupied, "and who should have the care and management thereof."

The arbitrator awarded that B. was entitled to the pump as his sole and exclusive property, except that D. was entitled to the free use of water from it, in common with B. In a subsequent part of the award he directed that the pump should in future be considered as belonging jointly to B. and D. and be repaired at their joint expense. He further awarded, that the hedge should be kept in repair by D., who should be at liberty to use the mud of the ditch for repairing the hedge bank, but not otherwise; and that, subject to such privilege, the ditch should be considered as the property of B.:

Held, that the award, as to the property in, and use of, the pump, was sufficiently certain and final. And that the directions as to repairs were not an excess of the arbitrator's authority.

Where a cause and all matters in difference are referred to arbitration, with a direction that the costs of the action, reference, and award, shall abide the event of such award, and be paid at such time as the arbitrator shall direct, and the arbitrator awards some things in favour of each party, so that the court cannot say upon the whole that the award is in favour of either, no order can be made as to any part of the costs; although the action was in trespass, and the arbitrator finds that trespasses were committed.

THE above-named parties entered into an agreement of reference, with a recital (in substance) as follows:—That Boodle was the owner and occupier of a messuage and lands, situate, &c., and Davies the owner and occupier of a messuage adjoining Boodle's. That there was a yard or passage between the two houses, the entrance to which was closed up by a door, and in which yard and passage were a pump, brew-house, and oven, and below or at the end of which yard was a crooked hedge and ditch dividing the lands of the parties from each other. That Davies was alleged to have erected a wall on part of the said passage or yard, a former wall so *erected by him having been thrown down [*201 by Boodle, and that the bricks of such former wall still remained in the passage. That Boodle had fastened up the said pump with a chain, which Davies had broken after receiving notice not to do so, nor to go to the said pump. That Boodle also charged Davies with having injured a foundation stone of his dwelling by placing a post of the said door upon it. That Boodle alleged himself to be possessed of or entitled to the said passage, yard, pump, brewhouse, and oven, and the land on which the said wall was erected, as his sole, entire, and exclusive property, and to have a right of ingress and egress into and out of the said yard at his pleasure. That Boodle charged Davies with having at different times removed the said hedge nearer to Boodle's lands; and that he denied any right in Davies to break the said chain, to take water from the pump after notice, to remove the hedge, or to do the other acts complained of. That Davies denied having committed any trespass, or given any ground of complaint. That Boodle had commenced an action against Davies for the alleged trespasses, to which action Davies had appeared, but no declaration had yet been delivered. And that to settle the said matters in difference, and on account of which the said action had been commenced, the said parties had agreed to a reference as after mentioned. It was then witnessed, among other things, that the parties agreed to abide by the award of an arbitrator, who was named, "of and concerning the premises so in dispute as aforesaid, or any thing in any wise relating thereto; and also of and concerning all" actions, suits, trespasses, damages, and demands, &c., up to and upon the day of the date of the said agreement had, made, commenced, *&c., between the said parties, "and in particular of [*202 and concerning the said cause or suit now depending between the said John Boodle and Roger Ward Davies in the Court of King's Bench as aforesaid and all other matters in difference between them, up to the day" last mentioned. And it was agreed that the arbitrator should have power in and by his said

award to state "*how and by whom and in what manner the said passage or yard, pump and doorway, hedge and ditch shall in future be enjoyed and occupied, and who shall have the care and management thereof:*" and that if he should find that any matter complained of had been illegally erected, placed, or continued he should and might award when and how the same should be abated, &c. "And also that all the costs and charges of the said action, and of these presents, and the said reference and award, and all other matters in any wise relating thereto, shall abide the event of the said award, and be paid at such time or times as the said arbitrator shall in and by such award direct." The submission was made a rule of Court.

The arbitrator made his award, by which, after directing that proceedings in the cause should cease, he awarded that Boodle was possessed of or entitled to the said passage, yard or pump, brewhose, and oven, and to the land on which the said wall was erected, up to a certain stile, "as his sole, entire, and exclusive property; except that the said R. W. Davies has a right to the free use of water from the said pump, in common with the said John Boodle, and of ingress and regress into and out of the said yard by and over the said stile, for the purpose of fetching such water therefrom. And I also award and adjudge that the said

*203] "John Boodle has a right to have free ingress and regress into and out of the said yard or passage at his free will and pleasure." He then proceeded to award that Davies had committed trespass on Boodle's land in respect of some of the matters complained of in the action; but he added, "I also award and adjudge that the said R. W. Davies has not removed the said crooked hedge into or nearer to the lands of the said J. Boodle than it formerly was, and that he had a right to break the chain so placed round the said pump as aforesaid, and to take away water from the same. And in further exercise of the several powers," &c., "I hereby award and declare that the said pump shall in future be considered as belonging jointly to the said J. Boodle and R. W. Davies, and be repaired at their joint expense; and the said R. W. Davies, his heirs, and assigns, shall have free ingress and regress into and out of the said yard by and over the said stile for the purpose of fetching and carrying away water therefrom." The arbitrator then directed that the boundary between the properties should remain as it was at present, and that Davies should not be interrupted in the use of the said wall, but that that the same, and the land whereon it stood, should "be considered as his absolute and exclusive property." And he continued,—"*I further award that, with the exception lastly hereinbefore mentioned,*" (of the said wall) "*the said yard shall be enjoyed by the said J. Boodle as his absolute and exclusive freehold property, and that the said hedge shall be kept in repair by the said R. W. Davies, who shall be at liberty to make use of the mud in the ditch abjoining for the purpose of repairing the hedge bank, but*"
 *204] "*not further or otherwise, and subject to the exercise of such privilege,*" the said ditch shall be considered as the property of the said J. Boodle, who shall be at liberty to carry away the mud therefrom as he may think proper." The arbitrator then gave directions for removing the bricks of the former wall, and he finally awarded as follows:—"I hereby further award and direct that my costs and charges of attending the said reference and of this my award, amounting to the sum of 12*l.* 3*s.* 10*d.*, shall be paid by the said R. W. Davies, and that all the costs and charges of the said action, of the said recited agreement, of the said reference, and of all other matters in anywise relating thereto, all which said costs and charges are by the said agreement directed to abide the event of this my award, to be taxed and allowed as between party and party, shall also be paid by the said R. W. Davies to the said J. Boodle," at &c., on &c.

In Michaelmas term, 1834, a rule nisi was obtained, calling on the plaintiff to show cause why the award should not be set aside, on the following grounds:

"That the arbitrator has exceeded his authority. That the said award is uncertain, and not final. That the arbitrator has awarded that the pump was

to be considered as belonging to plaintiff and defendant jointly; and that he has also awarded that the said pump belongs to and is the property of the plaintiff. And also for that the arbitrator has not awarded in pursuance of the said reference the payment of the costs of the action."

Sir *W. W. Follett* and *Wightman* now showed cause. First, it is not sufficient, within the rule of Court, *Easter term, 2 G. 4, 4 B. & Ald. 539, to state as an objection to the award, upon the rule nisi, "that the arbitrator has exceeded his authority." It should be shown how he has done so. In *Rawsthorn v. Arnold*, 6 B. & C. 629, where the statement of objection in the rule was general, Lord Tenterden held that it was aided by an affidavit put in support of it; but here no affidavit is made, and the statement in the rule conveys no information. [Lord DENMAN, C. J. In reading an award, very different objections may suggest themselves to different minds. A party supporting an award against such a rule as this might raise some objections which had not been thought of by the opposite side.] Independently of this defect in the rule, the award is good. In effect, it finds the pump to be the exclusive property of Boodle, subject to a right of user by Davies. [PATTESON, J. If the arbitrator meant to dispose of the property, and not merely to give an easement, there would be, so far, an excess of authority.] The words, "that the said pump shall in future, *be considered* as belonging jointly to the said J. Boodle and R. W. Davies, and shall be repaired at their joint expense," have not that meaning; and if they had, the parties to whom the award, in that respect, is favourable, have no right to take the objection. And the excess of authority, if any, affects the award only in part. As to costs, the arbitrator was justified in awarding them to the plaintiff. The finding, as to the trespasses, would have entitled him to a verdict in the action; and upon the rest of the matters in dispute, the award, upon the whole, is in the plaintiff's favour.

**R. V. Richards*, contra. The statement in the rule, "that the arbitrator has exceeded his authority," is specific enough. In a rule nisi for a quo warranto, or for setting aside an annuity, the objections are stated with equal generality. Then, as to the other points. Either the award amounts to an adjudication that the pump is the property of both parties, or it directs one to repair the property of the other. Now it cannot be contended that this award creates a tenancy in common; and, if it gives only a right of user to Davies, he cannot do repairs. So also the hedge is clearly the property of Boodle; and there is nothing in the award that can empower Davies to repair it, or to use the mud for that purpose. The words of the agreement of reference do not authorize the arbitrator to give such a power. It is said there, that the arbitrator shall have power to state in his award who shall have "the care and management" of the pump, hedge, and ditch; but those words do not include the liability to repair. Suppose the subject-matter had been a mansion-house, could the burden of repair have been imposed under the words "care and management?" With respect to costs, the arbitrator had no power to award them unless the event of the award was clear; but in this case the matters found in favour of the defendant may be more important than those found against him.

Lord DENMAN, C. J. As far as regards costs, we think that the defendant is right. As the award is drawn, he may have gained much more by it than the plaintiff; and the agreement of reference makes no provision for costs in the event of an award like the present. On the other points, I am of opinion that no objection is open *to the defendant but those which are specifically stated; for if, under such general words as are first used in this rule, a particular complaint could be introduced, still, when such words are followed by particular words of complaint, the inquiry is narrowed by these. The award that one party is entitled to the pump as his sole property, except that the other has a right to the free use of the water in common with him, and that the pump shall in future be considered as belonging jointly to them, appears contradictory, but it is explained by the subsequent direction, that it "shall be repaired at

their joint expense," which shows that it is meant to belong to them jointly in respect of the doing of repairs: see *Pomfret v. Ricroft*, 1 Wms. Saund. 322, 323. It is said that there is an excess of authority in directing one man to repair what is found to be the sole property of another; but the repair is directed to be done in a particular manner, and I think the words "care and management," in the agreement of reference, warrant such a direction as this. The award is said not to be final, but it is so as between these parties, and we do not see that any others are interested. The rule of Court which has been referred to does not mean merely, or at all, that the head of objection should be stated, but that the particular objection should be shown,—that the arbitrator should be alleged to have improperly done or omitted some particular thing. In the case which was referred to, the Court seems to have thought otherwise; but I think the proper construction of the rule is as I have stated.

*208] *LITTLEDALE, J.* I think the arbitrator in this case had no power to make the award as to costs, whether the right to them was consistent with his direction or not. As between Boodle and Davies, the award is sufficiently final. As to the adjudication respecting the pump, it is true the award says that Boodle is entitled to it as his sole and exclusive property; but that is subject to an exception, which is, in effect, that Davies has as much right to use it, for the only purpose to which a pump is applicable, as Boodle has. This part explains the former. Then in the subsequent clause the arbitrator says that the said pump shall in future be considered as belonging jointly to the parties, and be repaired at their joint expense. The first part of this direction varies but slightly from that before given, for the arbitrator had already made it almost a joint property, by giving a joint use; and he now further awards (in pursuance of the clause in the agreement of reference enabling him to provide for the care and management of this property,) that the repairs shall be done jointly by the two parties. In the subsequent part of the award, as to repairing the hedge, and taking mud from the ditch, the arbitrator's intention is declared in express words. I see no uncertainty; and I think the rule must be absolute as to costs only.

PATTESON, J. I am of the same opinion. The form of the reference is singular. Where an action is depending, it is reasonable to provide that the costs shall abide the event; but where all matters in difference are referred, it seems that under such an order as to costs, each party must necessarily pay his own, *209] unless every thing is found in favour of one. The provision that the costs shall be paid at such time or times as the arbitrator shall direct, contemplates the event of costs being payable consistently with the other terms of the submission. The arbitrator has thought that the present was such a case, but has been wrong. I hope it will not be taken that we consider objections stated in the general manner which has been pointed out here, to be correctly stated. *Rawsthorn v. Arnold*, 6 B. & C. 629, is a distinguishable case. There it was stated in the rule that the arbitrator "had not decided all matters in difference;" and the Court seems to have been of opinion that the rule alone would not have been sufficient; but there was an affidavit, of which Lord Tenterden thought that notice might be taken, and the two together held to explain the objection made to the award. Here no such affidavit is made; we have only the rule and the award, and there is nothing to draw our attention to any particular part of the award. I think, therefore, that there is not, in this case, a sufficient statement of the objection; and I hope, in future, it will be considered that a rule of this kind ought to state in what respect the arbitrator has exceeded his authority, and in what respect he has failed to decide all matters submitted. As to the more particular objections in this case, the award is not to be construed as strictly as a deed. The arbitrator had authority to direct "how and by whom, and in what manner," the pump should "be enjoyed and occupied." Having that authority, he awards that the property is in Boodle, but that Davies has an easement, and that such easement shall continue.

Then as to the repairs, in respect of which it is said *that he has exceeded his authority; the words empowering him to award *how* the property shall be occupied give him authority to say under what conditions the occupation shall be. The same observations apply to the hedge and ditch; and, if the arbitrator might say how they should be occupied, and who should repair them, he might also direct what should be done with the mud. [*210]

COLERIDGE, J. I am of the same opinion, and I must express my entire concurrence in the construction which has been given to the rule of Court. The purposes of that rule would be defeated if parties might state a general head of objection, as has been done here, and then go into any number of particular objections which might range themselves under it. As to the specific objections here, it must be considered that we are construing an award, and in doing so regard must be had to the subject-matter. It has been contended that the words "care and occupation" cannot involve repairs; and it has been asked whether such an effect could be given to them in the case of a mansion house; but here, if the subject-matter be looked to, the plaintiff's construction will appear sensible enough.

Rule discharged, except as to so much of the award as directs the payment of costs.

Sir W. W. *Follett* then called the attention of the Court more particularly to the costs of the action, observing that the matters sued upon had been found in favour of the plaintiff. But,

*PER CURIAM. The costs of the action were to abide the event of the award. There has been no event of the award for this purpose. The arbitrator had no power to say anything of costs. [*211]

COOPER against PHILIP THOMAS GARDNER. *Thursday, May 7.*

By inquisition, taken under an *elegit*, it was stated that G., the defendant, was possessed of a term in lands as mortgagee. The term had been bequeathed by words, upon which a question arose, whether such term were vested in G. or in the executrix. The court refused to decide, on motion, at the instance of the mortgagor or of the executrix, whether G. had an interest of the nature described in the inquisition, and liable to be extended.

THIS was a rule calling on the plaintiff, the defendant, and Frances Hatton, to shew cause why an inquisition taken by the sheriff of Anglesea, under the *elegit* issued in this cause, should not be set aside. The inquisition stated, that Philip Thomas Gardner on, &c., and on the day of taking the said inquisition, was possessed of the residue of an unexpired term of 500 years, granted March 28th, 1779, of and in certain messuages, tenements, lands, and hereditaments, particularly described, which term was held and possessed by the said P. T. Gardner, as mortgagee, for securing 6000*l.* and interest payable on a day which was past. The inquisition then stated the delivery to the plaintiff of a moiety of the said lands and tenements (being a moiety of the lands and tenements named in the writ of *elegit*.) according to the statute. It appeared by affidavit that the mortgages had been assigned to the Rev. Philip Gardner, the defendant's father, for the residue of the term, to secure 6000*l.* and interest, and that Mr. Gardner, by his will, devised the interest of the 6000*l.* to the defendant for life, and after his decease to trustees for the defendant's sons and daughters. The testator also appointed the defendant and Frances Hatton his executor and executrix; and the will contained a residuary *clause, [*212] which was relied upon in shewing cause, as conveying the principal sum of 6000*l.* to the defendant. The testator died in 1826. Judgment had been signed in this action in 1819. The defendant, on his father's death, renounced execution, and probate was taken out by Frances Hatton. The mortgagor had

continued in the receipt of the rents and profits ever since the mortgage was executed. The interest was regularly paid from the time of the testator's decease; and it was suggested in an affidavit, sworn in opposition to the rule, that such interest had been received by the defendant, as the party entitled to the principal. But an affidavit was subsequently filed on the other side,^(a) denying this, and stating that the interest had been paid to the use of Mrs. Hatton as executrix, and as the party legally interested in the term.

Chillon now shewed cause on behalf of the plaintiff, and contended that the defendant's interest in the premises was such as might be taken under the elegit; *213] but as no judgment was given on this point, the arguments *upon it are omitted. At all events the inquisition cannot be disputed in the present form of proceeding. This is an attempt by the mortgagor to try the debtor's title to the lands in a summary way. He, as a third person, has no right to interpose. Nor is he, in fact, prejudiced. As to legal rights, the elegit only puts the judgment creditor into the situation in which the defendant was before, according to the observation of Gibbs, C. J. in his judgment in *Rogers v. Pitcher*, 6 Taunt. 206, 207, and all the present equities between the mortgagor and mortgagee will still subsist. The finding upon this inquisition has been, that the defendant held and was possessed of the term. The Court is asked to decide summarily that such finding is, in point of fact, untrue; and that at the instance of a party who may be called a stranger. No authority can be shown for such a course.

Sir *J. Campbell*, Attorney-General, and *Hoggins*, contra. The mortgagor and Mrs. Hatton are entitled to contend that an interest such as this, in a mortgage term, cannot be taken under an elegit. [PATTERSON, J. This cannot be any thing more than the case of a sheriff seizing goods of A., under an execution against B. Has the Court ever proceeded summarily upon such a question as that?] In *Harris v. Booker*, 4 Bing. 96, on elegit sued out against the landlord, he was found to be seised for life of lands which were in the occupation of a tenant; the latter refused to pay rent, and defended himself in an action for use and occupation brought by the tenant by elegit, on the ground that the landlord had no legal interest in the premises; and Best, C. J., in 214] giving judgment, *said: "It is clear, in the present case, that the plaintiff was not entitled to the possession of the land, as against the landlord Cresswell; and if so, he could have no claim against the tenant. The inquisition certainly found that Cresswell was seised of the land; but a stranger to the inquisition was not bound to traverse it: he might dispute its correctness in any other way." [Lord DENMAN, C. J. We think it ought to be shewn by some direct authority that the Court has ever taken the course now suggested.] No authority has been found; but there are many analogous instances in which the Court will interfere to relieve the subject where an excess of jurisdiction has been committed; as, for instance, in setting aside orders of justices. [LITLEDALE, J. There the orders are brought before the Court by certiorari.] The inquisition here is on the files of the Court. [Lord DENMAN,

(a) The rule was obtained in Easter term, 1834 and, in the next term (after counsel had been partly heard in opposition,) it was enlarged in order that the facts might be turned into a special case. This was not done, and the rule was further enlarged. The affidavit above mentioned was sworn, by the solicitor to Mrs. Hatton, on the 2d of January 1835. Reference being made to it in the course of the argument partly reported above, it was objected that the affidavit came too late, and ought not to be received. LITLEDALE, J. On the plea side of the court, parties shewing cause against a rule are at liberty to file fresh affidavits every time the rule is enlarged. [The officers of the court stated that it was so on the plea side, though not on the crown side.] PATTERSON, J. Mrs. Hatton is an adverse party to the mortgagor upon this rule, and the affidavit is put in on her behalf.

It was part of the rule of enlargement made in this case in Michaelmas term, 1834, "that the affidavits which parties intend to read at the time of shewing cause, be filed one week before the next term."

C. J. Setting aside orders of justices is an exercise of the ancient jurisdiction of the Court. Here we are called upon to do that which properly belongs to others. PATTESON, J. When orders are brought up by certiorari, the Court does not inquire into matter not appearing upon the orders themselves.] Affidavits have been allowed, to shew that the orders were made without jurisdiction: *Rex v. The Justices of the West Riding*, 5 T. R. 629, *Rex v. The Justices of Somersetshire*, 5 B. & C. 816. Here is an excess of jurisdiction, and an abuse of the process of the Court.

Lord DENMAN, C. J. It is not an excess of jurisdiction that is alleged, but a mistake on the merits. That cannot be gone into in the manner proposed. *The interpleader act, in all the extent of equitable jurisdiction which it introduces, does not give such an authority as this. It is said that the [*215 process of the Court has been abused: but no fraud is complained of. The rule must be discharged.

LITLEDALE and PATTESON, Js. concurred.

COLERIDGE, J. As the case is put on behalf of the mortgagor, there is only a false finding, by which he need not be bound. Rule discharged.

UDALL against NELSON. Thursday, May 7.

The court will not discharge a defendant out of custody on mesne process, on the ground merely that the arrest was against good faith. As where the plaintiff agreed to accept payment of his debt by instalments, and, without further communication, arrested the defendant before any instalment was due.

G. F. JONES moved for the discharge of the defendant out of custody, under the following circumstances. The defendant being indebted to the plaintiff, and unable to pay immediately, told the plaintiff (as he now swore the fact was) that he, the defendant, had money coming to him through the hands of Messrs. Laidlaw and Harding, writers to the signet in Edinburgh, and would pay the debt out of such money if the plaintiff would give him time. The plaintiff consented, and on the 20th of April last wrote and signed this memorandum: "To Messieurs Laidlaw and Harding. Gentlemen, I have seen Mr. Nelson, upon whom I hold a bill for 27*l.*, and he proposes to pay me the amount by instalments of 5*l.* each per month, to which I agree, the first instalment to be the 4th May 1835, and on the fourth of each month following. [*216 *James Udall." On the 30th of the same month of April, the plaintiff, without any notice or intimation to the defendant or any request of payment, arrested him for the 27*l.* The defendant on the 4th of May, tendered 5*l.* which the plaintiff's attorney refused to accept. [THE COURT(a) asked if there were any instance of a party having been discharged out of custody on the ground of an arrest having been made contrary to good faith?] Proceedings on a bail bond would be set aside upon that ground. [LITLEDALE, J. The Court exercises a general summary jurisdiction over bail bonds.(b)]

PER CURIAM. The rule cannot be granted.

Rule refused.(c)

(a) Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

(b) See st. 4 Ann. c. 16, s. 20.

(c) As to the control which the courts will exercise over the right of holding to bail, see *Chambers v. Bernasconi*, 6 Bing. 498, judgment of Tindal, C. J., and the cases there cited; *Burton v. Haworth*, 4 B. & Ad. 462; *Anon. Loft*, 546.

***The KING against The Company of Proprietors of the BRECKNOCK and ABERGAVERN Canal Navigation. Friday, May 8.**

By an act establishing a canal company, it was provided, that certain land owners might call upon them by notice, as directed in the act, to execute certain works, communicating with the company's canal and railways; and that, if the company should refuse for six months after such request, the applicants might themselves perform the works in the same manner as the company might have done them.

An application being made to the company under this clause, they answered that they would do the works themselves; but they delayed proceeding, and, on remonstrance, gave as a reason, that the proposed operation would interfere with the property of other parties, who were likely, if so disturbed, to bring an action. The company offered, nevertheless, to proceed if indemnified. The applicants, in answer, stated that they considered the excuse insufficient, and did not understand how they could be expected to indemnify. Six months had at this time elapsed since the original application. The works not being done, a mandamus was applied for:

Held, that the writ could not issue, it not appearing from the above facts that, after the consent given by the company to execute the works, there had been any express demand and refusal of performance, or any conduct on the company's part equivalent to such refusal.

A RULE nisi was obtained, for a mandamus to the above-mentioned company to construct and complete the railways, bridges, and other works mentioned in a notice given to them by Richard Summers Harford and others, on the 18th of October 1832. The application was grounded on stat. 33 G. 3, c. 96, "for making and maintaining a navigable canal from the town of Brecknock to the Monmouthshire canal, near the town of Pontypool," &c., "and for making and maintaining railways and stone roads from such canal to several iron-works and mines," &c., by that statute (sect. 1,) the company of proprietors incorporated and invested with certain powers for the purposes of the act, and, among others, with that of making railways from their own canal to any mines, &c., within eight miles: and by sect. 96, it was further enacted as follows:—

"That if the owner or owners of any manor, estate or lands containing any mines," &c. "of iron, iron stone, lead, coals, or other minerals, or any quarries, &c., "situate and lying within the distance of eight miles from any part of the said canal," &c., "shall deem it expedient or necessary that any railway or stone roads shall be made over, &c., "the lands or grounds of any other person or persons, or across any highway," &c., "or that any bridges should be erected over and across any rivers, brooks, or watercourses, for the purpose of conveying his, her, or their iron, lead, coals, &c., "or any goods, wares, or merchandises, to or from the said canal," &c., "hereinbefore particularly described; and if the said company of proprietors shall refuse to make any such railway or wagon road, or to erect any such bridge, in virtue of the powers hereinbefore given them in that behalf, for the space of six months after an application and request in writing shall have been made to them for that purpose, at a general meeting or assembly to be held as hereinbefore is mentioned, by the person or persons so deeming it expedient," &c., then it shall be lawful for such person or persons "at his or their own proper costs and charges, at any time after the expiration of such three (Sic.) calendar months, without the consent of the owner or owners of such lands, or grounds, rivers, brooks, or watercourses, to make any such railways or wagonways, or to erect any such bridge or bridges as shall be deemed expedient to be made or erected as aforesaid, he or they first paying or tendering satisfaction for the damages to be thereby occasioned to any such lands," &c., in the manner pointed out by the act in the case of lands taken for similar purposes by the company.

When the canal and certain of the railways and other works had been completed, Messrs. Harford and Co., *the parties making the present application, required the company by a notice conformable to the act, de-

livered to them at a meeting of the proprietors on the 18th of October 1832, to make certain railways and erect certain bridges in the said notice particularly described, to communicate with certain mines, &c., of the applicants, situate within eight miles of the canal; and the making of which railways and bridges the applicants, as they stated in the notice, deemed it expedient and necessary. And the company were, by the said notice, informed that if they should refuse to make and erect the same for the space of six months after the application, the applicants would make and erect them at their own cost under powers of the act. The company, at their next general meeting holden in April 1833, (a) passed the following resolution with respect to that part of the notice which it was now sought to enforce by mandamus:—"Resolved, that, with respect to the first application, this company have determined to retain and to exercise their parliamentary powers, and for that purpose the clerk is hereby directed to make the necessary application to the owners and occupiers of land described on Messrs. Harfords' plan." A copy of this resolution was sent to Messrs. Harford and Co.

The resolution not being carried into effect, Messrs. Harford and Co., caused a letter to be written upon the subject to the clerk of the company, and were informed by him, in answer, that the company had begun the necessary operations, but found that it would be necessary to cross the rail-road of the Monmouthshire Canal Company, who had warned them against *trespassing, and who had already brought an action (still depending) against Messrs. Harford and Co., for crossing the same rail-road. (b) The company therefore suggested the propriety of waiting the result of the action, before any further step should be taken. The applicants, in a second letter, denied that the action referred to could determine any thing as to the undertaking now in question, and urged that the works should proceed. The clerk of the company answered as follows:—

"We understand that a meeting of the canal committee will be held on some day in the present month, when we will submit to them the correspondence which has recently taken place between us on this business. The nature of the notice given by the Monmouthshire Canal Company, leads us to think that the instant we commence operations at the Penmark Colliery, they will institute legal proceedings against us. We therefore take it for granted that your clients will agree to indemnify the Brecknock and Abergavenny Canal Company in respect to all the consequences of those operations."

To this letter the agent of Messrs. Harford and Co. replied, on the 3d of September, 1833:—"We cannot admit that the notice or apprehension of legal proceedings from the Monmouthshire Canal Company, to which you refer, at all justifies the delay on the part of your clients complained of in our former letter, nor do we understand upon what principle Messrs. Harfords and Co., can be expected to indemnify the Company of proprietors of the Brecknock and Abergavenny Canal Navigation in the exercise by that company, for their own *benefit, and by their own election, of the powers conferred upon them by their act of parliament." The works were not proceeded with. In Trinity term, 1834, the rule nisi was obtained for a mandamus. [221]

Sir John Campbell, Attorney-general, and E. V. Williams, (with whom was C. Powell), now showed cause, and contended that the Company were not obliged, nor clearly authorized by the act, to cross the Monmouthshire Canal Company's railway. As to the resolution passed upon Messrs. Harford and Co.'s application, it may be said on the other side that, by passing such a vote, the Breck-

(a) The resolution was passed a little more than six months after the notice, and this circumstance was discussed in the course of the argument, but nothing ultimately turned upon it.

(b) See as to this, *The Monmouthshire Canal Company v. Harford*, 5 Tyr. 68. 1 Cro. M. & R. 614.

noek and Abergavenny Canal Company have precluded the applicants from making the proposed railways themselves, the act only empowering parties to take such a course upon *refusal* of the company to do the works required. But if that be so, the proper mode of trying what injury has been sustained would be by an action on the case. And the company are willing to execute the works on receiving an indemnity, or to give a refusal, if that is necessary, to enable the parties to proceed for themselves.

Mauie, *contra*. The company have endeavoured to evade the rights given by this statute to the applicants. At the end of six months from the notice, they were bound either to give a refusal or to perform the works. There has been no refusal, but the company have declared that they would exercise their parliamentary powers. [Lord DENMAN, C. J. That, with reference to the request, is saying that they will do the works. PATTESON, J. You would compare the case to that of a company empowered to compel a sale of houses for the purposes *222] *of an act, after having given certain notices: the company, having given the notices, cannot retract, but may be obliged by mandamus to complete the purchase.(a)] The cases are similar. [COLBRIDGE, J. Supposing that the company have lost their right of election, ought not you, for the purpose of obtaining a mandamus, to show that you have applied to them, since the passing of the resolution, to do these works, and that, on such application, they have refused?] If they were bound to perform the works at all, they were bound to do it within a reasonable time after the resolution. When they passed it, the duty was thrown upon them. Harford and Co. had then a vested right to the performance of the works by the company. Their assent had put it out of the power of Harford and Co. to act for themselves. It is true, they now offer to give a refusal, but that must be on a fresh application under the statute; and the applicants have now lost two years.

Lord DENMAN, C. J. This case must go off upon a point not bearing on the merits. The parties making the application do not state anything, subsequent to the resolution in 1833, which carries the refusal of performance farther than a demand of indemnity for the company in case of their doing the works. We cannot grant a mandamus unless there has been a direct refusal; and here, I think, there has not. It is not indeed necessary that the word "refuse," or any equivalent to it, should be used; but there should be enough to shew that the *223] party withholds compliance, and distinctly *determines not to do what is required. The question is, as in a case which was lately before us respecting payment of taxes, (*Rex v. Ford*, 2 A. & E. 588,) whether the party had done what the Court distinctly sees to be equivalent to a refusal. Here I cannot perceive that in the correspondence and conduct of the company. Their answer to the last application is, that they are ready to do the works, if indemnified. That leaves the case short of the point to which it would have been brought if such an application had been made that any non-performance afterwards must have amounted to a refusal. Messrs. Harford and Co. might have said, "we desire a direct answer, and your not giving it will be considered a refusal." A direct application would probably have led to a direct denial; and that, or something equivalent, should have taken place, to furnish ground for a mandamus.

LITLEDALE, J. I am of the same opinion. It is not necessary that there should have been a refusal in so many words; but here the Company only answered the application by requiring an indemnity. There should, after that, have been a formal and distinct demand, to warrant this motion.

PATTESON, J. I am sorry that the case should go off on this point; but the Canal company had at one time agreed to perform the works, and nothing is shewn which amounts to an express rescinding of that consent. When Har-

ford and Co. declined indemnifying, they should have followed that up by a direct application to have the works done.

*COLERIDGE, J. A mandamus ought not to be moved for unless the party alleged to be in fault has known distinctly what he was required to do, so as to exercise an option whether he would do it or not. In this case it is not even clear that the Company knew, after the refusal of indemnity, whether Harford and Co. had not given up their demand. [*224

Rule discharged.(a)

In the Matter of HODGSON and ROSS. *Saturday, May 9th.*

An attorney who, after being examined, sworn, and admitted, neglects for a year to take out his certificate, is not an unqualified person within stat. 22 G. 2, c. 46, s. 11; and, if he practice, without being re-admitted, in the name of another attorney, he is not, therefore, liable to imprisonment, nor the other attorney to be struck off the roll, under that statute; though the latter would be punishable under the general jurisdiction of the court.

BAINES had obtained two rules in Hilary term last, calling upon Hodgson to shew cause why he should not be committed to the prison of this Court for a period not exceeding one year, and upon Ross, an attorney of this Court, to shew cause why he should not be struck off the roll. The application was grounded on stat. 22 G. 2, c. 46, s. 11.(b) Hodgson had been admitted *an attorney of this Court in 1827, and practised at Gisburne, in Yorkshire, till the year commencing in November, 1830; when, being in embarrassed circumstances, he did not take out his certificate. He remained uncertificated for more than a year; and since then, according to the affidavits in support of the rule, he had practised in the name of Ross. In answer, affidavits were filed in which these facts were explained or denied; and, on shewing cause, it was contended that the facts were not such as could warrant the application, even supposing the statute to include the case of an attorney who had omitted to take out his certificate. So much only of the facts and arguments is here reported as relates to the construction of the statute. [*225

Sir *Gregory Lewin* for Hodgson, and *F. V. Lee* for Ross, now shewed cause. The present is not a case within this section of the act, the object of which was to protect the public from the ignorance of unqualified persons, such as have not been examined (as directed by stat. 2 G. 2, c. 23, s. 6,) sworn and admitted. The renewal of the certificate is merely a fiscal regulation. The enactments

(a) See *Rex v. The Trustees of the Northleach and Witney Roads*, 5 B. & Ad. 978.

(b) Stat. 22 G. 2, c. 46, s. 11, "And whereas divers persons who are not examined, sworn, or admitted to act as attorneys or solicitors in any court of law or equity, do, in conjunction with, or by the assistance or connivance of certain sworn attorneys and solicitors, and by various subtle contrivances, intrude themselves into, and act, and practice in the office and business of attorneys and solicitors, to the great prejudice," &c. "be it therefore enacted, that from and after," 29th September, 1749, "if any sworn attorney or solicitor shall act as agent for any person or persons, not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be any ways made use of upon the account, or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practice in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the court from whence any such process did issue, and proof made thereof, upon oath, to the satisfaction of the court, that such sworn attorney or solicitor hath offended therein as aforesaid, then, and in such case, every such attorney or solicitor so offending shall be struck off the roll, and forever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said court, for any time not exceeding one year."

providing for the fitness of the attorney belong to a different class of regulations, *226] and are enforced *by different penalties, as under stat. 3 Ja. 1, c. 7, and stat. 2 G. 2, c. 23, which are continued by later acts. [COLERIDGE, J. You say that, if a person be off the rolls for want of renewing his certificate, he still retains a qualification, though it is suspended. Lord DENMAN, C. J. The words are not duly qualified to act "as aforesaid."] That means qualified by having been examined, sworn, and admitted. No case has occurred of applying this section to attorneys who have once been on the rolls. In *Re Palmer*, 2 A. & E. 686, (S. C. 1 Harr. 55,) In *Re Clark*, 3 D. & R. 260, In *Re Jackson and Wood*, 1 B. & C. 270, *Ex parte Whatton*, 5 B. & Ald. 824, In *Re King and Tredwell*, 1 A. & E. 560, were all cases in which the unqualified party had never been attorney at all. [PATTESON, J. Stat. 37 G. 3, c. 90, s. 31, makes the admission of attorneys, who neglect to renew their certificate, "null and void." Therefore it will be said that Hodgson practised without being admitted.] The first statute which required a certificate was stat. 25 G. 3, c. 80. Till that act passed, there could of course be no attempt to apply stat. 22 G. 2, c. 46, s. 11, to the case of a party practising without a certificate. Then how can stat. 25 G. 3, c. 80, or stat. 37 G. 3, c. 90, bring such a party within the previous act? The qualification referred to in stat. 22 G. 2, c. 47, s. 11, could not possibly mean such a qualification as was thereafter to be created; and the later acts contain nothing connecting them with the penalties of the preceding act.

Baines contra. The case falls within the plain words of the section. The admission is null and void by stat. *37 G. 3, c. 90, s. 31. The party, *227] therefore, is as if he had never been admitted. Then stat. 22 G. 2, c. 46, s. 11, inflicts the punishment upon persons who practise without possessing the qualification of admission. The penalties in the twelfth section of that act were enforced in a case where the party had not renewed his certificate, in *Slack v. Wilkins*, 1 Cr. & M. 28, (S. C. 3 Tyrwh. 158;) yet the preamble of that section refers much more distinctly to the danger of unskilfulness, than that of the eleventh section. [Lord DENMAN, C. J. The twelfth section contains the words—"unless such person shall continue so entered upon the roll." There is no such expression in the eleventh.] Lord Lyndhurst referred expressly to the admission and enrolment being null and void, under the act of 37 G. 3.

Lord DENMAN, C. J. This rule must be discharged. The conduct of the party is not the conduct contemplated in the eleventh section of stat. 22 G. 2, c. 46. The object of that section, and of previous enactments on the same matter, was to prevent unqualified persons from acting. The qualification "as aforesaid," is the having been examined, sworn, and admitted. Then any attorney who knowingly acts for a person not so qualified incurs the penalty. The qualification includes all the three things, examination, swearing, and admission. This gives rise to an argument founded on stat. 37 G. 3, c. 90, s. 31, which makes the admission null and void where the certificate has not been renewed. The strength of the argument in favour of the rule rests upon this; and certainly a fair doubt does arise upon the word "admission." Yet, looking at the *228] intent of stat. 22 G. 2, c. 46, *which was to secure skill and knowledge on the part of the attorney employed, and recollecting that a punishment is imposed for practising without qualification, we must, I think, control the sense of the word "admission." The object of stat. 37 G. 3, c. 90, was to secure the payment of the stamp duty; and although the thirty-first section declares the admission null and void, yet we cannot import that enactment into the preceding statute, so as to make the party subject to the punishment imposed on practising without being admitted. We are referred to the interpretation which the Court of Exchequer has put upon the twelfth section of stat. 22 G. 2, c. 46, in *Slack v. Wilkins*, 1 Cr. & M. 28; S. C. 3 Tyrwh. 158. That case was, I think, very properly decided; for the twelfth section imposes the penalty on the person acting, "unless such person shall continue so entered upon the

roll ;” and the enrolment there was set aside by the thirty-first section of stat. 37 G. 3, c. 90. But in the eleventh section of stat. 22 G. 2, c. 46, no such expression occurs as that in the twelfth ; under the eleventh, we have merely to look to the three qualifications. At the same time, I wish to say that it does not follow that, if an attorney once examined, sworn, and admitted, be off the roll, another person can act for him, without being subject to the authority of this Court. An officer of the Court would be made answerable for so acting, and so perhaps would any party. But our general power does not warrant our acceding to the present application.

LITTLEDALE, J. I am of the same opinion. The object of the eleventh section of stat. 22 G. 2, c. 46, is pointed out by the preamble, which adverts to the *practising of persons not examined, sworn, or admitted, by the assistance and connivance of sworn attorneys and solicitors, “to the great pre- [229] judice and loss of many of his Majesty’s subjects, and the scandal of the profession of the law.” The object was to prevent persons who were not regularly qualified “as aforesaid” from practising in the names of regular attorneys. Now Hodgson was duly admitted ; and there was therefore one time at which he was not within this section, as an unqualified person. Then the subsequent statute, 37 G. 3, c. 90, s. 31, declares that, if the certificate be not properly renewed, the admission shall be “from thenceforth null and void.” The object of that statute was merely the security of the revenue. Yet, if it does, in effect, operate on the provisions of the former act, this application is well founded. But it seems to me that it has no such effect. Though the admission be null and void, the party is not unqualified with the intent of sect. 11 of the former act. The object of that section was to prevent the indirect practice of improper persons ; the later act had the revenue only in view. Again, by stat. 37 G. 3, c. 90, s. 21, provision is made for *readmitting* attorneys who have failed to renew their certificate ; and yet the original admission was, under the same act, null and void. But an attorney who allows an unqualified person, within the meaning of stat. 22 G. 2, c. 46, s. 11, to practise in his name, is for ever after disabled from practising, and incapable of readmission. I think, therefore, that this section does not apply. If, indeed, we found that an attorney knowingly allowed an uncertificated person to practise in his name, we might, by our general power, strike him off the rolls, and in some way or other, punish the other party also. But this *is not a case within the provisions of the act, although, sup- [230] posing the offence to be made out, Ross would be liable under our general jurisdiction. The rule must, therefore, be discharged ; but, under the particular circumstances, it ought to be discharged without costs.

PATTERSON, J. I confess that it is very difficult to distinguish this case from that of a person struck off the rolls for misconduct ; and whether a person so struck off would be within stat. 22 G. 2, c. 46, s. 11, is difficult to say. The object of this section was not revenue, but the prevention of persons not qualified by examination, swearing, “or” admission, from practising in the names of others. The being examined and sworn is one part of the qualification. In default of such qualification the attorney acting for, or lending his name to, the unqualified party, is to be struck off the roll, and no discretion is given to the Court. The unqualified person is to be committed to prison. Hodgson had been examined, sworn, and admitted. But his admission has become null and void by his not having renewed his certificate. It is not disputed that he might be readmitted without being again examined or sworn : the readmission always, in such cases, takes place by rule of Court without the personal appearance of the defendant, and no examination is gone through. The provision of 37 G. 3, c. 90, under which the admission is avoided, subject to readmission, is merely a statutory regulation in favour of the revenue. It seems to me, therefore, that the avoidance which it creates does not bring a party within stat. 22 G. 2, c. 46, s. 11. But I cannot say, generally, that a party once admitted, and struck off

*281] the rolls for misconduct, *would not be within that section: perhaps, in such a case, the previous admission might be void for all purposes. I should be sorry that this decision should encourage attorneys to practise for persons not on the rolls: there are many ways in which such a practice might be punished.

COLERIDGE, J. The facts alleged in support of this application are, that Hodgson had not renewed his certificate, and was allowed by Ross to practice in his name; and we are called on to say whether we can apply to such a case the provisions of an act passed with a totally different object—the exclusion of persons who were not qualified. The question is, whether the enactment of stat. 37 G. 3, c. 90, s. 81, making void the admission, renders the person “unqualified” under stat. 11 G. 2, c. 46, s. 11, the latter, too, being a penal act, and compelling the Court, without any discretion, to strike off the rolls the attorney offending under that clause. Before applying that act, we ought to be very sure that the case is within it. I look at the preamble of the eleventh section. (His lordship here read the first part of the section.) It is quite obvious that the persons intended are those who have not gone through the examination: all the terms obviously regard persons unqualified to practice, *de facto*. Then comes the enactment. (His lordship then read the enacting part.) It seems to me too much to say that this person, who has been examined, sworn, and admitted, is unqualified. The words “null and void,” which are used in the subsequent statute, must have a limited sense given to them. For, after the penalty is paid, the party is readmitted without being examined, *232] *and, I believe, without being sworn. We should be carrying a penal act much too far if we were to say that such a case was within it.

Rule discharged, without costs.

KITCHENER and Others, Assignees of DEAN, a Bankrupt, against POWER. *Saturday, May 9.*

Under the Bankrupt act, 6 G. 4, c. 16, s. 92, the depositions taken before the commissioner are evidence of the petitioning creditor's debt, the trading, and the act of bankruptcy, in an action of trover brought by the assignees, though the declaration states a conversion in the time of the assignees only, if the cause of action be one for which the bankrupt himself might have sued.

For ascertaining whether or not the case is within sect. 92, the criterion is, whether the bankruptcy be only a formal step in the evidence, or whether it be so essentially a part of the ground of action that, without proof of it, no party could recover in respect of the alleged cause.

This is to be decided by the judge, upon the opening of evidence at the trial.

TROVER for bacon and lard. The declaration contained two counts,—one stating the possession to have been in the bankrupt before, the other in the assignees after, the bankruptcy, but both laying the conversion after the bankruptcy. Plea, the general issue. Notice was given of disputing the petitioning creditor's debt and the act of bankruptcy. On the trial before Lord Denman, C. J. at the sittings in London after Hilary Term, 1884, the plaintiffs' case was, that the defendant, assuming to be a creditor of the bankrupt, and knowing him to be in insolvent circumstances, had fraudulently contracted for the goods, and obtained them upon the express terms of paying for them in cash, but with the intention of setting off the price against his own demand. And it was contended, for the plaintiffs, that this being a fraud upon the bankrupt, and no contract, he might, but for his bankruptcy, have maintained an action to recover the goods back; and, consequently, that the depositions taken before the commissioners of bankrupt were conclusive evidence of the petition-

ing creditor's debt and act of bankruptcy, by stat. 6 G. 4, c. 16, *s. 92.(a) On the other hand it was alleged that, as the only conversion [*233 in the declaration was laid to have taken place after the bankruptcy, this, upon the face of the record, appeared not to be an action which the bankrupt could have maintained, and, therefore, the depositions were inadmissible. The Lord Chief Justice, upon the authority of *Jones v. Fort, M. & M.* 196, expressed himself of this opinion, and the plaintiffs being unable to prove their case without the depositions, were nonsuited. A rule nisi was obtained, in the following term, for a new trial, on account of the rejection of evidence. In Hilary term last,

Sir *F. Pollock*, Attorney-General, shewed cause.(b) The evidence was not admissible, because the action was not one which the bankrupt could have maintained before his bankruptcy. This appears, first by the declaration. The first count states, in effect, that the goods belonged originally to the bankrupt, but now belong to the assignees; and that since the bankruptcy, the defendant converted them. The conversion is the gist of the action. The second count does not allege *any possession by the bankrupt at all. The assignees cannot, [*234 after so stating their case, insist that there was a conversion in the bankrupt's time; and, if there was not, sect. 92, of the act does not apply. It is also clear, on referring to the substance of this transaction, that no suit could have been commenced in the time of the bankrupt. This is an attempt to recover back goods obtained under a contract of purchase. The plaintiffs' counsel at the trial compared the case on the defendant's part to that of *Major Semple*; (c) but there was no pretence for calling such a purchase as this a fraud; and, supposing that the assignees are entitled to sue for the purpose of recovering back the goods, they were not bound to do so: they might repudiate the contract or not, and until there had been a distinct repudiation and demand there was no conversion. In the bankrupt's time, at least, there was no repudiation of the contract, and therefore no ground of action. In *Smith v. Woodward*, 4 Car. & P. 541, (see p. 236, post,) the intimation of opinion ascribed to the learned Judge is loosely worded; but that that case is distinguishable from the present. There, goods had been deposited by the bankrupt with the defendant: he might, at any time have demanded them back, and the defendant was always bound to return them. It did not substantially differ from the case of an unpaid balance, not demanded before the bankruptcy, but which nevertheless was money had and received to the use of the bankrupt at that period, and, after the bankruptcy, might be considered as had and received to the use of the assigness. But in this case the transfer of the goods was not a deposit,—it was *a matter of contract, till the assignees elected to con- [*235 sider it otherwise; and until then there was no subsisting right to recover the goods back. The case is entirely different from that of a bill of exchange not due, or a credit not expired, at the time of the bankruptcy. Here, inasmuch as the contract was one which the assignees might have confirmed or not, the whole right of action took its rise from a period subsequent to the bankruptcy. In the cases where a cause of action at first imperfect has been

(a) 6 G. 3, c. 16, s. 92, "And be it enacted, That if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law or suits in equity brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit."

(b) Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Js.

(c) 1 Leach, C. C. 420, 4th ed. 2 East's P. O. c. 16, s. 112, p. 691. 2 Russ. on Crimes, p. 129, 2d ed.

made perfect since the bankruptcy, as in *Smith v. Woodward*, 4 Car. & P. 541, or where a bill indorsed to the bankrupt has become due since the bankruptcy, the particular state of facts may be expected to appear on the record. Here the pleadings do not suggest the existence of any ground of action before the bankruptcy. On the face of the declaration it appears that the conversion was subsequent.

Sir *W. W. Follett*, Solicitor-General, and *Crowder*, contra. The action is not grounded upon any repudiation of a contract. The assignees say that there was no contract; that the goods were obtained by fraud, and that no property passed. Section 92 of the Bankrupt Act applies where the right of action is independent of the bankruptcy; but where that right is affected by some altered state of facts consequent upon the bankruptcy, the section is inapplicable. The question in a case like this is, whether the bankrupt himself could have brought the action; not, of course, in the particular form of the then existing record, but in any form which the facts would have warranted? Thus, if goods
 *236] have been sold at a credit which had not expired at the time of the bankruptcy, the bankrupt, if that event had not happened, might have sued at the expiration of such credit. The case of a bill of exchange not due at the time of the bankruptcy is an instance of the same kind. The words of the section are, "for which the bankrupt might have sustained any action or suit;" that is, if the bankruptcy had not happened. The spirit of the clause is, that, where the assignees do not require the intervention of the bankruptcy to establish their claim, the depositions shall be evidence; the object being, that assignees shall not be vexatiously called upon to go through the several steps of proof relating to the bankruptcy, where the matters to be so proved are not the foundation of their title. In *Smith v. Woodward*, 4 Car. & P. 541, the bankruptcy was not an essential ingredient in the cause of action. The right to bring the action of detinue was not complete before that event; but if the bankrupt had demanded the goods he might have sued. And *Patteson, J.* said, "I think it is not necessary that the 'demand' should have been such as was perfect in the bankrupt at the time of his bankruptcy. The only cases in which it was intended to allow the assignees to be put to strict proof of the bankruptcy, were those in which the bankruptcy was itself almost a part of the cause of action, such as cases of fraudulent preference, or the like. But here it is immaterial whether the bankrupt or the assignee brings the action." *Fox v. Mahoney*, 2 Cro. & J. 325, (S. C. 2 Tyr. 285,) is a direct authority on this point. That was an action in trover, by assignees against a bailee who had converted
 *237] goods deposited with him by the bankrupt; the bankruptcy was proved by the depositions and proceedings only; and *Lord Lyndhurst, C. B.* said (referring to 6 G. 4, c. 16, s. 92), "I am of opinion that the intention of the legislature was, that, in cases where, in the event of there being no bankruptcy, the bankrupt could have maintained an action, and where no such notice as is prescribed in the section has been given, the depositions should be received as conclusive evidence; and I think so, on the ground stated at the bar, that if the defendant is not bound to pay the assignees, he is bound to pay the bankrupt; and that, by a subsequent clause in the act, he is discharged by such payment from any future claim, although the commission should be afterwards superseded." In that case, as in *Smith v. Woodward*, 4 Car. & P. 541, the bankrupt would not have been in a condition to sue unless something had been done which in fact was not done before the bankruptcy; viz. demanding the goods; but that was not held to make any difference. [*LORD DENMAN, C. J.* It does not appear, in *Fox v. Mahoney*, 2 Cro. & J. 325, (C. S. 2 Tyr. 285,) when the conversion was stated to have taken place.] The report shews that the declaration must have laid it in the time of the assignees. It is true that, in *Jones v. Fort, M. & M.* 196, *Lord Tenterden*, while he allowed that the proceedings were evidence in actions which the bankrupt might have brought, held them to be evidence on those counts only which laid the conversion in his time;

but the point was not discussed; the ruling appears to have been acquiesced in, and the plaintiff had a verdict. And *Fox v. Mahoney*, 2 Cro. & J. 325, (S. C. 2 Tyr. 285), and *Smith v. Woodward*, 4 Car. & P. 541, are authorities against such a limitation. The dictum of Patteson, J. *in the latter case [*238 suggests the only safe criterion, viz., whether proof of the bankruptcy be an essential step in the plaintiff's case, that fact constituting a part of the ground of action. [COLERIDGE, J. You say that, if there would have been a right of action in somebody at all events, the depositions are admissible.] That is the rule. [LITLEDAL, J. In acting upon such a rule you must reverse the usual course of proceedings on the trial; for, to ascertain whether the depositions are admissible or not, you must first prove the rest of the case. COLERIDGE, J. Counsel might open a case which would make the evidence admissible; but still would not its admissibility be made to depend upon the opinion of the jury as to the proof of those facts?] The question whether the plaintiff's case depended on the fact of bankruptcy or not, would always be a plain one, and could not require the decision of a jury. In the present case it arose upon the form of the record. The point of admissibility, however, cannot in general be determinable (as was suggested on the other side) by the form of the record. Indeed, in actions brought by assignees, the cause of action, as stated on the record, very commonly seems to be one for which the bankrupt could not have sued. [Lord DENMAN, C. J. I was of opinion at the trial that there was no case of fraud to go to the jury. The clause is an embarrassing one. The depositions are made admissible in all actions brought by the assignees for any debt or demand for which the bankrupt might have sued. What is such a debt or demand, may depend on many circumstances. By whose opinion is the effect of those to be determined? Is the judge to decide it, or to leave it to the jury? As to the form of the record, some records can furnish no information as *to the cause of action, by which this point can be determined: and [*239 others might, but do not.]

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the facts, and the objection taken at the trial, his lordship proceeded as follows:—

It is unnecessary to determine whether the plaintiffs would ultimately have made out a case entitling them to judgment against the defendant; for it is enough to say that they had had a right to present it to the consideration of the jury. The question, therefore, turns upon the construction of the ninety-second section of the statute 6 G. 4, c. 16; and, as this is a point of very general application, and the authorities appeared to conflict, we thought it right to look into them before we pronounced our judgment.

The words of the section, after stating the circumstances under which it is to apply at all, are these:—"The depositions"—"shall be conclusive evidence of the matters therein respectively contained, in all actions at law or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit." It would, perhaps, have rendered the intention of the legislature more obvious, if, immediately after the word "bankrupt," the words "*if no bankruptcy had intervened*" had been inserted.

Two modes of construing the latter words of the section were suggested; the first by a strict reference to the cause of action as stated on the record, which appears to have been the principle applied by Lord Tenderden in *Jones, Assignee of Wild v. Fort*, 1 M. & M. 196, a case *recognized by him in *Gibson v. Oldfield*, 4 C. & P. 313; and the latter by a reference to the facts of [*240 the case, as stated on the part of the assignees, which appears to have been the principle acted on in *Smith, Assignee of Parker v. Woodward*, 4 C. & P. 541, and *Fox, Assignee of Suweroropp v. Mahony*, 2 Cr. & J. 325, S. C. 2 Tyr. 285.

The nonsuit in the present case proceeded upon the adoption of the former mode; and this has apparently the advantage of great simplicity in its application. Taking the record to state all those circumstances which are necessary

conditions to the maintenance of the action, it would seem very desirable to be able to determine the admissibility of a particular mode of proof by reference to so unambiguous and fixed a criterion, especially with regard to facts usually proved in the commencement of the trial, and before the general facts of the case have been gone into.

But, upon consideration, we are of opinion that there is a fallacy in the application of this test; for, although the record must be taken to contain a statement of all circumstances formally necessary for the maintenance of the issue *by the plaintiffs*, the question is not, whether the same issue in form could have been sustained, merely substituting the bankrupt's name, as plaintiff, for that of his assignee, but whether the bankrupt, if no bankruptcy had occurred, could have maintained any action or suit for the recovery of the same debt or demand. A reference to the record cannot answer this latter question; a conversion, for example, must be alleged in trover, either before or after the bankruptcy, in order to found the action by the assignees; but how can a statement of the *241] latter only in *such action* be taken *as proof*, that the former also might not have been truly stated, if, *the bankrupt himself* being plaintiff, it had become necessary?

Further, we are of opinion that it is by adopting the latter rather than the former rule, that we best effectuate the intention of the statute. The section in question (the ninety-second) must be looked at in connection with the ninetieth and ninety-first, ninety-third and ninety-fourth; and, taking them altogether, it is obvious that the legislature intended on the one hand to facilitate, and on the other to indemnify against, the recovery by the assignees of such debts or demands as were due to the bankrupt; to the recovery of which their title as assignees was merely a formal step against every one but himself, and in the recovery of which, therefore, the bankruptcy was an immaterial circumstance. In all such cases, neither the bankrupt nor the debtor having given any notice of disputing their title, the assignees are relieved from producing any proof in support of it, and, if such notice be given by the debtor only, are furnished with a simple and conclusive proof in the depositions taken before the commissioners. As the debtor is indemnified against the bankrupt for any payment made by him or recovery had against him under such circumstances, there is no injustice or inconvenience in these provisions. Thus, in the matter now under consideration, if there be any case at all for the plaintiffs, the defendant is certainly liable either to them or to the bankrupt; and his payment to the assignee will be protected by the ninety-fourth section, if the notice specified by the ninety-second section has not been given, even should the commission be afterwards superseded. The bankruptcy, therefore, is an immaterial *fact in the cause. The same obser- *242] vation applies to the cases of bills not due, and of goods sold upon a credit unexpired at the date of the bankruptcy.

But there are cases, such as those of fraudulent preference, in which, unless there be a valid commission, there is no cause of action against the defendant in any one. In these, therefore, the bankruptcy is a material ingredient in the cause of action, and it would not be fitting to conclude the defendant as to that, more than as to any other part of the merits of the case, by the evidence taken by the commissioners when he was not present.

We think that this intent of the statute, and distinction in the nature of demands, would in many cases be lost sight of, if the records alone were looked to. On the other hand, the statement of the case relied on by the plaintiffs must always enable the Judge to decide within which class it falls; and no inconvenience can result from the admission of the evidence upon such statement, because, if the proof should not correspond, the plaintiffs will have made no case at all, and must be nonsuited.

We have remarked that the authorities upon this point are not uniform:—but, in the two cases earliest in point of time, the subject does not appear to have been brought fully before the mind of Lord Tenterden, and it was imma-

terial to reconsider his decision in either of them ; as in the first the facts were adequately proved by other evidence, and the second case went off upon a reference. Of the two latter cases—in *Smith v. Woodward*, 4 C. & P. 541, the verdict passed upon the admission of the *proceedings ; the ruling, therefore, might have been questioned, if it had upon consideration been [*243 thought improper ; and *Fox v. Mahony*, 2 Cr. & J. 325, S. O. 2 Tyr. 285, is a decision in banc by the Court of Exchequer, upon which I should have acted at *Nisi Prius*, if it had been then brought to my notice.

As well, therefore, upon a consideration of the words and intention of the statute, as of the weight of authority, we think that in the present case the proceedings should have been admitted, and consequently that the rule for setting aside the nonsuit should be absolute. Rule absolute.

VAN NYVEL *against* HUNTER. *Saturday, May 9.*

On motion for costs under stat. 43 G. 3, c. 46, s. 3, it is not necessary that the amount of the verdict should be stated in the affidavits, but it may be shewn by the judge's notes.

THE defendant had been arrested for a debt of 200*l*.

The cause was tried at the Winchester Summer assizes 1834, before Lord DENMAN, C. J., and a verdict was given for the plaintiff with 30*l*. damages. In Michaelmas term last, *Coleridge*, Serjt., on behalf of the defendant, obtained a rule nisi for costs, under stat. 43 G. 3, c. 46, s. 3. The affidavits in support of the rule did not state the amount of the verdict, but it appeared by the Lord Chief Justice's notes of the trial.

Erle and *Butt*, in shewing cause, contended that the Court could not take judicial notice of the amount of the verdict, but that it ought to have been shewn by affidavit. They urged that the verdict was not *matter of [*244 record ; and they cited *Fountain v. Young*, 1 Taunt. 60, [PATTERSON, J. I do not understand that case to have shewn that the judge's notes are to be excluded, but only that there must be affidavits as to the want of probable cause.]

Crowder, in support of the rule, contended that the words of the statute required only that the want of reasonable or probable cause should be made out by affidavit to the satisfaction of the Court, and that the notes of the Judge might be referred to. He cited *Glenville v. Hutchins*, 1 B. & C. 91, and also stated that, in a case(a) in the Court of Exchequer, in this term, on the discussion of a rule of the same kind, Parke, B., had expressly founded his opinion on the notes of the Judge, as well as on the facts in the affidavits.

PER CURIAM.(b) We have no doubt that the verdict is sufficiently before the Court by the Judge's notes.

On the merits of the case the rule was

Made absolute.

*In the Matter of the Arbitration between ALLEN PERING, and [*245 JOHN KEYMER and ALICE his Wife. *Saturday, May 9.*

A dispute was referred to the decision of three arbitrators, or any two of them. A proposed award was shewn at a meeting of the three, to which one of them objected, and

(a) Probably *Smith v. Smith*, 3 Dowl. P. C. 733.

(b) Lord Denman, C. J., Littledale, and Patterson, Js.

he, after a discussion, declared that, if the other two would not alter their view, they must make the award by themselves, and he would not join in it. Afterwards a draft, different from that of the proposed award, was sent by mistake to the last-mentioned arbitrator, by the other two; and he returned it with comments and objections. The two others subsequently made an award corresponding with that originally proposed, without again submitting it to the third arbitrator. The court set the award aside.

In Michaelmas term 1834, *Follett* obtained a rule nisi for setting aside the award in this case. The following facts appeared on affidavit. By an agreement, between Allen Pering of the one part, and John Keymer, and Alice his wife, of the other part, all matters in difference between the parties relating to certain property at Norwood were referred to the award of William Stevens and John Vincent, and, in case they should not agree, then to the award of Stevens and Vincent, and such person as they (before entering on the subject of the reference) should appoint, or any two of them. Mr. Stevens had been named by Pering, and Mr. Vincent by Keymer and his wife. Stevens and Vincent afterwards, and before entering upon the reference, named a barrister as umpire. Stevens and Vincent not agreeing, the three proceeded with the reference. After the case had been heard, at a meeting of the three arbitrators, the umpire stated the terms of a proposed award, to which Stevens objected, as not being sufficiently in Pering's favour. The matter was discussed at some length, and the meeting terminated by Stevens saying to the umpire, "If I cannot alter the impression on your mind, I must leave you and Mr. Vincent to draw up the award as you like; I shall not join in it." The three did not meet again.

Afterwards, by a mistake of Vincent's clerk, a draft of a proposed award, *246] made by Vincent at an earlier stage of the case, was sent to Stevens, who, conceiving it to be a draft of an award then proposed to be made, sent it to the umpire with remarks and objections. After this, and without any further communication with Stevens, the two other arbitrators executed an award which, as they now swore, was, in substance and fact, the same as that proposed at the last meeting of the three arbitrators.

The rule nisi specified, as an objection to the award, that it had been made by one of the arbitrators and the umpire without any consultation with, or intimation given to the other arbitrators.

Wightman now shewed cause. Any two of the three arbitrators had power to make the award. It is true that they could not do so without consulting the other. But it appears that they had discussed the case with him, and he had told them that, if they did not change their opinion, they must make the award by themselves, and that he would not join. And his objections were never withdrawn. After this, there was no use in applying to him again: his refusal to join in the award could not be more peremptory.

Sir *F. Pollock* and Sir *W. W. Follett*, *contrâ*, were stopped by the Court.

Lord DENMAN, C. J. This award was not properly made. Any two, under such a submission as this, may make a good award; but then it must be after discussion with the other arbitrator. If, after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed *247] proceed without* him. Here, Stevens, the arbitrator appointed by Pering, always took a view more favourable to Pering than the other arbitrators; and, on one occasion, he said that he would have no more to do with the matter. Had that declaration been acted on, I do not say that the award would not have been valid. But afterwards a memorandum of award finds its way, somehow or other, into the hands of Stevens. He gives his opinion upon that, and writes his objections. Then the other two, without meeting him, or considering how far their view may be varied by his objections, execute an award, as unfavourable as before to Pering. Stevens's objections might be insufficient; but the others were at least bound to hear what he had to say in support of them. It was only upon full notice given to him, that they were entitled to proceed without him.

LITLEDAL, J. I am of the same opinion; though, probably, if the arbitrators and umpire had proceeded regularly, the same award would have been made.

PATTESON, J. I am of the same opinion. The two who made the award did not treat Stevens's refusal at the last meeting as final.

COLERIDGE, J. The parties have not got what they stipulated for. They stipulated that two at least should make the award; but no two could make it till each arbitrator had been consulted. One of them refused his assent. I do not say that this might not have authorised the others to proceed without him; but they got into communication with him again, and he sent them his objections. Now they either did or did not take those objections into their consideration. If they *did not, the award is clearly bad for that reason; if they did, they ought to have consulted him upon them, before [*248 they made the award. Instead of this, they made another award.

Rule absolute.

SOADY against WILSON. *Monday, May 11.*

Under the statutes of sewers, every person, whose property derives benefit from the works of commissioners, is liable to be rated, although the benefit be not immediate. Thus, where a case stated that the eastern wing of Somerset House was drained by the Board of Works, and had no communication with the common sewer running under the body of Somerset House, and being under the jurisdiction of the commissioners, and that the buildings derived no benefit from the sewer, *except* the general advantage of being accessible, and of the approaches and neighbouring public ways being properly drained and cleansed: it was held that the occupiers of the eastern wing were rateable for the common sewer.

Semble, that in an action of trespass against the commissioners for levying a rate, if it appeared that they had jurisdiction, the court would not inquire whether the rate was proportioned to the benefit received from the sewage by the party rated.

Under the Sewers' Act, 52 G. 3, c. xlviii. (local and personal, public) s. 7, the party rated to the poor as the occupier of premises, is to be considered as the occupier for the purpose of assessment to the sewers' rate, although, in point of fact, the occupancy is questioned.

THIS was an action of trespass, brought by the clerk of the minutes to the Commissioners for Auditing the Public Accounts, against a bailiff to the Commissioners of Sewers for the city and liberty of Westminster and part of Middlesex, for taking and distraining a table. A case was stated for the opinion of this Court (pursuant to stat. 3 & 4 W. 4, c. 42, s. 25,) to the following effect:—

The office of the Commissioners for Auditing Public Accounts is situated in the east wing of Somerset House, which is in the parish of St. Mary-le-Strand, in the city and liberty of Westminster, and in the district of the eastern division of the Westminster sewers. By stat. 15 G. 3, c. 33, s. 16, his Majesty's palace, called Somerset House, with all its rights, members, &c., was declared to be vested in his Majesty, his heirs, and successors from all incumbrances whatsoever, for the use, intent, and purpose of erecting and establishing within the same (amongst other public offices in the said act enumerated)* the Auditors of the Imprests Office. By stat. 25 G. 3, c. 52, the last-mentioned office was determined, and the office of Commissioners for Auditing the Public Accounts established in its place. The plaintiff is the principal clerk to the commissioners in that office. [*249

Neither the Commissioners for Auditing the Public Accounts, nor the plaintiff, reside in the office appropriated to the service of auditing the public accounts, nor is there any room or place in the said office fitted up for the purpose of residence. The attendance of the commissioners and of the plaintiff at such office is only from ten o'clock in the morning to four in the afternoon, for the

purpose of discharging the duties of their respective offices. The persons, who sleep on the premises appropriated to the office of the said commissioners, are the office-keeper, and one of the messengers attached to the said office, who inhabit three sitting-rooms, five bed-rooms, two kitchens, &c. The commissioners, the plaintiff, and the messenger are paid by salaries, but no deduction is made from the salary of the commissioners or the plaintiff for the use made by them of the office, nor from the messenger's salary in respect of his sleeping therein.

The statute of sewers, 23 H. 8, c. 5, s. 8, (see page 257, post,) authorises the Commissioners to distrain; and s. 9, enacts that the same laws, ordinances, &c., to be made by the commissioners, "shall bind as well the lands, tenements, and hereditaments of the King our sovereign lord, as all and every other person and persons, and their heirs, for such their interest as they shall fortune to have, or may have, in any lands, tenements, or hereditaments, or other casual profit, *250] advantage or commodity, whatsoever* they be, whereunto the said laws, ordinances, and decrees shall in anywise extend according to the true purport, meaning, and intent of the same laws." The stat. 3 & 4 Ed. 6, c. 8, s. 1, continues the preceding statute; and s. 2, gives authority to levy all sewer-rates assessed upon the lands, &c. of the King, by distress or otherwise, in like manner as may be done in the lands, &c. of any other person; and enacts that bills of acquittance, signed by the collector to the Commissioners, shall be a discharge to the tenants, farmers, and occupiers of such grounds, for the sums assessed.

Under the Somerset House there are drains and sewers originally made by the authority of his Majesty's Board of Works and at the public expense, which drains and sewers are still under the management and control of the said board, and are cleansed, repaired, and maintained at the public expense. The drains and sewers under the east wing of Somerset House communicate with the above drains and sewers, and form part thereof, and are west of the city of London, and fall into the river Thames.

The statute 3 Ja. 1, c. 14, after a recital (which was set out in the case,) enacts, by s. 2, "that the walls, ditches, banks, gutters, sewers, gates, cawseys, bridges, streams and watercourses, within the limits of two miles of and from the city of London, which waters have their course, and fall into the river of Thames, shall from henceforth be to all intents, constructions and purposes, as fully subject to the commission of sewers, and to all the statutes made for sewers, and to all penalties in the same statutes and in every of them contained, as if the same places near to the city of London had been particularly named in the *251] said statute of sewers, or that *therein the water had ebbed and flowed, and therein free passage with boats and barges to the sea had been heretofore used; any thing in the said statutes, or elsewhere, to the contrary in anywise notwithstanding."

The case next set out stat. 2 W. & M. sess. 2, c. 8, s. 14, which, after reciting that many new sewers have been made in Westminster by the Commissioners under an act (13 & 14 Car. 2, c. 2,) since expired, and are now neglected from a doubt as to jurisdiction, enacts that all new sewers made since 12 Car. 2, shall be subject to the commission of sewers, and to the statutes of sewers, as if mentioned therein.

By stat. 47 G. 3, sess. 1, c. vii. (local and personal, public) s. 1, after reciting the above-mentioned acts of 3 Ja. 1, and 2 W. & M. and also reciting certain inconveniences, (a) it is enacted, "that all the walls, ditches, banks, gutters,

(a) This recital, (set out in the case,) is as follows:—"Whereas many persons who reside at a greater distance than two miles from the city of London, have the convenience of carrying off the waters from their lands and houses by means of divers communications with the great sewers under the management of the commissioners for the city and liberty of Westminster, and part of the county of Middlesex: and whereas those communications with the great sewers as aforesaid have caused great expense to the said commissioners, and

sewers, gotes, causeys, bridges, streams, and watercourses west of the city of London, extending to and including a certain watercourse, part of which divides *the parish of Chelsea on the one side from the parish of Fulham on the other side thereof, and including the several parishes within the city and liberty of Westminster and precincts of the same west of and extending to Temple Bar, and also including the several parishes of" &c., "and all sewers and drains communicating with the same watercourse, or with any of the ancient sewers comprised within the limits prescribed by the said act" (3 Ja. 1, c. 14,) "or with any of the sewers mentioned or comprised in the said act" (2 W. & M. sess. 2, c. 7, s. 14,) "which sewers and waters have their course and fall into the river Thames, shall from henceforth be, to all intents, constructions, and purposes, and fully subject to the commission of sewers for the city and liberty of Westminster and part of the county of Middlesex, and to the statutes made for sewers, and to all penalties and provisions," &c., as if expressly comprised in the Statutes of Sewers, &c.

There is a common sewer running through the square at Somerset House, running under Somerset House, which was made and is cleansed, repaired, and maintained, by the commissioners of sewers for the city and liberty of Westminster; but the drains and sewers under the eastern wing aforesaid do not communicate therewith; nor do any of the drains and sewers stated above to have been made and to be cleansed, repaired, and maintained by, and to be under the management of his Majesty's Board of Works: so that the buildings of Somerset House derive no immediate benefit from the said drain or sewer of the Commissioners of Sewers, except the general benefit and advantage of being accessible, and of its approaches and neighbouring public ways being properly drained and cleansed.

*The office of the Commissioners for Auditing Public Accounts has not heretofore been rated to any sewers' rates, nor has any person, until the rate after mentioned, been rated in respect thereof. The assessment in question was entered in the commissioners' rate book as follows: [253

"Brooking Soady, Esq., Office for Auditing Public Accounts.

	£	£ s. d.
Rated at 463	.	11 11 6
Ditto 104	.	2 12 0

By stat. 52 G. 3. c. xlviii. (local and personal, public) s. 7, after reciting that difficulty had arisen to the commissioners of sewers in laying an equal rate, by reason of their not being authorised to call for and inspect the poor's rates of the parishes within their jurisdiction, they are empowered to order their clerk, or other person on their behalf, to inspect and take a copy of the last poor's rate in any parish within their jurisdiction; and the vestry clerk, or other person having the custody of such rate, is required, under the regulations laid down in that clause (which was set out in the case,) to produce such rate and allow a copy to be taken, or furnish a copy, "in order to enable the said commissioners of sewers to lay an equal rate or assessment on the several inhabitants within the limits of the said commissions, or any portion thereof."

The commissioners of sewers, by virtue of the last mentioned act, inspected the rate-books of the said parish of St. Mary-le-Strand, and the plaintiff is therein rated for the relief of the poor of that parish in respect of the said

considerable hurt, damage, and inconvenience to divers of his majesty's subjects, from the additional quantity of water which passes through them to the aforesaid sewers, occasioned by the increase of buildings out of the said limits: and whereas divers sewers, streams, drains, and water courses which are situate or may be made beyond the limits prescribed by the said recited acts respectively, may require to be surveyed, corrected, and amended by the said commissioners, and doubts having arisen whether the sewers, steams, drains, and water courses mentioned, are under the survey, correction, and amendment of the said commissioners for the city and liberty," &c. "by virtue of the several statutes of sewers."

premises, at the yearly rental before-mentioned. Payment of the rate was duly demanded, and refused; and thereupon the commissioners of sewers made a *warrant according to stat. 7 Ann. c. 10, s. 3, which empowers the *254] commissioners by their warrant to give authority for levying the sums to be assessed upon the lands, &c., "liable or chargeable with any cesses, taxes, impositions, or charges, by authority of their said commission, by distress and sale of the goods of such person or persons that shall not pay, or refuse to pay." By the said warrant the defendant was authorised and required to levy by distress and sale of the goods of the several persons mentioned in a certain schedule annexed thereto, or of any other occupiers of the premises mentioned in the said schedule opposite to their respective names, the respective sums placed against their names, in the said schedule, being so much taxed or assessed upon the said premises for and towards the cleansing, repairing, and maintaining of certain common sewers within the district called the eastern division of the Westminster sewers. The defendant made the levy upon the plaintiff, which was the trespass now alleged.

If the Court should be of opinion that the office of the Commissioners for Auditing Public Accounts was liable to the sewers' rate, and that the commissioners, or the plaintiff, were liable to be assessed thereto as the occupiers or occupier of the said office, judgment was to be entered for the defendant; if the Court should be of a contrary opinion, judgment to be entered for the plaintiff. The questions stated in the margin of the case were,—1st. Whether, upon the construction of the several sections of acts set out in the case, the office of the Commissioners for Auditing the Public Accounts is liable to be rated at all for sewage rates. 2dly. If the office be liable, whether the plaintiff, according to *255] the facts stated, is liable to be rated in respect of his occupation of the said office. This case was argued in last Hilary term.(a)

Rogers, for the plaintiff. It is not denied that the premises on which the distress was taken are within the ambit of the jurisdiction given to the commissioners of sewers by the statute referred to in the case. The principal question is, Whether the Commissioners for Auditing Public Accounts, derive any benefit, as to the office used by them, from the works of the commissioners of sewers, which benefit can be made the ground of an assessment. That to warrant such a tax there must be a benefit received by the party charged, is shewn by the Case of the Isle of Ely, 10 Rep. 142, b, and may be collected from *Keighley's case*, 10 Rep. 189, a., and *Rooke's case*, 5 Rep. 99, b. The principle appears to be also recognised in *Callis on Sewers*, pp. 120, 121, and 124, and elsewhere. It is also adopted in several modern cases. In *Dore v. Gray*, 2 T. R. 366, Buller, J. says, "It is objected, Where will the jurisdiction of the commissioners stop in such cases? The line may be drawn from this case, where it is stated that the party, over whose land the work is done, is, or is likely to be, benefited by it: if he be so, that is sufficient to give them jurisdiction." In *Masters v. Scroggs*, 3 M. & S. 447, the Court of King's Bench expressed the same opinion. There the house assessed was within the jurisdiction of the Commissioners of Sewers, and therefore *prima facie* rateable; but it was argued, and with success, that the plaintiff's house was much above *the *256] level of the great northern sewer, and could not have been injured if that sewer had been obstructed, nor did it receive any additional benefit from the covering of the watercourse mentioned in the case, communicating with that sewer. In the present case, the sewage in question does not even communicate with the works under the management of the commissioners of sewers: it receives no immediate or definite advantage from them. In *Stafford v. Hamston*, 2 B. & B. 695, Dallas, C. J. says, "The commissioners are only to assess those who receive, or who are likely to reap profit, or who have, or may have hurt, loss, or disadvantage;" and he comments on the previous cases, recognising the

law laid down in them. The same principle was acted upon in *Netherton v. Ward*, 3 B. & Ald. 21, and *Rex v. The Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517. In the first of these two cases, it was stated that the dock yard, in which the assessed premises stood, was "principally" drained by sewers made and maintained at the expense of the Crown, but derived a benefit from the public sewers also. Here the eastern wing of Somerset House is entirely drained by the Board of Works, and its sewers have no communication with the public sewer. It is not contended, on the other side, that this charge can be imposed unless some benefit be derived from the sewer. Then the question will be, What kind of benefit is sufficient? To ascertain what benefit is received, it may be asked, whether the party to be charged makes any use of the sewer. In the case of an embankment, the question would be, whether damage would result to him from its being removed, as in *Rooke's case*, 5 Rep. 100 a.; with respect to an inland drainage the question is, whether any immediate advantage is derived from it to those lands for which the party is charged, the direct object and intention of the sewage being to drain the land and relieve it from water. Now here no immediate benefit arises in respect of the land in question; but the neighbouring land receives some benefit from which this property indirectly derives advantage. If that is a ground of charge, there are two things for which the rate is imposed—the direct benefit, and the indirect, which last is merely of the same nature as that received by all the King's subjects passing along the Strand. The persons using Somerset House enjoy it in a greater degree; but the advantage is of the same kind; and it is not one in respect of which parties can properly be rated. The statute 23 H. 8, c. 5, s. 3, (a) directs the commissions of sewers to assess persons for the purposes of the act, "after the quantity of their lands," which must mean the quantity of the lands benefited; but this could not be estimated with reference to such an indirect benefit as is received in the present instance. This is like the case of an individual choosing to drain his own land; he ought to be exempt from charge, and not to be rated for some benefit which he may derive from the draining of adjacent land by others. Perhaps the commissioners if they had not confidence in such an individual, might insist upon taking the drainage into their own hands; but here that has not been done. Suppose the level of the ground were such that it required no sewage, must the proprietors be rated because the neighbouring soil is rendered more healthy by draining? The rule must be, that the benefit, forming the consideration for the rate, shall accrue in respect of the thing which is the subject of assessment. Besides, the advantage received by the occupiers of these premises from the sufficiency of the drainage, is not derived by them from the commissioners of sewers: it is the business of the commissioners of pavements, or other parish officers, to cleanse and purify the approaches, and it is to them the occupiers look for that accommodation: if the performance of that work is rendered easier by the drainage, the benefit is not one which the occupiers can be said to derive immediately

(a) Stat. 23 H. 8, c. 5, ss. 2, 3, 4, sets out the commission of sewers, by which (sect. 3), the commissioners are directed to survey the sewers, &c., to cause the same to be amended, &c. after their discretions, and to ordain therein after the form of the statutes and ordinances made, &c. touching the premises; "as also to inquire by the oaths of the honest and lawful men," &c., "through whose default the said hurts and damages have happened, and who hath or holdeth any lands or tenements, or common pasture, or profit of fishing, or hath or may have any hurt, loss, or disadvantage by any manner of means in the said places, as well near to the said dangers, lets, and impediments, as inhabiting or dwelling thereabouts, by the said walls, ditches, banks, gutters, gotes, sewers, trenches, and other the said impediments and annoyances; and all those persons, and every of them, to tax, assess, charge, distrain, and punish, as well within the metes, limits, and bounds of old time accustomed, or otherwise, or elsewhere within our realm of England, after the quantity of their lands, and tenements, and rents, by the number of acres and perches, after the rate of every person's portion, tenure, or profit, or after the quantity of their common of pasture, or profit of fishing, or other commodities there, by such ways and means, and in such manner," as to the commissioners, or six of them, shall seem most convenient.

from the commissioners of sewers. These commissioners are paid for the direct benefit by those who reap it, and are not to be paid again by those who profit by their works indirectly. [WILLIAMS, J. Do you make any distinction, as to this point, between premises occupied as Somerset House is, and those of a private person?] None is intended: all the cases which have been cited *259] on the subject of benefit derived (except *Netherton v. Ward*, 3 B. & Ald. 21,) relative to premises of the latter kind.

A further question is, whether there be an occupation of these premises, in respect of which any person can be rated. The assessment to the poor-rate proves nothing; and it is not even stated that the rate has ever been paid. The case, as to the occupation, is like *Holford v. Copeland*, 3 B. & P. 129, where the Masters in Chancery were held not liable to paying rate as occupiers of the premises used by them as offices; and the authorities on the subject were there fully cited. If there is no occupier in the present case, the King, as owner may be rated under stat. 23 H. 8, c. 5, s. 9, and the rate levied, if necessary, by distress, under stat. 3 & 4 Ed. 6, c. 8, s. 1. Here the charge has been laid by persons having no relation to the estate, either as owners or their representatives, as tenants, or as occupiers: they are merely persons frequenting an office. The messenger is not the servant of the Commissioners of the Audit Office, but of the Crown; and, if this were otherwise, his occupation would take its character from that of the commissioners, and would furnish no additional ground for holding them liable.

Blackburne contra. The facts of the case sufficiently shew that the plaintiff is an occupier. *Netherton v. Ward*, 3 B. & Ald. 21, decides that, where premises belonging to the Crown are the subject of sewers' rate, a person occupying them, though not paying rent, is liable; and then, by stat. 52 G. 3, c. xlviii. s. 7, it is to be ascertained from the poor's rate who are liable to be *260] assessed as so occupying. *[LITLEDAL, J. The poor's rate is to be looked at to ascertain the proportion of assessment, but it does not follow that that reference should have the effect of introducing any new person as subject to the rate.] The land being liable to rate, the goods were liable by being found upon it. *Saffery v. Elgood*, 1 A. & E. 191, shews this; for the sewers' rate is a charge upon the land, and, so far, in the nature of a rent-charge. But the real question is (and it is one rather of fact than of law), whether the east wing of Somerset House derives, or is like to derive, a benefit from the works of the Commissioners of sewers. It is certainly not sufficient to shew that the premises charged are within the jurisdiction of the Commissioners of sewers; this is established by *Masters v. Scroggs*, 3 M. & S. 447, and *Stafford v. Hamston*, 2 B. & B. 691: it must appear, as the Court said in the former case, that the party receives, or is likely to receive, a benefit. But as to the case put on the other side, of premises in an elevated situation and requiring no drainage, why should the occupier of such premises be exempt from rate, if by means of the drainage he is enabled the better to come at his land, and make it beneficial? It has been suggested that the commissioners of sewers may be twice paid, as if this were the case of men executing the work and deriving a profit from it; but the Commissioners are only persons laying out the public money for public works; the question is, whether the east wing of Somerset House, receiving a benefit from those works, shall pay for such benefit: if that part of Somerset House be rated for the benefit so derived, some other place will be rated less. *261] The Court cannot enter into the question how much or how little advantage is received, if the place rated receives any. Nor does it matter whether the benefit be direct or indirect, nor whether it arise from draining the place itself, or from draining the adjacent land, and making the whole more accessible. The plaintiff is not assessed as a person walking along the Strand, but as one occupying land which gains an advantage from the sewers. And that an advantage does accrue, is admitted by the case itself; for it states, "that the buildings of Somerset House derive no immediate benefit from the said

drain or sewer,"—"except the general benefit and advantage of being accessible, and of its approaches and neighbouring public ways being properly drained and cleansed." Besides if there were not a great sewer under Somerset House, like that described in the case, the water which runs through that sewer would go into the drains under the east wing. [LITTLEDALE, J. The plaintiff means that the sewage under the east wing is sufficient for the buildings there, and that they do not want the benefit of the great sewer.]

Rogers, in reply. In *Netherton v. Ward*, 3 B. & Ald. 21, an occupation in fact was expressly stated in the case, and was particularly relied upon by *Holroyd, J.* in giving judgment. The object of stat. 52 G. 3, c. xlviii. is the ascertaining, not who are to be considered occupiers, but in what proportions they shall be rated. It is said that the distress was at all events legal, because the goods were found upon the lands charged; but assuming the fact to be so, which is not stated, the question submitted to the Court in this case is, not whether *the distress would be legal if the assessment were good, but whether the assessment was laid on the right person. And it is not cor- [*262
rect to say that the charge is laid upon the land; by the statute of sewers it is imposed on the person in respect of the land. The case expressly finds that no immediate benefit is derived from the great sewer to the building in question. If the charge is to be in proportion to the advantage received, it is impossible to fix any proportion in which the charge should be assessed for the indirect and indefinite advantage here insisted upon.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.

This was an action of trespass for the purpose of trying the validity of a sewers' rate imposed on the plaintiff as occupier of the Audit Office in the eastern wing of Somerset House. The plaintiff contended that such rate was improperly imposed on him as the occupier, even if it could be imposed at all in respect of that building: but that also he denied.

A case was agreed upon, stating the particulars from which the plaintiff's occupation was inferred by the defendant: on the effect of them we do not find it necessary to give any opinion, because the 52 G. 3, c. xlviii. gives the power to rate those persons as occupiers who are de facto assessed at the poor's rate, and the plaintiff filling the latter character with respect to the premises, is clothed with the former by the statute referred to. We are, therefore, to decide whether the occupier of the Audit Office is liable to be rated to the sewers in respect of that occupation.

*The facts on this point were these: that under Somerset House there are drains and sewers originally made by and still under the manage- [*263
ment and control of the Board of Works, at the public expense; that the drains and sewers under the eastern wing communicate with these and form part thereof; that they are west of London, and fall into the Thames: that there is a common sewer running through the square of Somerset House and under Somerset House, which was made and is repaired by the commissioners of sewers for Westminster, but the drains and sewers under the eastern wing do not communicate therewith, nor do the buildings of Somerset House derive any immediate benefit therefrom, except the general benefit and advantage of being accessible, and of its approaches and neighbouring public ways being properly drained and cleansed.

Though numerous cases were cited in the argument, from *Keighley's Case*, 10 Rep. 142, b., to *Rex v. The Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517, the doctrine laid down in them all is uniform and undisputed, as applicable to the present question. It rests on the principle, that every one whose property derives benefit from the works of the Commissioners may be assessed to the rates they impose. The benefit is not required to be immediate, nor do the cases, or the commission itself, or the statutes, say anything of the nature or amount of the benefit. Possibly that benefit may be so extremely small, that a jury would not have found the fact stated in the case.

But, on the other hand, the kind of benefit may be of high value, as if a house were inaccessible, because surrounded by marshes, and the works of sewage *had made them hard and passable. The case does not even state that the amount of rate does not bear a just proportion to the extent of benefit. This may possibly be immaterial: for if the Commissioners have jurisdiction, this Court would not inquire whether they had correctly exercised their judgment, in an action of trespass for levying the rate. But as the jurisdiction results from the fact of benefit being derived, and the case expressly states that some benefit was derived, we think ourselves bound by the finding to say that the defendant had authority to levy the rate, and is consequently entitled to our judgment. Judgment for the defendant.

*265] *DOE on the several Demises of JOSEPH LANE LUCAS SHELTON, THOMAS WOOD ROBERTS, and THOMAS WOOD ROBERTS, WILLIAM ROBERTS, and JOHN ROBERTS, *against* BROWN SHELTON. *Monday, May 11.*

1. A verdict was taken for plaintiff in ejectment, subject to a special case, which stated that it was "the custom in the manor" in which the premises in question, being copyhold lands, were, that where a copyholder, being a feme covert, surrendered, if the husband consented to the surrender, such consent should be expressed in the surrender and admission; and that without his consent the surrender was inoperative. Quære, whether upon this it must be understood that, if the husband were shewn to have consented in fact, but such consent was not expressed in the surrender, the surrender was inoperative.
2. The custom so understood would not be bad in law.
3. The court refused to amend the case, at the instance of plaintiff alone, by the judge's notes, so as to limit it to a mere statement that the common practice was to enter the consent in the surrender and admission.
4. Supposing such an entry not indispensable, the court, upon a case stated, will not, in default of evidence, assume the fact of the consent, in order, to prevent the surrender from being invalidated, as against a party disputing the efficacy of the surrender and claiming as heir to the wife.
5. Nor will the court so assume, upon proof that the husband had joined in a previous surrender of the copyholds to the use of a stranger for the wife's life, and was not entitled to curtesy, that he was present in the court at which the surrender in question took place; that the entry of the surrender in the court-roll was incomplete, but contained no entry of the consent; and that the surrenderee was admitted, but did not take possession.
6. And semble, that a jury ought not so to assume, on these facts alone.
7. The objection to the want of consent, or to its not being expressed in the surrender and admission, may be taken by a party claiming as heir to the wife.
8. The statement, in the case, of the necessity of the husband's consent, cannot be understood to apply to cases only where he has an interest at the time of the surrender.
9. A surrender expressed that S. "came by W. H. and R. J. his assignees duly appointed." Held to be no proof, against a party disputing the surrender, that S. had been a bankrupt, nor of W. H. and R. J. having been authorised by him to appear.
10. A surrender so expressed does not satisfy a custom, that a surrender may be made by attorney duly appointed, and that, when a surrender is so made, it is to be mentioned in the surrender that it was made by attorney duly appointed.
11. By a deed of January, 1796, reciting S.'s bankruptcy, and the conveyance under it of land, belonging to S., to T. W., T. W. conveyed to B. for the purpose of making a tenant to the præcipe. B. was no party to this deed; but he, in February, 1796, by deed not referring expressly to the bankruptcy or the previous deed, conveyed the lands to a tenant to the præcipe, and declared the uses of the recovery to be to his mother for life, remainder to himself in fee: the parties to the intended recovery, named in this deed, were the same as those mentioned in the preceding: Held, that B., in a suit respecting other land, was not estopped from disputing S.'s bankruptcy.
13. If the husband of a woman who, in 1796, has a reversionary estate tail in copyhold lands in which there is no curtesy, be proved to have been a bankrupt in 1796, and the wife's estate tail afterwards vest in possession, and she surrender it in 1803, this is not

prima facie proof, as against the son of the two, claiming under the entail, that the husband had no interest at the time of the surrender.

13. Semble, that it would be such prima facie as proof against the husband.

On the trial of this ejectment, at the Herefordshire Summer assizes, 1833, before Tindal, C. J., the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case :—

*The premises in question are copyhold of inheritance of the manor of Bromyard and Bromyard Foreign, in the county of Hereford. On [266 the 11th of April, 1749, Anthony Kerry, being seized of the premises in fee, according to the custom of the said manor, duly surrendered them to the use of the said Anthony Kerry, James Lane, and Elizabeth his wife (the daughter of the said Anthony Kerry,) successively, and after their deceases to the heir or heirs of the body of the said Elizabeth by James, remainder over. Anthony Kerry was, on the same day, duly admitted tenant of the same premises. Elizabeth, wife of the said James Lane, died in 1759, leaving issue by the said James Lane two daughters, Mary and Elizabeth. By the custom of the manor there is no coparcenary, but the eldest daughter is the sole heir; and, therefore, on the death of Elizabeth the mother in 1759, the estate tail vested in Mary the eldest daughter. She survived Anthony Kerry, who died in 1770, and also James Lane, who died in January, 1803. In 1769, Mary Lane was married to Brown Shelton the elder, by whom she had issue four children; Brown Shelton the younger, the defendant; James Lane Shelton, the second son; a daughter named Mary Maria; and Joseph Shelton, the youngest son, who was the father of Joseph Lane Lucas Shelton, one of the lessors of the plaintiff.

The lessors of the plaintiff put in a deed of January 26th, 1796, purporting to be between Thomas Wood, of the first part; Richard Jones, of the second part; James Lane of the third part; Mary, the wife of Brown Shelton the elder, of the fourth part; William Hyde, of the fifth part; and Brown Shelton, the younger, of the sixth part: whereby it was recited that by a settlement *in 1773, made soon after the marriage of Brown Shelton the elder and Mary his wife, and also under and by virtue of divers proceed- [267 ings, conveyances, and assurances in the law, had, made, done, and executed by virtue of and under a commission of bankrupt bearing date the 8th of January, 1781, awarded and issued against the said Brown Shelton the elder, by the description, &c., a certain estate at Eastham had been conveyed to the said Thomas Wood and to Benjamin Taylor, deceased, and their heirs, during the life of Brown Shelton the elder, in trust, for the sole and separate use of Mary the wife of the said Brown Shelton, for her life, remainder to the said Mary for her life, remainder to their issue in tail male, with divers remainders over. And, after further reciting that it was intended that a common recovery should be suffered, wherein the said James Lane should be demandant, and Richard Barneby should be tenant, and Brown Shelton the younger should be vouchee, the indenture then conveyed the said freehold premises to Brown Shelton the younger, for the purpose of vesting the freehold in him, so as to enable him to convey the same to Barneby, in order to make him a good tenant to the præcipe. This deed was executed by all the above-mentioned parties, except Brown Shelton the younger.

By an indenture of release, dated the 9th February, 1796, between Brown Shelton the younger, of the first part; Richard Barneby, of the second part; James Lane, of the third part; Mary, wife of Brown Shelton the elder, of the fourth part; and Richard Jones, of the fifth part; it was witnessed that, for barring of all estates tail and remainders over in the hereditaments therein granted, the said Brown Shelton conveyed the *said premises at Eastham [268 unto Richard Barneby, with the intent to make him a good tenant of the freehold, in order for suffering a common recovery; and by the said deed it was declared, that James Lane should be defendant, Richard Barneby, tenant, and Brown Shelton the younger, vouchee. The uses of the said recovery were declared to be for the sole and separate use of Mary, the wife of Brown Shelton

the elder, for her life, with remainder to Brown Shelton the younger, in fee. This deed was executed by the defendant and Richard Barneby only.

These deeds were offered in evidence to prove that an estate at Eastham had been settled upon the issue of the marriage, and also that Brown Shelton the elder was declared a bankrupt in January, 1781: but their admissibility was disputed on the part of the defendant, and the Chief Justice received them in evidence, subject to the opinion of this Court.

The lessors of the plaintiff put in a copy of court roll, dated 22d April, 1782, stating that "at that court came Brown Shelton, by William Hyde and Richard Jones, his assignees, duly appointed, and Mary, wife of the said Brown Shelton, customary tenants of the said manor (the said Mary having been first privately examined apart from her said husband by the steward, and freely consenting), and surrendered into the hands of the lord of the said manor, according to the custom of the said manor," the premises in question, expectant on the death of James Lane (who was stated to have a life interest in the said premises), to the use and behoof of Thomas Wood, and his heir or heirs, during the joint lives of the said Brown Shelton, and Mary his wife, which said Mary *269] was stated therein to have a life *interest in the premises if she survived the said James Lane: and the said Thomas Wood was admitted at the same court tenant under the surrender for the joint lives of Brown Shelton and his wife, expectant upon the death of the said James Lane.

It is the custom in the said manor, if the husband consents to a surrender, that such consent shall be expressed in the surrender and admission, and without his consent the surrender is wholly inoperative. And, by the said custom, the husband takes no interest after his wife's decease, as tenant by the curtesy. By the custom of the manor a surrender may be made by attorney duly appointed; but, when it is so made, it is always mentioned in the surrender that it was made by the attorney duly appointed.

By indenture of release of 14th August, 1783, the release made between James Lane, the father of Mary Shelton, Brown Shelton's wife, Thomas Wood, of Collington, and Richard Jones and William Hyde, the said James Lane conveyed certain freehold estates to the said Richard Jones and William Hyde, in trust for himself during his life; and on his decease to pay to the said Mary, or permit her to receive, the rents and profits to her separate use for life; and, by the same indenture, after reciting that a commission of bankrupt had issued against Brown Shelton, and that his assignees had put up for sale by auction his copyhold premises, and that the said Thomas Wood had been the highest bidder thereat for the same, and was declared the purchaser, but had purchased the same with the money of James Lane, and in trust for him, the said Thomas Wood covenanted to stand seised of the said copyhold premises, after the decease of *270] the said James Lane, during *the joint lives of the said Brown Shelton the elder, and Mary his wife, upon trust to pay to the said Mary, or permit her and her assigns (the same to be at her election) to receive all the clear yearly rents, issues, and profits thereafter to arise or become payable for or in respect thereof, for her sole and separate use, to the intent that the same might be subject to her own sole disposal, independent of the said Brown Shelton the elder, her said husband, in like manner as was thereinbefore declared touching the annual rents and profits of the said freehold premises. Brown Shelton, the father, was not, neither was the defendant, a party to the last deed.

By the custom of this manor, a tenant in tail may bar the entail by surrender only, without fine or recovery; and James Lane, the surviving tenant for life under the surrender of 1749, having died in January, 1803, Mary Shelton, together with the said Thomas Wood, attended at a court held on the 3d of May, 1803. The lessors of the plaintiff put in an alleged copy of the court-roll, part of which was in the hand-writing of William Griffiths, the then steward, and was also signed by him, whereby it was stated as follows:—

"Manor of Bromyard and Bromyard Foreign.

"At a Court Baron of Folliott, by divine permission, Lord Bishop of Hereford, there held the third day of May, in the year of our Lord 1803, before William Griffiths, gentleman, steward there:

"At this court came Mary Shelton, the wife of Brown Shelton, and Thomas Wood, two of the customary tenants of the said manor (the said Mary having been privately examined by the steward aforesaid, and freely consenting), and surrendered into the hands of the lord of the *said manor, by the hands and acceptance of the said steward, according to the custom of the said [*271 manor, two messuages," &c. (setting out the premises) "lying in the village of Norton, within the manor aforesaid, and all their and each of their estate, right, and interest therein, to the use of the said Thomas Wood, his heir or heirs forever, according to the custom of the said manor, by the rent, heriot, and all other services therefore due and of right accustomed; but upon the trusts and for the purposes following," (setting out the trusts). "And the said Thomas Wood, being present in court, prayed to be admitted to all and singular the said premises so surrendered to his use as aforesaid, upon and subject to the trusts hereinbefore declared with respect to the same; to whom the lord of the said manor, by his said steward, granted the same messuages," &c., accordingly, habendum to the said Thomas Wood, his heir or heirs for ever, under and subject to the trusts aforesaid, by the rent, &c.; "and he gives to the lord for a fine 5*l.* 5*s.*, and is admitted tenant thereof, and had seisin by the rod, and his fealty is respited.

"WILLIAM GRIFFITHS, Steward."

The court at which such surrender and admission were made, was held at some inn at Bromyard. It was a general and not a special court; it lasted many hours, and a great number of persons attended it; sometimes the rooms were quite full. The jury said that Brown Shelton the elder was present at that court. The original court roll was produced, which contains the following entry, and no other, applicable to the last mentioned surrender:—"At this court came Mary Shelton, the wife of Brown Shelton." There is annexed to that *entry the following, which was not made at the time, but after the year [*272 1825. "See minute book proceedings of a court held for this manor not entered on the roll." The minute book of the steward, with reference to the proceedings at the court held on the 3d of May, 1803, contained the following entry:—"Manor of Bromyard and Bromyard Foreign. At a court there held the 2d of May, 1803, before William Griffiths, steward" (then follow the names of the jury and the homage). "At this court came Mary Shelton, wife of Brown Shelton, the said Mary having been first privately examined by the steward aforesaid, and freely consenting; and Thomas Wood, customary tenants of this manor; and surrendered all those two messuages as in Price's draft, surrender," &c.

In the margin of the same book was an entry of the steward's charges (set out in the case), including a private examination.(a)

Thomas Wood was admitted tenant of the premises in fee the same day, and has since died, leaving Thomas Wood Roberts, one of the lessors of the plaintiff,

	£.	s.	d.
(a) Heriots	10	10	0
Bailiff and steward	1	6	8
Fine	5	5	0
Copy	2	8	6
Extra length	0	6	8
Private examination	0	6	8
Perusing opinion	0	13	4
Bailiff	0	2	6
Jury and crier	0	2	0
Received	£21	1	4

his heir at law. Mary Shelton had lived separate from her husband many years before the death of James Lane, *and never lived with him again. She *273] lived on the copyhold property until her death in 1821.

The questions for the opinion of the court were, first, whether the deeds of the 26th of January, 1796, and the 9th of February, 1796, were admissible to prove the bankruptcy of Brown Shelton the elder, and the settlement of the Eastham estate: and, secondly, whether the lessors of the plaintiff were entitled to recover upon the facts of the case. The case was argued in Hilary term last (January 20th). (a)

Sir W. W. Follett, Solicitor-General, for the plaintiff. The husband, by his assignees, was a party to the surrender of 1782, and there is presumptive proof of his consent to that of 1803. Neither the custom, nor the ordinary copyhold law, requires that he should personally be a party to the surrender, so that he consents. [Lord DENMAN, C. J. But it is found that his consent must be expressed in the surrender and admission.] The "custom in the manor" is that it should be so expressed; but that does not mean that such is the "custom of the manor;" it means only that this is usual. If the expression, as it now stands, necessarily import the custom of the manor, the case should be amended by the judge's notes. The plaintiff is in possession of the verdict, subject to the case. A special case, as was said by Abbott, C. J. in *Van Wart v. Wolley, Ry. & Moo. 5*, contains "the admissions of the parties to the facts therein stated," and this is on the same footing with pleadings, which contain the statement of the question agreed upon by the parties. It should, *therefore, *274] be amendable, as pleadings are. [Lord DENMAN, C. J. Suppose you prevailed upon the judge to amend, how would the amended case bind the other party without his consent? We cannot amend.] The meaning of the case cannot be taken to be, that the consent of the husband, in every instance, must be expressed in the surrender, in order to make it binding. Otherwise it would follow that, if the case expressly found the consent, still the surrender could not bind, unless the consent were expressed on the face of it; but a custom to that extent could not be supported. Now here, as to the surrender of 1782, the husband is a party, and consenting, if his assignees represent him. That depends upon the evidence of his bankruptcy, which is completely made out by the deeds of January and February, 1796. It will be argued that the defendant was no party to the deed of January; but he is a party to that of February, which conveys an interest to himself, and which, as it rests entirely upon the deed of January, must be considered as forming one conveyance with it. The surrender of 1782 is therefore binding. Then the wife, having a reversionary interest, makes the surrender in 1803. The husband is not, indeed, stated to be a party to that surrender; but he is present in court: and, supposing this by itself not to be evidence of his consent, it is ground for presuming his consent, if the consent be indispensable. Here too there is an admission, following up the surrender; and this, in default of negative evidence, shews that all was done which was requisite to perfect the conveyance. In *Scamon v. Maw*, 3 Bing. 378, though there was no special custom, a surrender by the wife alone to the use of her *husband was considered to be good, his assent being presumed *275] from his being present in court, and being afterwards admitted. The absence of an entry of the husband's consent on the rolls, cannot be insisted upon with respect to the surrender of 1803, since the court rolls are not complete for that time. It cannot, therefore, be assumed that he was not a party.

But, further, the want of the husband's consent cannot be insisted upon by the defendant, who claims as heir to the wife. The wife herself could not have taken the objection; it is for the husband alone, or those claiming under him. (b) Again, though, independently of any special custom, a surrender by consent of

(a) Before Lord Denman, C. J., Littledale, and Williams, Js.

(b) See *Scriven on Copyholds*, part I. ch. 4, vol. I. p. 162, (3d edit.)

the husband will pass an estate as against both husband and wife, and not without such consent, yet the consent of the husband is necessary only where he has some interest in the property, and only in consequence of such interest. In Watkins on Copyholds, p. 68, (vol. I. chap. 3, p. 89, 4th edit.) it is said, "As the husband becomes, on marriage, entitled to the profits of the wife's copyholds, during her life, and often by custom, during his own, it would be unreasonable that the wife should be suffered to deprive him of them by force of a particular custom, without his consent: it has therefore been determined, that a custom for a feme covert to surrender without such consent cannot be supported." For this Stevens dem. *Wise v. Tyrrell*, 2 Wils. 1, is cited. But it is added, "But where a copyhold is settled on a wife for her own separate use, it does not fall within the reasons of the last case, and therefore she may surrender it without her husband. And where the wife is not entitled to her separate use, yet a surrender *of the copyhold by her alone, with the consent of her husband, would be good. And if the husband be present at such a surrender, it [*276 will be sufficient proof of his assent. So, if the husband and wife agree to live separate, and the husband thereupon covenants that the wife shall therefore enjoy to her own use her real estates, &c., after such covenant her surrender shall be taken to be with his assent; and by custom such a surrender is good, as appears in *Moore*, 123" (Anonymous Case, pl. 268.) Here the husband had been a bankrupt; and afterwards, in 1782, had given up whatever interest he had to Wood, during the joint lives of himself and his wife; and, after her death, by the custom, he was not entitled to courtesy. In *Compton v. Collinson*, 1 H. Bl. 384, (see 2 Br. Ca. Ch. 377; and Mr. Eden's note (1)), the husband was separated by deed from his wife, and covenanted that she should enjoy her estates to her own use, and that he would join her in levying a fine, or suffering a recovery, and limiting to such uses as she should appoint; and it was held that she might, without a special custom, surrender without his consent: and Lord Loughborough illustrated the case by the law of fines, saying "it has been settled ever since the case in the 17 Ed. 3, (a) that if a fine be levied by a feme covert without her husband, it shall bind her and her heirs, if it be not avoided by the husband." *Compton v. Collinson*, (1 H. Bl. 384, see 2 Br. Ca. Ch. 377; and Mr. Eden's note (1)), has been questioned as to some part of the grounds of decision; but the principle assumed in it, that the husband's assent is necessary only by virtue of his interest, has not been shaken. The want of interest, too, is also an additional reason for presuming his consent, if necessary. The *custom here, of expressing the consent [*277 of the husband on the surrender, can be applicable only to cases where the consent is required by the ordinary copyhold law: if more was meant, the case should have expressed it.

Maule, contra. The custom is expressly stated to be that the consent of the husband must be expressed in the surrender and admission; and nothing has been shown which renders such a custom bad. Indeed, the points which have been raised, as to presuming the consent, sufficiently shew that such a custom is convenient and reasonable, as it will prevent estates from being divested by matter not in writing, or by vague recollections, and presumptions of fact. The surrender of 1808 is invalid for want of the husband's consent, expressed on the surrender. It cannot be said that the court rolls are not extant: they are extant, and not defaced; they are however incomplete, so far as relates to any entry of the husband's consent, and the minutes of the steward do not aid this. Even the presence of the husband at the surrender does not appear; but only that, at some part of the time during which the court was held, he was there. Then it is argued that no consent at all is necessary, unless the husband be interested. This in reality amounts to saying that a wife may bind herself in

(a) Yearbook, Mich. 17 Ed. 3, p. 52, pl. 32; p. 78, pl. 117. Lib. Assis. Ann. 17. p. 51. pl. 17.

in every case where the husband has no interest; as, for instance, that she may convey a remainder expectant upon the death of her husband,—a proposition clearly untenable. The restriction upon the acts of a married woman belongs in reality, not to the law of property, but to the marital law: the husband is to govern the wife's discretion. Besides, the issue by the father *is interested. Watkins certainly lays down a principle similar to that contended for, as to the ordinary copyhold law. But here the custom is express and general. Besides, if a custom be not against reason, it is not to be restrained to that which may be considered to be the reason of its origin; for customs often extend beyond the principle in which they originate. With respect to *Compton v. Collinson*, 1 H. Bl. 334, its authority is questionable, as appears by Mr. Eden's note on the case, in Bro. Ch. Ca. (2 Br. Ca. Ch. 377, note (1), and from *Scriven on Copyholds*, Part I., ch., 4, (vol. i., p. 160, 3rd edit.), citing *Bramhall v. Hall*, Amb. 467. There too the husband had expressly parted with the power over the wife's estate. And the wife surrendered, in that case, as a feme sole: but here she is named as the wife of Brown Shelton. The analogy of a fine is very questionable. The effect of a fine is derived from statute: and it may be asked at what period of the law the analogy is to commence? Whether at the statute *De finibus levatus*, (27 Ed. 1, st. 1, c. 1,) or that of 82 H. 8, c. 36? No point of time, in the progress of the law of fines, can be fixed, at which a surrender of a copyhold by a married woman, and a fine levied by her, can be referred to the same principle. The suggestion, that the consent of the husband may be presumed from the admission having taken effect, cannot be supported. Wood was copyholder up to the time of the surrender, and was admitted on the surrender, but does not appear to have taken possession: and the wife resided on the premises till her death; so that no change took place.

*279] Then it is argued, that the husband's consent may be *presumed from his having no interest. This is no ground of presumption. And, moreover, the assumption that he had no interest is founded on the evidence of the bankruptcy, which rests only on the deeds of January and February, 1796. The first only of these mentions the bankruptcy, and the defendant is no party to that. He does execute the second; that does not make the first evidence against him: the second deed does not refer to the first, nor in any way connect the defendant with it, or with the facts recited in it. And even if it let in the evidence of the first, that would come to no more than an admission by the defendant, that a commission of bankruptcy had been awarded against his father: there would be no admission of the trading, act of bankruptcy, and other essentials to the title of the assignees. Parties disputing a bankruptcy frequently admit the commission.

Further, the consent of the assignees to the deed of 1782, is of no effect: the custom requires a special consent by attorney. The authority of an attorney is revocable by the party constituting him; that of assignees extends to what the bankrupt might not consent to. The deed of 1782 is therefore wholly inoperative, and so is the surrender 1803. That being so, there is no surrender; and the property could pass only by surrender, otherwise the lord's rights would be prejudiced.

Sir W. W. Follett, Solicitor-General, in reply. The defendant professes to exercise a dominion over the property in the deed of February, 1796; and, that being so, he admits all that was requisite to pass the title to him; therefore, not *280] the commission merely, but all the essentials *of the bankruptcy are recognized by him. The concurrence of the assignees in the surrender shows the same facts.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was an action of ejectment, brought on the demise of (amongst others) Thomas Wood Roberts, heir at law of Thomas Wood, for certain copyhold tenements of the manor of Bromyard and Bromyard Foreign, to which Thomas Wood had been admitted, on a surrender from Mary the wife of Brown Shelton

in 1803. A verdict was taken for the plaintiff (whose title depended on the validity of that surrender), subject to the opinion of this Court on the following state of facts.

(His lordship then recapitulated the facts of the case.)

It does not appear, in the case, that T. Wood had ever taken possession of the premises surrendered to him, nor in what manner or when the defendant had obtained such possession. His mother died in 1821.

Various arguments were urged on behalf of the plaintiff to show that the surrender might be valid, though the husband's consent was not expressed in it. The terms in which the custom is set forth were analysed to prove that, as the nullity arose from the want of consent, not from the want of its being expressed, parol proof of the consent might be received, and appeared on the case to have been given. But, supposing this refined construction to prevail, the fact of consent is not stated in the case. Circumstances are indeed detailed from which a jury might be called upon to *infer that fact, and liberty is given to the Court to make any inference that a jury ought to have drawn. We must, [*281 however, decline this office: we cannot undertake to say whether a jury ought or ought not to have drawn that inference from the facts of the case: we rather think the contrary; more particularly where the party admitted tenant by the steward does not appear to have at any time taken possession under his admissions.

But we are far from acquiescing in the proposition asserted at the bar, that a custom requiring the expression of consent on the face of the surrender would be void in law. There seems to be good reason for requiring the best evidence of that which is made essential to the validity of the act done, and that that evidence should accompany the act itself.

We were also told, that the law itself would presume that the custom was complied with to prevent the surrender from being invalidated. Such presumption possibly might be made by way of estoppel against one claiming under the surrender, but surely not against him who denies its efficacy. Besides, when the nature of this custom is considered, proof that no consent was formally expressed must be taken as strong evidence that none was given. It really appears to me that the law might as well presume a seal, where the form of a bond was produced and no seal appeared.

The plaintiff's main reliance was, however, placed on the necessity of restricting the custom to those cases where the husband has a personal interest in the wife's estate, which is said not to exist in him under the circumstances. For as, by the custom of the manor, he does not become tenant by the curtesy, and as in this *case he is said to have been divested, at the time of the surrender, of all interest during his wife's life, it is argued, that there was [*282 nothing in him on which his consent could have operated, and, therefore, the custom could not apply to a person in his situation.

Whether a Court could be justified in engrafting on a positive custom an implied exception, having reference to the principle in which it may believe the custom to have originated, seems to be a very questionable point; but it is one which we are not here required to determine. The custom exacting the husband's consent to an alienation of property by the wife, is found to be general, and must have universal operation, unless we clearly saw that, carried beyond the line of restriction drawn in the argument of the plaintiff, it would become unreasonable and absurd. But we find no such ground for cutting down this custom, which may have been founded on the desire to protect, not only the husband's interest, but that of the wife herself, and of her family, by constituting her husband and the father of their common offspring the guardian of both.

But, even if the custom could be so limited, the fact of the husband being stripped of all interest in her property during her life, is neither stated in the case, nor to be collected from the facts appearing. Of all the circumstances

put forward for this purpose, not one amount to satisfactory proof. The surrender in 1782, said to be made by Brown Shelton, by persons calling themselves his "assignees duly appointed," makes no mention of the bankruptcy. It cannot bind him as the act of his attorney, not only on account of the custom for stating in the surrender the due appointment of such attorney, but for want
 *283] of all proof of authority from him. *The fact of the surrender might, however, be established against the defendant quoad the bankrupt's interest if the bankruptcy and the assigneeship should be proved against him by other evidence. Recourse is now had to the two deeds of 1796: the former of which, reciting a sale to have taken place under a commission of bankruptcy duly awarded and issued against Brown Shelton, conveys to the defendant lands sold thereunder by the assignees; by the latter, the defendant, acting upon that conveyance, executes a settlement of them upon himself after his mother's death. The former deed, however, which recites the bankruptcy, &c. is not executed by the defendant; and that which is, is silent respecting the bankruptcy. There is, consequently, no direct estoppel. He is said to have recognized and adopted the whole of the former deed, by thus executing the latter. But it is true, as a general proposition, that a party so claiming adopts the statement of facts in an anterior deed, which go to make up his title? We are aware of no authority for such a doctrine. It is also remarkable, that the defendant is not stated to have had any enjoyment of the property, the subject-matter of these deeds, though possibly that would have made no difference. But it is material to add that, even if the bankruptcy, &c. had been regularly and strictly proved, so as to give validity to the surrender in 1782 of all the bankrupt's interest in his wife's estate, he may possibly have become a new man in 1803, when his wife surrendered the estate in fee then vested in her in possession by her father's death. If the bankrupt had been the party to the suit, the burthen of proving such a fact might have been cast upon him; but, I apprehend, the law makes
 *284] no presumption on the subject against this *defendant, who, though the bankrupt's son, does not claim under him.

Upon the whole, then, we think that the plaintiff has not succeeded in making out his title upon the facts brought before us, and that our judgment must be for the defendant. Judgment for the defendant.

The KING *against* The Lord of the Hundred of MILVERTON. *Monday, May 11th.*

On motion in Michaelmas term, 1834, (made more than a month after old Michaelmas-day,) for a mandamus to compel the lord of a hundred to hold a court leet forthwith, to appoint officers, the lord contended that he could hold it only in October; and it appeared that the court had, as far as was remembered, been held in every October until the October preceeding the application, when no court was held. It was not shewn whether the leet was by charter or prescription, nor did any party swear to his belief that the leet could be held only in October. The court, in the absence of such evidence, granted the mandamus, in Easter term, 1835, twenty-two days after Easter Sunday.

DUNDAS had obtained a rule in Michaelmas term last, 24th November, 1834, calling on the lord of the hundred or district of Milverton, and the steward for the time being of the court leet there, to shew cause why a mandamus should not issue, commanding them forthwith to hold a court leet for the said hundred or district, and to take all legal steps necessary for the purpose of choosing and appointing thereat high constables, constables and tything men, and all such other officers as ought by law to be chosen at such court, and to do and transact the other lawful business of the said court. The affidavits in support of the rule stated that, as long as the deponents could recollect, courts leet for the dis-

trict had been held in October, until October, 1834, when the present lord neglected to hold one; he had, however, held one since he had become lord, in October, 1833. It did not appear whether the leet existed by prescription or charter. The officers named in the rule had always been chosen at the court. The lord of the manor, and *his attorney, both made affidavits in opposition to the rule; but no deponent on either side stated that there was [*285 either prescription or charter confining the times for holding the leet to October. The lord had been applied to to hold the court, but he had taken no steps in consequence of the application; neither did it appear that he had expressly refused to hold the court.

Sir *W. W. Follett* now shewed cause. The application is for a mandamus to compel the holding of the court "forthwith;" but such a mandamus ought not to be granted, unless it appear that the holding of the court will be effectual. It will not be so unless held at the proper time. Now the proper time appears to be in October. But, if the affidavits do not go far enough to shew a ground for presuming a charter or prescription by which the holding is limited to that month, then, by the equity of *Magna Charta*, (a) it should take place within a month after Easter, (b) or a month after Michaelmas; *Com. Dig. Leet (C)*; *Dakin's Case*, 2 Saund. 291 b; and see 2 Inst. 72; *Gryffyth v. Biddle*, Cro. Car. 275. Officers could not be legally appointed at a court irregularly held. The utmost that could be done would be to compel the holding of the court in October next; but, as the lord has not absolutely refused, that cannot be done in the present case. In a case respecting the Merchant Tailors' Company, this court held that a mandamus should not issue to the master and wardens to elect officers according to the charters, the proper time not having arrived, and the *court not knowing that the parties would not at that time proceed [*286 regularly. (c)

Sir *F. Pollock*, in support of the rule. Practically, the question is, whether this court leet is ever to be held at all; for, if the court will not grant the mandamus to hold at the proper time, before that time arrives, and if, after the time has past, the mandamus cannot be granted to hold at any other time, there are no means of enforcing the performance of the duty, and the objection would destroy the general power of this court to enforce the holding of courts leets by mandamus, which power is, however, proved by the authorities. (d) If the lord insist upon the limitation as to time, he should depose to the existence of such a limitation distinctly; otherwise, the court will at least put him to return it.

PER CURIAM (e) (stopping Sir *G. A. Lewin* on the same side.) We may at least say that it is doubtful whether any charter or prescription exist, limiting the time. Where neither the party, nor his attorney, swears to the belief of such a limitation, we cannot assume it. Great public inconvenience might accrue, if a mandamus were refused on such grounds.

Rule absolute. (f)

(a) 9 H. 3, c. 35, explained by st. 31 Ed. st. 1, c. 15. See 2 Inst. 71, (3).

(b) In 1835, Easter Sunday was the 19th of April.

(c) *Rex v. Attwood*, 4 B. & Ad. 484.

(d) See *R. v. Willis*, Andr. 279, and the argument there; S. C. 7 Mod. 261. *Rex v. Grantham*, 2 W. Bl. 716.

(e) Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

(f) The lord obeyed the mandamus, and made no return, and in a subsequent term a rule was obtained, under stat. 1 W. 4, c. 21, s. 6, calling on him to shew cause why he should not pay the costs of the mandamus and of that application, which rule, after cause shewn, was made absolute in Trinity term (May 26th) 1836.

*The KING against CLARK and AUSTEN. *Tuesday, May 12.*

A collector of the land-tax is not entitled, either under the provisions of stat. 38 G. 3, c. 5, s. 17, or under his general authority, to take a constable with him into the house of a person from whom he is demanding payment for the arrear of the land-tax. But if he has reasonable ground (from past or present circumstances) to apprehend violence from such person, he may call in constables to assist in keeping the peace, and such constables are justified in staying while the collector remains to be paid, as long as there is reason to expect violence; and, if the owner of the house use violence to remove them, he is indictable for assaulting a peace-officer in the execution of his duty.

THE defendants were indicted for assaulting Francis Grinder, a peace-officer, in the due execution of his duty. There was also a count for a common assault. On the trial before Gaselee, J., at the last Sussex assizes, the facts proved were these. Charles Tipper, a collector of land-tax, had applied to the defendant Clark, on the 28th of October, 1833, for 8*l.* 2*s.* 2*d.*, due from Clark for arrears of land-tax, which had been repeatedly demanded before. At the time of this application, Tipper was accompanied by a constable named John Collins. Clark, in answer to Tipper's application, said, "I suppose, if I do not pay it, you are going to distrain." Tipper replied that he probably should; to which Clark answered, "If you put your hand upon a thing, I will split your skull." Tipper said he had no fear of that. Clark then promised to send the money on the following Saturday, but did not do so. On the 29th of November following, Tipper went to Clark's house (which was an hotel,) and entered a room in it, with Collins, and again demanded the arrears. Tipper, on this occasion, took with him also, Grinder and a third constable, and desired the two last to remain outside of the house, and "to be on the alert, lest there should be a row." As soon as the demand was made, Clark quitted the room, and directly afterwards he was heard to fasten the house door. Upon this, Collins, by Tipper's order, unfastened the door, and brought in Grinder and the other constable. Clark *288] soon afterwards returned into the room *with bank notes in his hand, accompanied by ten or twelve men, among whom was the defendant Austen. Clark asked what Grinder did there; and Collins answered, that Grinder was there to aid and assist if required. Upon this, Clark said, "I will not pay the taxes till the thief-catcher has left the room." Grinder refused to depart, upon which Clark desired Austen to put him out, saying that he would be answerable. Austen then attempted to force Grinder out of the room, and in so doing committed the assault in question. Clark afterwards paid the taxes with the notes in his hand. For the defendants it was objected, that it did not appear that Grinder, at the time of the assault, was entitled to be in the house; that he was, therefore, not in the execution of his duty as peace-officer; and that the defendants were justified in removing him forcibly. The learned Judge left it to the jury to say, whether Tipper introduced Grinder for the purpose of keeping the peace, and desired them, if they thought he did so, to find a verdict of guilty. The jury found in the affirmative upon the question left, and convicted both the defendants. His lordship gave leave to move that this verdict should be set aside, and a verdict entered for the defendants. In the present term, April 23d, Andrews, Serjt. obtained a rule accordingly.

Platt and G. F. Jones now shewed cause. The seventeenth section of the Land Tax Act, 38 G. 3, c. 5, (a) authorises the collectors to call in the aid and

(a) Made perpetual by stat. 38 G. 3, c. 60, s. 1. Sect. 17, of 38 G. 3, c. 5, is as follows:—"And whereas doubts have arisen touching the authority of collectors to distrain for non-payment of the land-tax under the warrant usually granted by commissioners at the time of their appointments; be it further enacted and declared, That if any person shall refuse or neglect to pay any sum or sums of money whereat he or she shall be rated or assessed in England," &c., "by this act, upon demand, by the said collector or collectors of that place, according to the precepts or estreats to him or them delivered by

assistance of constables when any refusal or neglect *of payment shall have taken place; and that which had passed in the present case fully [*289 amounted to neglect and refusal. It cannot be fairly contended that the provisions of the act apply to cases only where the collector is going to break open houses or chests. Had that been intended, the provision would probably have been, that "it shall be lawful for the collector calling to his assistance the constables," &c., "to break open," &c.: but, instead of this, the provision as to calling in the assistance of the constables occurs at the end of the section, and must refer to all the steps directed to be taken throughout the section. Sect. 40, of the same *act provides for the case where the lands or houses are un-occupied, and no distress can be found on the premises, and there the [*290 "collectors, constables, or tithing men" are to distrain at any time after. There can be no reason for interpreting the provisions of these two sections differently. Independently of the statute, the mere fact of a breach of the peace authorised the collector to take with him a constable to preserve the peace; and the constable was bound to attend for that purpose. A constable might interfere if a breach of the peace was apprehended, though a private individual could not: and it is upon this principle that stat. 1 G. 4, c. 37, s. 1, authorises the appointment of special constables, not merely in cases of actual tumult, riot, or felony, but on reasonable apprehension thereof. At all events, the count for a common assault may be supported; for a collector is justified in taking an assistant with him, otherwise no collector could perform his duty.

Andrews, Serjt., and Long, in support of the rule. The statutory provision in stat. 38 G. 3, c. 5, s. 17, confines the power of the collector to take constables with him to the special cases provided for in that section, that is to say, when a house or chest is to be broken open. The sense of the previous enactments terminates before the words "and moreover," at which the provisions connected with the power to call in the constables commence. And, even if it were not so, it ought to have been shewn, on the part of the prosecutors, that the collector had a warrant to distrain. [PATTERSON, J. The act gives the collector a general power to distrain: a special warrant is not necessary.] *At [*291 any rate he ought to have had the book of assessments with him. [PATTERSON, J. That is unnecessary. COLERIDGE, J. Do you mean to contend that he must take the warrant with him whenever he does any act in his character of collector?] That would, perhaps, not be necessary in the case of a mere demand. Then, as to the charge at common law. There was no evidence of an intention to resist the enforcing of payment; on the contrary, Clark appears to have gone for the purpose of bringing the money, and actually to have brought it. No distress would have been justifiable at all under these circumstances: at any rate, Tipper had no right, before there had been resistance of any kind, to introduce the three constables into the house; one of whom was

the said commissioners; that then, and in all and every such case and cases, it shall and may be lawful to and for the said collectors, or any of them, and they are hereby authorised and required, to levy the sum assessed by distress," &c., "without any further authority from the commissioners for that purpose; and the goods and chattels" (here follows directions as to the disposal of the proceeds), "and the overplus coming by such sale (if any be) over and above the tax and charge of taking and keeping the said distress, to be immediately returned to the owners thereof; and moreover, that it shall be lawful to break open, in the day time, any house, and upon warrants under the hands and seals of any two or more of the said commissioners, any chest, trunk, box, or other thing, where any such goods are, calling to their assistance the constables, tything-men, or headboroughs within the counties, ridings, cities, towns, or places, where any refusal or neglect shall be made; which said officers are hereby required to be aiding and assisting in the premises, as they will answer the contrary at their perils," &c., and if any person assessed by this act as aforesaid, shall neglect or refuse to pay his assessment by the space of ten days after demand, or convey away any of his goods, whereby the sums assessed cannot be levied according to this act, any two or more of the commissioners are authorised, by warrant under their hands and seals, to commit such person or persons (except a peer or peeress of Great Britain) to the common gaol, until payment.

even brought in before the demand was made. And Clark had a right, at the time of his paying the money, to insist upon the constables quitting the house. If so, he was justified in removing them forcibly, and in calling in help to do so; and this is an answer to both counts.

LORD DENMAN, C. J. The question is, whether this was an assault, committed by the two defendants upon Grinder, in the execution of his duty as a peace-officer. It appears that Grinder was a constable, and that he was brought to the premises by the collector Tipper. Tipper, on the 28th of October, had been threatened by Clark, in the event of his distraining. On the 29th of November, Tipper went again to Clark's, accompanied, as he had been on the former occasion, by the constable Collins. No objection was made, either then or before, to Tipper's taking Collins with him. On the second occasion, he took *292] with him also Grinder and another *constable, but these two he did not introduce into the house at first. After he got in, Clark fastened the door, keeping him and Collins in the house. Now Clark had no right whatever to imprison them; and the collector had then good ground, from what had passed at that time and on the previous occasion, to apprehend violence. Other persons are then brought into the room by Clark. The jury find that Tipper introduced Grinder for the purpose of keeping the peace. But Clark declares that he will pay nothing while Grinder remains. Was not Grinder then in the execution of his duty? There can be no doubt that he was. Tipper was justified in calling him in; and had he gone out when Clark desired him to do so, he would have left the collector in a situation of danger. With respect to the statute, it appears to me to be inapplicable. But, as to the general law, Tipper was quite justified in having Grinder with him. Grinder did not come in before it was fit that he should do so; and he would not have been justified in remaining on the outside.

LITLEDALE, J. I am of the same opinion. (His lordship then recapitulated the facts.) It appears to me that this was an assault on the peace officers, and that Tipper was justified in bringing them in; there being a reasonable ground for apprehending violence if they remained absent.

PATTESON, J. I am of the same opinion. I think the first count is sustained. I do not, however, rest this upon the statute, for that is clearly applicable to cases only where a house, or a chest, is to be broken open. But the *293] presence of the constable was justified by Clark's *conduct. He threatens the collector, upon his intimating an intention to distrain, on the 28th of October: he then promises to send the money, and does not send it. Then, on the 29th of November, the collector applies again for the money. It does not appear that he intended to distrain. I think he had no right to take Collins with him, on either occasion; he was not justified in bringing any person into the house, besides himself, for the purpose of demanding the money. If he had any right to introduce another person, that must have been in consequence of his apprehending resistance. However, no objection is made to Collins's presence, on either occasion. Tipper takes with him also two other persons, who remain on the outside, to be ready to assist in case of violence. Probably nothing would have happened, if Clark had behaved quietly. But when Clark goes out of the room, it is found that he fastens the door. What could be supposed from this, but that Clark was designing some violence? If he went out merely for the money, why should he fasten the door? Then the other two constables are brought into the house for the purpose of preventing violence. So far, there was nothing wrong on their part; all was perfectly justifiable. Clark returns with ten or twelve men. It is true, that he then finds that Grinder and the other constable have been introduced in the mean time. He says, "turn them out, or I will not pay." What would have happened, if Grinder had then gone out, leaving Tipper? He staid to protect Tipper: and then Clark, instead of paying the money, or relying upon such legal remedy as he might have against the constable (supposing that he had no right to remain,)

assaults him. It seems to me that the constable was assaulted in the execution of his duty.

*COLEBRIDGE, J. I am quite of the same opinion. The question is, [*294 whether Grinder was lawfully in the house persisting to remain there: if he was, no doubt the first count is sustained. I am of opinion that he was, laying aside the statute, which does not apply to the facts. He was lawfully there, by virtue of his general authority. Tipper's character as collector was well known: he was authorized to distrain without a special warrant, and therefore he was not bound, in every individual case, to have a warrant with him. At any rate, no demand of the warrant was made. An intention to distrain had been expressed before: and Clark had then used improper language. Tipper went away; and during the intermediate time, no payment was made. Was he not afterwards justified in providing himself peaceably with the means of enforcing payment? On the 29th of November Collins enters with him, which is not objected to. When the business is mentioned, Clark goes out and bolts the door. During his absence, Tipper and Collins having heard the door bolted, Tipper sends Collins out for the other constables. It is not till Clark has bolted the door, an act which I consider unjustifiable, that Grinder and the other constables are introduced. Then Clark comes in with several men. A conversation follows about payment. The language which Clark used towards Grinder, shews that he knew his character as a constable. Grinder had a justifiable cause for entering the house, and his conduct there was peaceable. He finds that several men come into the room, and that he is called on, in strong language, to retire. If he had retired, it would have been a breach of duty; and, had violence ensued upon his retiring, he would have been highly responsible. *He was therefore justified in remaining; and the justification arises out [*295 of his special character as a peace officer.

Rule discharged.

In the Matter of Arbitration between **TRIBE, Gent., One, &c.** and **UPPERTON, Gent., One, &c.** *Tuesday, May 12.*

An agreement containing several stipulations was entered into, and partly carried into execution; after which one of the parties filed a bill in chancery, praying that it might be rescinded on certain terms; and the other party not answering, an injunction was granted, restraining him from proceeding to enforce the agreement until he should have answered, and the Court of Chancery should have made further order. The parties then referred the suit and all matters in difference between them to arbitration; and it was provided by the submission, that all proceedings in the suit should be stayed until the time for making the award, when, if none were made, either party might proceed; but that the injunction should have its full effect till dissolved.

The arbitrator awarded upon the matters of the agreement, and directed certain things to be done, the performance of which was to be taken in full satisfaction of all the matters in difference. He also awarded that each party should bear his own costs of the chancery suit; but he made no further order as to the suit, nor did he direct that the agreement should be rescinded; and, upon motion to set aside the award for these omissions, it became a question whether or not the arbitrator had fully decided upon all the matters of the agreement:

Held, that the award was bad, inasmuch as it neither ordered the agreement to be rescinded, nor clearly determined all the matters of it; and as it did not put an end to the chancery suit.

Orders of different judges, to the number of eleven, enlarging the time for making the above award, was made a rule of court by a single rule.

THE above named parties executed an agreement (March 30th, 1832), by which Tribe undertook to purchase of Upperton, and Upperton to give up to him, the business of a solicitor and conveyancer, theretofore carried on by Upperton, for 2100*l*. The agreement contained a number of stipulations relating

to the transfer of the business, of beneficial interests connected with it, and of premises which Upperton had occupied while carrying it on. Among other things it was agreed, that the business should be conducted for three years in the joint names of the parties, but for Tribe's sole benefit, by giving Upperton a bond of indemnity from all loss by reason of his name being used. And Upperton agreed *to give up to Tribe all the fields he then rented of the Duke of Norfolk and others at Steyning, with the consent of the Duke of Norfolk so far as he was concerned. Tribe took possession of business, papers, and offices; but, becoming dissatisfied with the bargain, he declined fulfilling his part of it, and proposed that the agreement should be rescinded: and he filed a bill in equity, alleging that he had been deceived as to the profits and advantages of the business, and praying that the agreement might be rescinded, declared void, and delivered up to be cancelled, he, Tribe, being willing to account for the profits of the business done by him, on receiving compensation for expenses and loss of time; and praying also that Upperton might be restrained by injunction from proceeding at law against Tribe upon the said agreement, or for recovering the said 2100*l*. Upperton did not put in his answer in time, and an injunction was thereupon granted, restraining him from all further proceedings at law against Tribe, touching any of the matters complained of in the bill, until he should have fully answered the said bill, and cleared his contempt, and the Court of Chancery should have made further order to the contrary.

The parties afterwards executed mutual bonds of submission to arbitration, whereby, after reciting that differences and disputes had arisen and were subsisting between them, which were the subject of a suit in Chancery then pending, for bringing to a speedy close the subject-matter of the said suit and all matters in difference between the said parties, it was agreed between them that the same should be referred to the hearing, arbitration and determination of two *arbitrators, and of an umpire in case of disagreement; that the *award should be binding and conclusive; and that all proceedings in the said suit should be stayed until the time thereafter mentioned for making the award; when, if no award should be made, either party should be at liberty to proceed in the said suit, or to prosecute any other action or suit, but so that the injunction obtained by Tribe should have its full effect until the same should be dissolved. The submission and award were to be made an order of the Court of Chancery or a rule of this Court. Power was given to the arbitrators or umpire to enlarge the time for making the award. The arbitrators met upon the reference, and did not agree; whereupon the case was referred to the umpire, who, after several enlargements of the time(a) by orders of different judges, made and published his award.

The award contained a number of directions as to the matters referred. It ordered, among other things, that Tribe should pay Upperton 1200*l*. only for the *business, and 151*l*. for fixtures, &c.; that the business should be carried on by Tribe in his own name, or, at his option, in those of Upperton and Tribe, for a certain time, and that Tribe should indemnify Upperton and save

(a) The enlargements were eleven in number, and had been made by different judges. *Friday, May 1st.*

In this term, and before the motion made for setting aside the award, as after mentioned, *Comyn* moved for one rule of court, making the eleven orders of enlargement a rule of court. He stated that the old practice was, for the Clerk of the Rules to draw up separate rules upon each order: but he submitted that it was unreasonable to put the party to such an expense; for, in the present case, if eleven separate rules should be taken out, it would make a difference of several pounds in the costs; and, as it was mere matter of form, it would seem more reasonable that there should be but one rule, the object of the new practice of the courts at Westminster being to moderate expense to suitors as much as possible.

Cur. adv. vult.

On this day, the matter being mentioned again to the court, Lord DENMAN, C. J. said, that one rule might be taken out, making all the orders a rule of court.

Rule accordingly.

him harmless from all expenses, &c., and consequences whatsoever, for and in respect of his name having been, or being so used. And, in another part of the award, that Upperton, on a certain payment being made, should give up to Tribe, and he should accept, a certain dwelling-house, offices, gardens, stables, and the appurtenances; "and also one of the said fields in the said agreement mentioned or alluded to, called Star-plot Field." The umpire, after directing that Upperton should give a bond to Tribe for the due performance of the things to be done by him, concluded by awarding: "That the said sums of money so to be secured and paid to the said Robert Upperton as aforesaid, shall be so secured, paid and received, and the observance and performance of the said acts, matters, and things, so by me directed to be observed, done, and performed, shall be accepted, received, and taken, as in full discharge and satisfaction of all the said matters in difference so referred as aforesaid." And the umpire, in pursuance of the authority given him as to costs, awarded that each of his parties should bear his own costs of the suit in Chancery, and of the reference, &c. With this exception, the award was silent as to the Chancery suit, and the course to be taken respecting it; nor did it state whether or not the agreement of March, 1832, should be rescinded according to the prayer of the bill in Chancery. In this term, a rule nisi was obtained for setting aside the award, on the grounds that the umpire had not awarded any thing *touching the suit [299 in Chancery, and that he had not awarded whether or not the agreement should be rescinded. At the time of making the motion, the bill in Chancery still remained on the files of that Court unanswered, and the injunction had not been dissolved.

Sir F. Pollock now shewed cause. As to the first objection, the umpire has directed that each party shall pay his own costs, and he has disposed of all the matters which were in difference in the suit. The terms of the submission were, that all proceedings in the suit should be stayed till the time for making the award, when, if no award should be made, either party should be at liberty to proceed in the suit. The inference is that, if an award should be made, the parties were not to be at liberty to proceed. In *Hawkins v. Coldclough*, 1 Bur. 274, an award that each of the parties should pay his own charges at law, and that the defendant pay the plaintiff five shillings, for his making the first breach in the law, was held to be sufficiently final. So, in *Jackson v. Yabsley*, 5 B. & Ald. 848, where an action of covenant was referred, and the arbitrators merely found that the plaintiff had no claim on the defendant for any alleged breaches of covenant or otherwise, and that the defendant had no claim on the plaintiff, the Court said, "We are of opinion that the award is final. It is sufficient if, looking at the whole award, it appears that the matter is determined." There was no necessity, under the circumstances of this case, that the bill should be actually dismissed. As to the second objection, the umpire has distinctly awarded upon every matter contained in the agreement, and therefore it was *unnecessary to rescind it in formal terms. [Lord DENMAN, C. J. Are [300 not the matter of the Chancery suit, and the prayer of the bill for rescinding the agreement, a subject of express reference? And, if so, can the award be good? for it will not effectually conclude the parties, even though it may in substance decide upon every point in the agreement and in the Chancery suit. Such an award may leave a perpetual source of litigation open.] All that could be done is done by the award. It could not replace the parties in the precise situation in which they stood before. The object of the bill in equity was not that the agreement should be rescinded absolutely, which indeed could not be done after it had been in part acted upon, but that it should be moulded according to equity. The umpire has awarded all that could have been ordered by a court of equity. He has altered, and, pro tanto, rescinded, the agreement, and he has awarded upon every thing contained in it.

Sir W. W. Follett, contra. As to the Chancery suit, it is not correct to say that the award virtually ends it because the costs are disposed of. That may

be so where the award is in other respects such as to show that the arbitrator intended to adjudicate upon the subject-matter of the suit, and put an end to it, as in the two cases which have been cited. And in *Pearse v. Pearse*, 9 B. & C. 484, an award was held to be final, though it did not expressly dispose of a particular matter referred, because it directed a bill in Chancery to be dismissed, *301] in which that matter was included. That is not so *here. By the terms of the reference, proceedings in the suit were to be stayed till the time for making the award, when, if none should be made, either party was to be at liberty to proceed, but so that the injunction should have its full effect until dissolved. The award is made, but it does not notice the suit, or in any way dispose of the injunction. It could not be said here that the suit was virtually put an end to, unless the award contained a final determination as to the agreement. How this might be, if the award had in fact decided every particular subject-matter of the agreement, it is not necessary to say. There are several stipulations in the agreement not decided upon, but left open to future litigation.

He proceeded here to contend, in particular, that the award decided nothing with certainty as to the manner in which Tribe was to indemnify Upperton; and that it did not clearly put an end to the agreement as to giving up all the fields rented by Upperton of the Duke of Norfolk. He was then stopped by the Court.

LITLEDAL, J.(a) I am of opinion that this rule must be absolute. One object of the reference to arbitration was, that the arbitrator might decide whether the agreement should be at an end or not. We cannot say by inference that it is ended. The difficulty we should be under in so doing appears from the last instance of uncertainty pointed out by Sir W. Follett. So as to the suit in equity. It was probably the umpire's intention to put an end to it, but we cannot say in point of law that he has done so. *Hawkins v. Colclough*, 1 Bur. *302] 274, was * a different case. There the arbitrator awarded, not only that each party should pay his own costs, but that the defendant should pay damages. So in *Jackson v. Yabsley*, 5 B. & Ald. 848, the award went farther than if it had given a direction as to costs, because it declared that the plaintiff had no claim on the defendant, nor the defendant on the plaintiff.

PATTESON, J. As soon as it is found, in such a case as this, to be a matter of difficulty to say whether the agreement is determined or not, there is an end of the question, because the object of the reference was, to have it settled whether or not the agreement should be ended. The umpire should have shown that by his award. By the terms of the reference, proceedings were to be stayed until the time for making the award, when, if no award should be made, either party should be at liberty to proceed. But that implied that the arbitrators, if they made an award, should determine whether the suit should proceed or not. At the same time, if the arbitrator had determined that the agreement should be rescinded, and had also ordered each party to pay his own costs, I should have been inclined to think that the suit was put an end to.(b)

Rule absolute.

*303] *MEAD against DAVIDSON. Tuesday, May 12.

A policy of insurance on a ship, lost or not lost, is good, the ship having been accepted for insurance, and the premium paid, before loss, although the policy was not actually executed and stamped till loss had happened, and both insurer and assured knew it.

By the rules of a mutual insurance society, with which the above insurance was effected, the insurance on a ship was to commence on the day of her being accepted as insurable, and to continue in force twelve months. A member of the society gave a power of attorney to his agent, to insure ships for him under the terms, restrictions, and regu-

(a) Lord Denman, C. J., had left the court during the argument.

(b) Coleridge, J. was absent.

lations by which the society might be governed: Held, that the power (though it did not refer to the case of being lost, and though such a case was not expressly provided for in the regulations of the society) was special enough to warrant the agent in executing the above-mentioned policy for the principal as insurer, after a loss had happened within the knowledge of all the parties, as before stated.

ASSUMPSIT upon a policy of insurance on the ship *Crisis*. (a) **Plea**, non assumpsit. At the trial before Lord Lyndhurst, C. B. at the Spring assizes for Surrey, 1834, the following facts appeared:—The plaintiff and defendant were members of a mutual insurance society, called The British Association of London. The ship was proposed and accepted for insurance in February 1829, when the premium was paid; and the insurance purported to be (lost or not lost) on the body, &c., of the ship, from the 15th of February, 1829, to the 15th of February 1830. The policy was formally executed on the 21st of October 1829, by Mr. Scott, an agent for the defendant, conformably to the rules of the society, and appeared not to have been stamped till the time of execution. By the practice of the society, policies used to be filled up and delivered out as members applied for them. Before the 21st of October, an average loss, for which this action was brought, had happened; and the loss had, before that day became known to the plaintiff and defendant. No fraud was imputed.

By the first of the society's rules, it was provided that the sums to be insured should be from 500*l.* to 1200*l.* on each ship, to commence on the day of her being *accepted by the committee, and to continue in force for twelve months from that time, the assured paying 5*s.* per cent. on the sum insured, towards defraying the necessary expenses, also the charge for policies and power of attorney, and two guineas for survey. By rule 20, a committee was appointed, of whom Scott was one, for settling averages, and managing the affairs of the association. In executing the above-mentioned policy, Scott acted for the defendant under a power of attorney, the practice of the society being for the members of the committee to act under powers of attorney for the several members of the society. By the instrument in question, the defendant, described therein as of South Shields, ship-owner, appointed Scott, described as of the Coal Exchange, London, ship-owner, and three others, his attorneys and attorney, for him and in his name, &c., "to insure, underwrite, and subscribe any policy or policies for insuring any ship or vessel, or ships, or vessels, from and against all perils and dangers of the seas and waters, both in and out of harbour, laden or unladen, and from fire," &c., "and from all other perils, losses, and misfortunes whatsoever, in and for such sums or sum of money, and upon such voyage or voyages, and under such terms, restrictions, and regulations, as are annexed to the policies, and any others by which a certain society, called The British Association for the Mutual Insurance of Shipping, may be governed, hereby ratifying, allowing, and confirming all and whatsoever my said attorneys and attorney, or either of them, shall lawfully do or cause to be done in the premises by virtue of these presents."

It was objected that no action could be sustained upon a policy executed after the loss had taken place within the knowledge of the parties; and that, at all events, a general power of attorney like that above mentioned could not authorize an agent to effect a policy after such known loss. The Lord Chief Baron nonsuited the plaintiff, giving leave to move to set the non-suit aside, and enter a verdict for the plaintiff. A rule nisi was obtained accordingly, against which

Thesiger and *F. D. M. Dawson* shewed cause in this term. (b) The question whether or not an assured can recover on a policy effected after a loss known both to him and to the insurer, has never yet been decided. Insurance in a contract of indemnity against possible loss; it is inconsistent with the na-

(a) See extract from the declaration, at the end of the case.

(b) April 28. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

ture of such a contract, that it should be entered into after the loss is known. The words "lost or not lost" make no difference; they are usually inserted in policies where the parties are in ignorance of the event, and apply to such a case but not to this. The effect of this expression is discussed in *Jefferies v. Legendra*, 1 Show. 324, (in argument), and in *The Earl of March v. Pigot*, 5 Burr. 2804. In the latter case, a bet upon survivorship between the fathers of the wagering parties was held to be good, though Mr. Pigot's father was dead at the time of the bet; one of the grounds of decision was that neither party knew of that event. The contract here was no policy until the 21st of October. By stat. 35 G. 3, c. 63, s. 11, every contract of insurance, subject to duty under that act, must be "ingrossed, printed, or written," and must have, specified upon it, the particulars there pointed out; and *Roderick v. Hovil*, 3 Camp.

*306] 103, and *Warwick v. Slade*, 3 Camp. 127, shew that, even if *the terms be reduced to writing, the policy is null, unless it be duly stamped, before it was effected. If the contrary were held in cases like the present, the parties might agree that their policies should never be stamped till after loss, and so defeat the statute. The society appoint a committee to subscribe policies, in order that they may exercise a judgment in doubtful cases; it would be idle to establish such a body with a power to sign policies after the ships were lost. Then as to the terms of the power of attorney in this case, it evidently contemplates an authority to insure against losses that *may* happen, according to the general tenor of such policies. There are no words conferring a power to insure after loss, which is out of the usual course, and requires a special authority.

Platt, contra. The power of attorney is, expressly, to subscribe policies under the terms, restrictions, and regulations by which this society may be governed; it therefore authorized an insurance after loss, which might be effected under the rule of the association directing that the insurance shall commence from the day the ship being accepted, and continue in force twelve months. Here the ship was accepted as insurable in February, though the policy was not filled up till October. If, at that time, only one of the parties had known of the loss, the question might have been different; but both knowing it, there is no illegality in the transaction on either side. The words "lost or not lost," expressly refer to the case of a ship being actually lost at the time; her not being lost is not of the essence of the policy, nor does the knowledge or ignorance of the parties make it more or less so. As to the effect of the stamp act, it is sufficient, within the

*307] terms of *the statute, that the policy was stamped when executed. It is said that, if this construction were to prevail, policies would not be stamped till a loss happened; but then the parties would have no security but in each other's honour for the performance of their respective engagements; it is not likely therefore, that such a course would be adopted.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of Court as follows:—

This was an action on a policy of insurance on the plaintiff's ship. He and the defendant were members of an association for mutual insurance. The ship was accepted in February 1829, when the premium was paid, and the insurance was to be from that period for twelve months from that date. The policy was formally executed in October, 1829, and that, not by the defendant himself, but under a power of attorney, and according to the rules of the society; and the ship was in fact lost, and known by all parties to be so, before the execution of the policy. On these facts being proved, Lord Lydhurst directed a nonsuit, on a rule for setting which aside, and entering a verdict for the plaintiff, the case has been fully argued before us.

The material question was, whether an assured can recover on a policy executed after the loss had accrued, and become known to both parties. Now the case of the *Earl of March v. Pigot*, 5 Burr. 2802, referred to in the argument, is a direct authority in principle in favour of the right to recover, if the loss was

known to neither party at the time of effecting the policy. According to *the same case, and indeed on the plainest general principles, if the loss had been known to the assured only, the policy would be void. But no case has determined that an underwriter who chooses to effect a policy, with full knowledge that the loss has actually happened, may not be bound by it. His conduct might indeed appear extraordinary, if it were not clear that he had a good legal consideration for entering into the contract, viz. the payment of the premium, which may be regarded as a price actually given and received for the underwriter's indemnity against the contingency that has arisen. There is considerable analogy between this case and *Paine v. Meller*, 6 Ves. Jun. 349, decided in 1801 by Lord Eldon, who held the purchaser bound to perform his contract, though the house was burnt before the time appointed for conveying it. "As to the mere effect of the accident itself," said his lordship, "no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes." (Page 352.) He also said, advertng to the case of annuities, where the purchasers have been compelled to pay the purchase money, though the grantor die before he has made a single payment, "the party has the thing he bought, though no payment may have been made; for he bought subject to contingency." So, in the present case, he bought and paid for the underwriter's promise to indemnify. If his ship had arrived, the underwriter would have kept the whole premium; though she has perished, he cannot be relieved from his agreement. Equity would have compelled him to execute the formal policy, whenever tendered *to him; in voluntarily executing, he has only performed a manifest duty, and cannot now retract the obligation. [*309]

The case of *Jefferyes v. Legendra*, 1 Show. 820, (see p. 324, note b; Holt, 465,) cited from Shower's Reports (and reported for the judgment only in Holt, 465), seems inapplicable, as it only proves that a vessel sails with convoy if she departs with convoy and is accidentally separated by stress of weather. *Roderick v. Hovil*, 3 Camp. 108, and *Warwick v. Slade*, 3 Camp. 127, have no bearing on the present question. The former established that a policy executed without stamp was void, though stamped before the trial. *Warwick v. Slade*, decided that a broker cannot recover premiums paid for insurance after his authority to insure had been revoked by his principal. Here, the stamps were correct, and the authority was never revoked. The defect of stamps was urged as a preliminary objection, but it is answered by the foregoing observation.

Another preliminary objection was founded on the execution of the policy under a power of attorney which did not warrant the execution of such a policy as this. Upon reference, however, to the instrument, we are of opinion that it did authorize the agent to execute a policy granted, like this, upon the usual terms of the association.

The rule must, therefore, be made absolute.(a)

(a) The first count of the declaration stated, that the plaintiff heretofore, to wit, 21st of October 1829, caused to be made a policy of insurance, lost or not lost, at and from, &c. upon the body, &c. of the ship *Crisis*, beginning the adventure upon the said ship at twelve at noon of the 15th of February 1829, and so should continue until twelve at noon of the 15th February 1830. The whole policy was set out, and the count then stated that, by a schedule indorsed on the policy, the several ship-owners, whose *names were underwritten, being members of an association called The British Association, [*310] did thereby severally and respectively agree with each other to insure their respective ships, and did declare that the following rules and regulations should govern them, which are the rules of the said association, viz. (The count then set them out, the first rule being as above stated in the report of the case.) The plaintiff further averred, that he, the said plaintiff and the said defendant, on the 15th of February 1829, and thenceforth continually until the 1st of February 1830, were respectively ship-owners and members of the said British Association, and that their names were respectively written under the said writing or schedule, and that they were respectively parties to and bound by the said rules and regulations therein mentioned; that the said policy of insurance with the said memorandum was so made by the plaintiff as aforesaid, for and on the part and be-

EDWARD YOUDE *against* SARAH YOUDE. *Wednesday, May 13.*

In an action brought upon a bond, in the name of an obligee resident abroad, for the benefit of an assignee in this country, the defendant may claim security for costs from the nominal plaintiff: the assignee's written undertaking is not sufficient.

TYRWITT, in this term, obtained a rule to shew cause why proceedings in the above action should not be stayed till the plaintiff should give security, to be approved of by the Master, for costs. The action was brought on a bond, in the name of the obligee, for the benefit of Elizabeth Whalley, an assignee. The nominal plaintiff was permanently resident abroad; and, upon security being demanded of his attorneys, the assignee, who resided in this country, offered her own written undertaking, in the words following:—"Edward Youde v. Sarah Youde. This action having been brought in the name of the above-named plaintiff for my benefit, I do hereby undertake to pay the said defendant all such costs as she the said defendant may be entitled to recover from the above-named plaintiff. Eliz. Whalley."

*312] **Bayley* now shewed cause, and contended that the security was sufficient.

Tyrwhitt, contra. It is true, that, if the assignee had been suing in her own name, the defendant could not have applied for security; but she sues in the

half of himself; and that the said policy and memorandum was afterwards, viz. on the said 21st of October 1829, subscribed with the names of the said defendant and of divers other persons respectively, by an agent in that behalf duly appointed, as assurers for the sum of 1200*l.* upon the premises in the said policy mentioned; and that the said ship *Crisis* was, upon the day of beginning the adventure on the said ship in the said policy mentioned, viz. 15th February 1829, accepted by the said committee, according to the said first rule of the said Association; and thereupon, afterwards, viz. on the said 21st of October 1829, in consideration of the premises, and that the said plaintiff, at the request of the said defendant, had paid 5*s.* per cent. on the said sum insured, towards defraying the necessary expenses, and also all other charges due from the plaintiff, according to the said first rule, and had paid to and for the use and benefit of the members of the said association 126*l.* as a premium, &c.; and that the said plaintiff, at the request of the said defendant, had promised the said defendant to perform all things in the said policy of insurance, memorandum, and rules and regulations contained on the part and behalf of the said plaintiff to be performed; the said defendant promised the said plaintiff, that he, the said defendant, would become and be an assurer to the said plaintiff for the part and proportion of the said defendant of the said sum of 1200*l.* upon the premises in the said policy of insurance mentioned, upon the terms mentioned and referred to in the said policy of assurance, memorandum, and rules and regulations, and would perform all things in the said policy of insurance, memorandum, rules, &c., contained on the part and behalf of the said defendant to be performed. The plaintiff in his count further averred, that at the beginning of the adventure, viz. 15th of February 1829, and thence continually until the said 1st of February 1829, the plaintiff was owner of and interested in the said ship to the amount of the moneys insured; and he went on to make various statements, shewing his compliance with the rules, and that the adventure was conformable thereto.

*311] He then stated that heretofore, and while the **ship* was covered by the said policy, and within the times prescribed by the said rules, viz. on the 10th of May 1829, the said ship departed and set sail from London, on a voyage towards a place beyond the seas, viz. Archangel, the same not being a port or place excepted in the policy, and the ship not being within any of the exceptions in the said rules mentioned; and that afterwards, and during the continuance of the risk in the said policy of insurance mentioned, and whilst the ship was not within any of the exceptions, &c., viz. on the 5th of June 1829, and on divers days between that day and the 12th of June, &c.; the count then went on to allege an average loss during that time, and another average loss (with the like introductory statements), on the 25th of July following; it also averred notice (August 1st) to the committee of the Association, pursuant to the rules, before the repairs were commenced; election made by them that the repairs should be done; adjustment, (November 18th); the proportion calculated to be due from the defendant, notice to him, and his liability, &c. There was a second count upon the policy, with statements to the same effect, but in some respects more general; and there were the common money counts.

name of a person who is permanently resident in a foreign country, and the defendant is therefore entitled to the usual security in such cases. In the absence of such security, the nominal plaintiff abroad would be the person against whom the defendant would have to proceed for costs. The undertaking offered by the assignee could only be enforced (if at all) by a special act of assumpsit. If security is ordered as prayed, the assignee may be one of his sureties.

PER CURIAM.(a) We think that the plaintiff in the action should give security. Rule absolute.

COTTON against BROWNE. Wednesday, May 13.

In an action for maliciously indicting the plaintiff without probable cause, the defendant may give evidence of probable cause under the general issue; and if in addition to the plea of not guilty, he pleads specially that he had probable cause, the Court will order such plea to be struck out.

CASE for maliciously indicting the plaintiff for a conspiracy. The defendant pleaded, first, not guilty, and, secondly, as follows:—"And for a further plea, &c., the said defendant says that, although true it is that he caused the said plaintiff to be indicted, as he the said plaintiff above in his said declaration has alleged, yet *that he the said defendant did so for reasonable and prob- [*313] able cause, and without malice; for the said defendant says that, before the preferring of the said indictment, to wit, on," &c.; the plea then went into a very long statement, for the purpose of shewing that the defendant had reasonable cause for the prosecution. In this term a rule nisi was obtained for striking out the second plea, or so much thereof as the Court should direct.

Archbold now shewed cause. Before the new rules, Hil. 4 W. 4, 5 B. & Ad. i. ix. the matter of the second plea might have been proved under the general issue; but it might also have been specially pleaded; *Pain v. Rochester*, Cro. Eliz. 871. The new rules not only do not prevent, but compel its being specially pleaded. In *Frankum v. The Earl of Falmouth*, 2 A. & E. 452, (S. C. 1 Harrison, 1,) it was held that a defendant could not, under a plea of the general issue, deny that the act was *wrongfully* done. [PATTESON, J. There the attempt was, under the word "wrongfully," in an action on the case for diverting water, to bring into question the plaintiff's right of possession.] The examples given under the head Pleadings in Particular Actions, IV. 5 B. & Ad. ix., to illustrate the operation of the plea of not guilty, shew that the plea denies the act only, and not the matter which makes it wrongful. In the instance of slander there referred to, the uttering of the words is, in itself, *prima facie*, a malicious act; yet, even before the new rules, it was not sufficient to deny the speaking, as alleged in the declaration, if the defendant meant to justify it.(b) *Here the plea of not guilty, if it had the operation contended for on [*314] the other side, would put in issue not merely the preferring of the indictment, and wrongfully, but the preferring it without reasonable and probable cause. This would be contrary to the intention of the new rules, which is, that the plaintiff should be always apprised of the defence intended to be set up.

E. V. Williams, contra, was stopped by the Court.

LORD DENMAN, C. J. I am of opinion that it was unnecessary for the defendant to plead in denial of the want of probable cause. The injury complained of in this action is, not merely in the indicting, nor in the indictment being wrongful, but in maliciously indicting, and in doing so without reasonable or probable cause. The plea of not guilty is sufficient.

LITTLEDALE, J. concurred.

PATTESON, J. Some cases have been referred to, in which the plaintiff makes

(a) Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

(b) But see *Fairman v. Ives*, 5 B. & Ald. 642, and the judgment of Holroyd, J. there, pp. 645, 646.

an assertion of right, and then complains of an injury done in respect of it; and there it is proper for the defendant to answer by denying the right. But here there is no such assertion of right; the whole matter alleged in the declaration is an act of injury.

COLERIDGE, J. concurred.

Rule absolute for striking out the whole of the second plea.

*315] POWELL *against* LOCK. *Wednesday, May 13.*

A third party called upon by an interpleader rule under stat. 1 & 2 W. 4, c. 58, to appear and state the nature and particulars of his claim to property seized by the sheriff, must make such statement by affidavit. It is not sufficient that he appears by counsel, and that upon affidavits put in by other parties, it appears that he has given formal notice of his claim to the sheriff.

A RULE was obtained under the Interpleader Act, 1 & 2 W. 4, c. 58, s. 6, calling upon the plaintiff and Hannah Budd to appear before this court, and state the nature and particulars of their respective claims to the goods and chattels seized by the sheriff of Dorset under the fieri facias issued in this cause, and maintain or else relinquish the same, and shew cause why the court should not make such rule or rules touching the same as it should think fit, pursuant to the statute, &c. The defendant's goods had been taken in execution as above mentioned; and the sheriff's officer, while in possession, received a written notice from Mrs. Budd's attorney, stating that the goods belonged exclusively to her, she having purchased them at a public sale on the premises in the preceding year. The notice offered proofs of Mrs. Budd's right, and called upon the officer to relinquish possession. *Rogers* now appeared on behalf of Hannah Budd, but produced no affidavit. *Butt* appeared for the sheriff.

Tomlinson for the plaintiff. Hannah Budd is not before the court, not having made out her title by affidavit. By sect. 1 of the act, the court is empowered to call upon a third party claiming "to appear and state the nature and particulars of his claim;" that must be on oath, in the usual manner. The execution creditor ought not to be driven to try an issue by a mere notice, unsupported by affidavit.

*316] **Rogers, contra.* It is sufficient that the third party appears. The court will not try the merits of the claim on affidavit, but will, as of course, direct an issue; *Bramidge v. Adshead*, 2 Dowl. P. C. 59. [Lord DENMAN, C. J. That is, if there be a claim stated on affidavit. LITTLEDALE, J. The act requires the party to appear and state the nature and particulars of his claim. Must not that be by affidavit? Can we take it on the statement of counsel? COLERIDGE, J. The rule calls upon Mrs. Budd to state the particulars of her claim: but all that now appears before us, is something said by her to the sheriff.]

THE COURT(a) being clearly of opinion that an affidavit was necessary, and considering that the omission to make one might have arisen from a misconception of the act, granted time (on *Rogers's* application) for an affidavit to be made.

(a) Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

DOUGLASS and Another *against* STANBROUGH. *Wednesday,*
May 13.

Where the friend of a party arrested makes a deposit of his own money on the defendant's behalf, in lieu of bail, and the sum is afterwards paid into Court to abide the event of the suit, and the defendant then renders, the owner of the money may have it restored to him on motion, under stat. 7 & 8 G. 4, c. 71, s. 3, if the defendant appears in Court and assents.

For this purpose the render is equivalent to putting in and perfecting special bail.

THE defendant being arrested on mesne process, Mr. Shuttleworth, his attorney, on receiving security from the defendant, undertook to put in and perfect bail for him, but, instead of putting in bail, he made a deposit of his own money, which was afterwards paid into *court in lieu of bail, pursuant [*317 to stat. 7 & 8 G. 4, c. 71, s. 2.(a) The defendant subsequently ren. [*317 dered; and a rule was then obtained, calling on the plaintiffs and defendant to shew cause why the money deposited should not be paid out of court to Mr. Shuttleworth.

Follett, on behalf of the plaintiffs, contended that this application was not maintainable under the statute, sects. 2 and 3, first, because the application did not proceed from the defendant himself, but from a person who stood merely in the situation of a lender of money; and, secondly, because the defendant had only rendered, and had not put in and perfected special bail. [COLEBRIDGE, J., on the first point, referred to Nunn v. Powell, 1 Smith, 13, and Edelsten v. Adams, 8 Taunt. 557, (S. C. 2 B. Moore, 610,) decided under stat. 43 G. 3, c. 46, s. 2; observing, however, that in the latter case the application was to restore the money to the defendant. PATTESON, J. As to the render, the question is whether, under the statute, it is equivalent to putting in and perfecting special bail. It has been considered so under the former statute.](b)

White, for the defendant, stated that he was not instructed to oppose the motion.

*Wightman, in support of the motion. The case now stands as if the [*318 defendant had originally moved for the rule. And if this were not so, the clause as to taking out deposits is not introduced for the benefit of plaintiffs, and they are not entitled to raise objections on the subject. (He was then stopped by the court.)

LORD DENMAN, C. J. The case comes before us now as upon an application made by the defendant. Then it falls within the third section of the act, although bail has not been put in, because it has been held that, on a reasonable construction, rendering must be considered equivalent to putting in and perfecting special bail.

LITTLEDALE, J. concurred.

PATTESON, J. The only doubt I had at first was, whether this could be considered as an application by the defendant; but, it being so, the case is clear. After all, the object of the statute, in the clauses which have been referred to, was only to secure the defendant's body. The render is sufficient.

COLEBRIDGE, J. concurred.

Rule absolute (by defendant's consent) for paying the money out of court to Mr. Shuttleworth.(c)

(a) 7 & 8 G. 4, c. 71, s. 3, enacts, "That it shall and may be lawful for the said defendant who hath made his election to make such deposit and payment as aforesaid, at any time in the progress of the cause before issue joined in law or fact, or inter locutory judgment to receive the same out of Court, by order of the said Court, upon putting in and perfecting special bail in the cause, and payment of such costs to the plaintiff as the said Court shall direct."

(b) See 1 Tidd's Practice, 228, 9th edit., and the authorities there cited.

(c) See Bull v. Turner, 1 Tyrwhitt & Granger, 367, 3 Cro. M. & R. 47.

*CHITTY *against* DENDY. *Wednesday, May 18.*

CHITTY *against* LUXFORD.

To an action of debt in a court not of record, the defendant pleaded two distinct pleas, one concluding to the country, the other with a verification. The plaintiff replied to the first, and took no notice of the other. The cause was tried, and the plaintiff had a verdict and judgment. Upon writ of false judgment, Held, that the judgment below was right, for that the plaintiff might take issue upon the first plea, and treat the second as surplusage.

Declaration stated that the defendant was indebted to plaintiff within the jurisdiction of the county court for the wages of and due and owing to plaintiff within the jurisdiction, as the servant of the defendant. Admitted, that this was a sufficient allegation of the cause of action having accrued within the jurisdiction.

THESE cases came before the Court on writs of false judgment given in the county court of Sussex for the plaintiffs there, now the defendants in error.

In *Dendy v. Chitty*, the plaintiff (as appeared by the entry of proceedings) declared in debt, for goods sold, &c. The defendant pleaded nil debet, concluding to the country, and he then pleaded a set off, beginning, "and for a further plea in this behalf, the said defendant, by leave of the Court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that," &c., and concluding with a verification. The plaintiff replied as follows: "And the said plaintiff, as to the plea of the defendant whereof he has put himself upon the country, doth the like;" taking no other notice of either plea. The entry then stated a venire awarded, to make a jury on the plea aforesaid, and to recognise the truth of the premises; and it set forth that the jury afterwards appeared in court, and, being sworn "to speak the truth of the premises above contained and put in issue between the said parties," upon their oath said, that there was due from Chitty to Dendy 30*l.*, beside his costs, &c.; for which sum and costs Dendy had judgment. The entry of the judgment was as follows: "And upon this the said W. D. prays the judgment of the Court hereof *and upon the premises: and thereupon all
*320] and singular the premises aforesaid being seen," &c., "it is considered," &c. The special errors now assigned were, "That the said William Dendy hath not in any manner replied to, answered, or denied, or demurred in law to the said plea of the said Charles Chitty by him secondly above pleaded to the said declaration, whereby the said William Dendy hath confessed the truth of the matters in the said second plea contained, and thereby also the said suit of the said William Dendy was and is discontinued:" and also, "that there is not shewn in the record and proceedings aforesaid, any finding by the jury or judgment of the Court as to the matters in the said second plea contained and set forth."

In *Luxford v. Chitty* the entry was not materially different, except that the declaration stated the defendant to be indebted to the plaintiff within the jurisdiction of the Court in the sum of 2*l.* 10*s.*, "for the wages of and due and owing to the said plaintiff, within the said jurisdiction, as the servant of the said defendant, and at his like instance and request;" and it was assigned for error (in addition to the grounds alleged in the other case), that the supposed causes of action "are not stated or alleged, nor do the same sufficiently appear in or by the said declaration, to have arisen or happened within the jurisdiction of the county court," &c., "and also for that it is not stated in the said declaration that the said James Luxford was the servant of the said Charles Chitty, or rendered him any services, or was hired, within the jurisdiction, &c. (See *Peacock v. Bell*, 1 Saund. 75; *Trevor v. Wall*, 1 T. R. 151.) These cases were argued in last Hilary term.(a)

(a) Jan. 16th. Before Lord Denman, C. J., Littledale, and Williams, Js.

**Blackburne* for the plaintiff in error. There is on this record a distinct plea, upon which issue might have been tendered, but which the plaintiff has left altogether unnoticed. He was not entitled to treat that plea as a nullity. The statute 4 Ann. c. 16, s. 4, as to pleading several matters, does not apply to the county court. Before that statute, pleading double was matter to be taken advantage of by special demurrer; on general demurrer it was aided; Com. Dig. Pleader (E. 2), p. 377: and the same rule must still extend to pleadings not within the statute. [LITTLEDALE, J. By the new rules of Court, Hil. 2 W. 4, sect. 34, 3 B. & Ad. 378, if several pleas are pleaded without a rule for the purpose, the plaintiff may sign judgment, but that is in the superior courts.] [*321]

Chilton, contra. This is not the case of a double plea, properly so called, and to which the old authorities refer, but of two separate and distinct pleas. Before the new rule which has been referred to, if a party filed two pleas without a rule for the purpose, both might be considered a nullity, in the Court of King's Bench, though not in the Common Pleas. (See *Griffiths v. Eyles*, 1 Bos. & P. 415, note a; and *Jervis's New Rules*, p. 55, note i). Here the plaintiff, in an inferior court, only seeks to pass by one of two pleas, which has been improperly pleaded. To the other he has given a complete answer. It may be said that he ought not to have the power of selecting one plea; but his doing so is not so great a hardship on the defendant as if both might be considered a nullity, according to the practice of the superior courts.

Blackburne, in reply. If the defendant's pleading was a nullity, the plaintiff should have signed judgment; *but, instead of doing so, he has answered over, which has always been held to cure duplicity in pleading. It is said that this is the case, not of a double plea, but of two pleas; but that makes no difference. In Com. Dig. Pleader (E. 2), p. 376, one of the instances given of a double plea is, if the defendant pleads matter of law and also matter in fact; yet it appears that this would be cured by the plaintiff's demurring generally or pleading over. [LITTLEDALE, J. In Com. Dig. Pleader (E. 2) p. 377, it is said, "So, if a plea is double, and the plaintiff by his replication answers only to one matter and takes issue upon it, which is found, this aids the duplicity of the plea." And at (F. 4) it is said, "The replication ought to answer the whole plea, otherwise it is a discontinuance;" and then at (W. 2), "If there be an issue for part, and a discontinuance for other part, the Court will not give judgment against the plaintiff, till issue tried; for the discontinuance will be aided by a verdict." But the plea or replication is so aided by the statute 32 H. 8, c. 30, which does not apply here. The Court below, if a motion had been made there, would probably have ordered the second plea to be struck out.] [*322]

In *Chitty v. Luxford*, *Blackburne* mentioned the objection stated in the assignment of errors, that the service in respect of which this action was brought did not sufficiently appear to have been performed within the jurisdiction.

Chilton, contra, contended that the declaration did, substantially, aver this. The objection was not insisted upon. *Cur. adv. vult.*

*Lord DENMAN, C. J. now delivered the judgment of the Court, as follows:— [*323]

This was a writ of false judgment given for the plaintiff in the County Court of Sussex. The plaintiff below declared in debt on simple contract. The defendant below pleaded nil debet, and concluded to the country. He also for a further plea, by leave of the Court, according to the form of the statute in such case made and provided, pleaded a set-off. The plaintiff below joined issue on the plea of nil debet, but took no notice of the plea of set-off. The venire was awarded on the issue joined only, and the jury gave a verdict for the plaintiff, on which judgment was given for him.

It is a rule in pleading that a plea must not be double, but then the plaintiff must demur to the plea if he means to object to it: but if he does not demur,

he ought to reply to the whole plea, and he cannot leave one part unanswered, because it is uncertain what part of the plea the defendant means to rely upon.

And it is also a rule in pleading that if the plaintiff does not answer the whole of the plea it amounts to a discontinuance of the action, on the part of the plaintiff. But then if the action is discontinued, such discontinuance is cured by verdict under the provisions of 32 H. 8, c. 30. This statute, however, only extends to courts of record, and therefore the county court is not affected by it, and consequently a discontinuance in the present case would not be cured by verdict.

The rule which requires the plaintiff to demur to the plea if it be double, appears to apply only to cases where it is pleaded as one plea; but in this case the general issue and set-off are not pleaded as one plea; but they are distinctly *324] pleaded as two pleas, and the *second plea is pleaded by leave of the Court according to the form of the statute. But the county court, not being a court of record, has no authority in point of law to give leave to plead several pleas, the stat. 4 Ann. c. 16, being confined to courts of record; the plaintiff below, therefore, was not bound to take any notice of such a plea; and it cannot be said that it was not known which plea the defendant meant to rely upon, for the defendant pleaded the general issue, and tendered an issue to the country. The plaintiff, therefore had a right to consider that as a complete plea upon which he might take issue.

A court of error will take judicial notice that the county court had no authority to give leave to plead double; and, as a complete plea had been before pleaded, they will consider the second plea as mere surplusage. We are therefore of opinion that there is no error or false judgment in the court below, and the judgment of that court must be affirmed.

The case of *Chitty v. Luxford* is the same as *Chitty v. Dendy*, except that in the case of *Luxford* there is an objection to the declaration in the court below, that it is not alleged as to part of the cause of action, that it did not arise within the jurisdiction of the county court. But that objection was given up on the argument, and therefore there must be the same judgment of affirmance as in *Chitty v. Dendy*. Judgments affirmed.

*325]

*GARRITT *against* SHARP. *Wednesday, May 13.*

Plaintiff had a barn, in the side of which, adjoining the defendant's premises, were apertures, by which, chiefly, the barn was lighted. Plaintiff converted the barn into a malt-house, and cut windows where the apertures had been in the barn. Defendant erected (on his own ground) a fence before the windows, which obstructed the access of light. In an action on the case for such obstruction, evidence was offered at the trial to shew that the mode of enjoying the light had been essentially altered by the plaintiff himself, in a manner prejudicial to the defendant. The judge did not receive the evidence, but directed the jury, if they thought that the defendant had left the plaintiff less light than he enjoyed before the present windows were made, to give damages for such diminution:

Held, on motion for a new trial, that evidence of the above description was receivable, and that it might have appeared from such evidence that the plaintiff had altogether lost his right to the easement in question.

CASE. The declaration stated, that the plaintiff, before, and at the time, &c., was lawfully possessed of a certain building or malthouse with the appurtenances, situate, &c., in which, during all the time aforesaid, there were, and still of right ought to be, divers to wit, &c., ancient openings or lights through which the light and air during, &c., ought to have come and entered, and still of right ought, &c., into the said building or malthouse, for the convenient use, occupation, and enjoyment thereof; and that the defendant, contriving, &c., wrongfully and injuriously erected and kept and continued a wooden fence near the

said openings or lights, whereby the said building or malthouse was darkened, and the light and air prevented from coming into the same through the said openings or lights in so ample and beneficial a manner, &c., and the building was rendered unfit for carrying on therein the business of making malt, &c. Plea, that in the said building or malthouse, during all or any part of the said time, &c., there were not, nor of right ought to be, any ancient openings or lights as above alleged, and that the said fence was not nor is wrongfully and injuriously erected, &c., near to the said openings or lights in manner, &c. Issue tendered and joined.

On the trial before Tindal, C. J. at the Hertfordshire *Summer assizes, 1834, it appeared that, before the bringing of this action, and for [326 a period of more than twenty years, the building in question had been a barn, in the side of which, abutting on the defendant's premises, were a number of apertures from one to two inches wide. Enough of light and air entered through the apertures for the purposes of those who used the building as a barn. There was no other light, except through the doors. The plaintiff's case was, that the openings had been made on purpose; the defendant endeavoured to shew that they had been caused by the decay and wear, or by shrinking of the boards. In 1833 the plaintiff turned the barn into a malthouse, stopped some of the crevices, and converted others, by cutting, into windows, to which he put lattices. The defendant afterwards erected the fence complained of in the declaration, which faced the whole of the apertures, and prevented the access, not only of any additional light which might have been obtained by the recent alteration, but also, as the plaintiff alleged, of that quantity of light which came into the building in its original state. The defendant (as was stated on the motion for a new trial) offered evidence to shew that the alteration in the mode of admitting light to the plaintiff's building was injurious to the defendant's adjoining property; such evidence, however, was not received. The Lord Chief Justice left it to the jury to say whether the apertures were originally placed there on purpose to admit light, and whether the defendant had obstructed any portion of the light admitted: and, in case of their finding in the affirmative on these questions, he directed them, if the light now fell short of the quantity before enjoyed by the plaintiff for the use *of his barn, to give damages for [327 such diminution. The jury found a verdict for the plaintiff, damages 27*l*. In the ensuing term *Thesiger* moved for a rule to shew cause why a new trial should not be had, first, on the ground of misdirection, on which point he contended that the proof given respecting the apertures in the barn did not entitle the plaintiff to any enjoyment of windows which admitted light more extensively and in an entirely different manner; and that no license for such an enjoyment could be presumed from the license, if proved, to have crevices in the wall of a barn; and he referred to *Martin v. Goble*, 1 Camp. 322, and 1 Com. Dig. Action on the Case for a Nuisance, C. (p. 294,) where it is said, "So, an action upon the case does not lie, if the defendant prevents an excess in the plaintiff in using his right: as if A. had lights in an ancient house, and he rebuilds his house, and makes lights in other places, and larger, to the inconvenience of the plaintiff." And he stated, secondly, that the defendant had offered evidence as to the injurious nature of the new openings, which had been rejected. A rule nisi was granted, against which, in this term, (a)

Platt and *S. B. Harrison* shewed cause, and contended that the plaintiff, although he had no right to prejudice the defendant by his alterations, was, at all events, entitled to the enjoyment of as much light after he made the windows as before, to which point they cited the dictum of *Wilmot, C. J.*, in *Dougal v. *Wilson*, 2 Wms. Saund. 175. [Lord DENMAN, C. J. In *Martin v. Goble*, 1 Camp. 322, the holding was, that the plaintiff was entitled [328

(a) May 6th. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

to the same quantity of light in the new state of things as was necessary in the old for the business then carried on.]

Thesiger, contra. The claim of ancient lights could not be supported under the circumstances of this case, even if the former apertures were made on purpose to admit light. The mode of admitting light was completely changed. The plaintiff might as reasonably have claimed to turn the crevices of his barn into cottage windows. [Lord DENMAN, C. J. They might overlook the neighbouring premises; it does not appear that these openings could.] The right to have a particular opening to admit light is established by twenty years enjoyment; because the attention of the neighbour is called to it, and, if he has acquiesced in the enjoyment for twenty years, he is presumed to have granted the privilege of having it unobstructed. But, if the manner of introducing the light be totally altered, it cannot again be presumed that there was a grant for a mode of enjoyment entirely different from the first. Where there is a mere enlargement, the amount of excess can be ascertained and reduced; but for an alteration like that of changing crevices into windows there is no such remedy. It is only contended, on the other side, that the plaintiff might make the alteration if it did not prejudice his neighbour. The defendant should have been permitted to shew that it did prejudice him. [LITLEDAL, J. The statute 2 & 3 W. 4, c. 71, s. 3, enacts, that when the access of light to any building *329] *shall have been actually enjoyed therewith for twenty years without interruption, the right thereto shall be deemed indefeasible. Perhaps you will contend that that means the same individual building, or a building of the same kind.] It is not necessary to go so far. This case may be put upon the same grounds as *Moore v. Rawson*, 3 B. & C. 332, where a party having pulled down a building in which he had an ancient window, and erected something entirely different in its place, was held to have abandoned his right of having such window. [COLERIDGE, J., referred to *Cotterell v. Griffiths*, 4 Esp. 60. The alteration there was merely the removal of a blind from a window, not a total change in the mode of enjoyment, as in this case. [Lord DENMAN, C. J. We will speak to the Lord Chief Justice as to the rejection of evidence. If the defendant offered to prove that the present mode of enjoying the light was more prejudicial to him than the former, and that evidence was rejected, I cannot say that the ruling was not wrong. (a)] *Curr. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was an action on the case for stopping ancient lights, tried before the Lord Chief Justice of the Common Pleas at Hertford. The verdict was for the *330] plaintiff, and a rule nisi was obtained for a new trial for *misdirection and rejection of evidence. The misdirection imputed was that it was left to the jury to consider the case of enjoying the light obstructed before the obstruction was not material to be considered, provided the plaintiff were deprived by the defendant's act of the same quantity of light as he had enjoyed before. The evidence said to be rejected was intended to shew that the mode of enjoyment had been essentially altered by the plaintiff himself, to the inconvenience or injury of the defendant.

The learned Chief Justice has reported to us, that the question he left to the jury was, whether the apertures in the wall of the plaintiff's tenement were placed there on purpose to admit the light, and whether the defendant had obstructed any portion of the light admitted. He does not recollect any evidence being tendered of alterations made by the plaintiff as above-mentioned; we think it, however, clear that the point was made, and that the jury were not required by the judge to consider whether the plaintiff had essentially varied the

(a) Lord Denman, C. J. referred to a case in which it was held (against the decision of Burrough, J. at nisi prius), that an alteration made by the plaintiff in his mill-wheels did not prevent him from maintaining an action for disturbance in his enjoyment of the accustomed flow of water. Probably *Sanaders v. Newman*, 1 B. & Ald. 268.

manner in which the light was enjoyed. His lordship farther stated, that he was not satisfied with the verdict, and thought it not justified by the evidence.

Under all these circumstances, we think the defendant entitled to a new trial. It is enough to say that a party may so alter the mode in which he has been permitted to enjoy this kind of easement, as to lose the right altogether; and, in this case, some part even of the plaintiff's proofs made it proper that the opinion of the jury should be taken on that subject. Rule absolute.

*SPENCER against PARRY. Wednesday, May 13.

[*331]

Tenant, by written agreement under which he took the premises, engaged to pay taxes which, by statute, were due from the landlord. He made default; and the landlord, having been obliged to pay, sued him for the amount, as money paid to his use: Held, that, as the landlord was originally liable for the taxes, and exempted from them only by agreement with the tenant, he should have declared specially on such agreement, and could not recover on the *indebitatus assumpsit*.

A promise, made by defendant after action brought, to give a *cognovit*, is no evidence of an account stated before action brought.

DEBT for money paid and laid out, and on an account stated. Plea, *nil debet*. At the trial Patteson, J., at the sittings in Middlesex after Easter term, 1834, the facts appeared to be as follows. The plaintiff let a house to the defendant under a written agreement by which the defendant undertook to pay 42*l.* a year rent, "free and clear from all land-tax and parochial taxes. The defendant held the premises twelve months and then left them, not paying the land-tax or poor-rates. Upon his refusal to discharge these, the collector of land-tax recovered the arrears of that duty from the succeeding tenant, and the collector of poor-rate distrained for the year's rates upon the plaintiff's receiver of rents, pursuant to a local act for the parish in which the premises were situate, viz., 11 G. 4, c. x., ss. 92, 93, (local and personal, public,) for regulating the affairs of the parishes of St. Giles in the Fields and St. George, Bloomsbury, by which the landlords of certain houses are subjected to the poor-rate, but it is enacted that the person authorised to receive or collect, or the person receiving or collecting the rents, shall be compellable to pay the rates, unless the real landlord shall declare himself and pay, or shall be distinctly or certainly known to be such by the vestrymen, &c.(a) The rates were paid by the receiver on the plaintiff's account, and the plaintiff reimbursed the new tenant for the land-tax *levied upon him. The action was brought to recover the amount so paid; and it was proved that the defendant, after the commencement of [*332 the action, had promised to give the plaintiff a *cognovit* to settle it, but had not done so. For the defendant it was objected that, if he was liable to the present claim, he was so by virtue of the special agreement, and that the declaration should have been framed upon that. For the plaintiff it was urged that, the contract having been determined, a count for money paid was sustainable, and further, that the promise to give a *cognovit* was proof of an account stated. The learned Judge was of opinion that there was no proof of an account stated, and that the evidence did not support the count for money paid to the defendant's use, inasmuch as the defendant was never liable for the tax or rate to any person but the plaintiff. He therefore directed a nonsuit, giving leave to move to enter a verdict.

Hutchinson moved accordingly in Trinity term, 1834, and cited (as to the count for money paid) *Exall v. Partridge*, 8 T. R. 308, *Dawson v. Linton*, 5 B. & Ald. 521; and *Brown v. Hodgson*, 4 Taunt. 189. He also relied upon the offer of a *cognovit* as evidence of an account stated. [TAUNTON, J. The offer

(a) See the clauses cited in *Rex v. Dyer*, 2 A. & E. 607, 608.

of a cognovit is matter subsequent to the suing out of the writ.] It shews a pre-existing demand. [Lord DENMAN, C. J. It does not follow that there had been an account stated. LITTLEDALE, J. To support that allegation, there should have been something of a settlement before the action was brought.] On *333] the *question as to the count for money paid, the Court granted a rule nisi.

Alexander now shewed cause. The nonsuit was right. Unless by special agreement, the defendant was not liable either for land-tax or poor-rate. The landlord is chargeable with the one, by deduction from his rent, under the land-tax act, 38 G. 3, c. 5, s. 17, and the landlord or receiver of the rents is liable to the other by the local act, 11 G. 4, c. x. ss. 92, 93. To support a count for money paid, it must be shewn that the demand was one to which the defendant was primarily liable. [PATTESON, J. The defendant's agreement here made him liable as between him and the landlord, but not as to other parties. The plaintiff pays his own debt, which the defendant had agreed to pay, and then alleges that he has made the payment to the defendant's use.] Again, where there is a special contract still subsisting, upon which the action might be brought, a general indebitatus count is not applicable. *Cooke v. Munstone*, 1 New Rep. 351, and *Lightfoot v. Creed*, 8 Taunt. 268, are authorities on this point, which is also illustrated by *Child v. Morley*, 8 T. R. 610; *Exall v. Partridge*, 8 T. R. 308, is distinguishable: there the defendants were originally liable for the rent which the plaintiff paid. And Lord Kenyon said, "Some propositions have been stated, on the part of the plaintiff, to which I cannot assent. It has been said, that where one person is benefitted by the payment of money by another, the law raises an *assumpsit* against the former: but that I deny: if that were so, and I owed a sum of money to a friend, and an enemy *334] chose to pay *that debt, the latter might convert himself into my debtor," (creditor) "*nolens volens*." In *Brown v. Hodgson*, 4 Taunt. 189, the goods for which the plaintiff paid had actually been received by the defendant, and he was liable to pay for them at the time when the payment was made by the plaintiff. In *Dawson v. Linton*, 5 B. & Ald. 521, the landlord was the person ultimately liable, under the drainage act, to the tax which the plaintiff, his tenant, paid. Here the tenant, the defendant, was not liable, except by the special agreement between him and the plaintiff.

Sir W. W. *Follett*, contra. It is not necessary to the action for money paid, that the defendant should be primarily liable to the person receiving the payment; it is enough if he was bound to reimburse the plaintiff; and in all the cases the real question has been whether or not the plaintiff was compelled to pay the money: because, if he was so, the defendant as between himself and the plaintiff, was bound to repay it. The plaintiff here, as landlord, was so compelled, and may therefore recover against the defendant, for money paid to his use. In *Williamson v. Henley*, 6 Bing. 299, the plaintiff defended an action for some money which he had delivered over to the defendant Henley at his request, and, being obliged to pay the sum and costs, he was held entitled to recover the amount from Henley, upon a special count alleging Henley's agreement to indemnify; but Tindal, C. J. at the same time expressed a strong opinion that he might have recovered on a general count for money paid. [PATTESON, J. It *335] appears in that case that the action *was defended at Henley's request. If a man pays a debt for another at his request, no doubt he may recover the amount as money paid.] The costs of the action never were a debt of Henley's. In *Lightfoot v. Creed*, 8 Taunt. 268, *Gibbs, C. J.*, said, "An action for money paid, cannot be maintained, unless there be a request to pay it, either express or implied. This was a special contract by the defendant to transfer stock, for breach of which, the plaintiff might recover unliquidated damages. He does not do that, but affects to liquidate the damages by purchasing the stock, and sues the defendant for the difference, as money paid to his use; but it is paid without authority." Here such authority may be presumed from the

facts; and the payment by the plaintiff who was not voluntary and officious, but compelled by the defendant's fault. In *Child v. Morley*, 8 T. R. 610, Lord Kenyon, when describing the point of view in which the case appeared most favourably to the plaintiff, said, "I considered that his paying the differences under such circumstances was not altogether a voluntary act, but done under the pressure of a situation in which he was involved by the defendant's breach of faith." That case does not bear out the proposition that an action for money paid will not lie unless the defendant was primarily liable. In *Exall v. Partridge*, 8 T. R. 808, the plaintiff left his carriage upon premises demised to lessees, two of whom, with the plaintiff's knowledge, had assigned their interest to the third, and the carriage was seized by the landlord for rent due under the lease, whereupon the plaintiff paid the rent to redeem his property, and sued the three lessees for money paid to their use. Lord Kenyon *there said, [*336 "As the plaintiff put his goods on the premises, knowing the interests of the defendants, and thereby placed himself in a situation where he was liable to pay this money, without the concurrence of two of the defendants, I thought at the trial it was money paid to the use of the other defendant only; but on that point I have since doubted; and I rather think that the opinion I gave at the trial was not well founded." And Grose, J. said, "The plaintiff could not have relieved himself from the distress without paying the rent: it was not therefore a voluntary, but a compulsory payment. Under these circumstances, the law implies a promise by the three defendants to repay the plaintiff." *Dawson v. Linton*, 5 B. & Ald. 521, was a case similar to the present, except that the defendant there was liable, not by an agreement, but by a local act of parliament. The real ground of the decision there was, that, as between the parties to that suit, the defendant was the person liable to pay the tax, which the plaintiff had paid under compulsion. So in *Brown v. Hodgson*, 4 Taunt. 189, Mansfield, C. J., in giving judgment observed that this was "not the case of a man officiously and without reason paying money for another." With respect to the form of the action, as now brought, the law will imply a request on the part of the defendant, where a debt which he was bound to pay is discharged by the plaintiff. [PATTESON, J. In the present case the landlord, who sues, was the party liable to pay by the statutes, though by agreement he and the tenant changed places: the fallacy in the argument lies in passing over the fact that the tenant was not liable *but for the agreement.] It is suffi- [*337 cient that this was a compulsory payment of a debt for which the defendant was liable. [COLERIDGE, J., referred to *Schlenker v. Moxsy*, 3 B. & C. 789. PATTESON, J. I did not put the present case upon the question of voluntary or compulsory payment.]

Sir *W. W. Follett* also referred, after the conclusion of the argument, to 1 Chitty on Pleading, p. 384, 5th ed. (350, 6th ed.), and the authorities there collected, and to *Fisher v. Fallows*, 5 Esp. N. P. C. 171, and Coleridge, J., mentioned *Carter v. Carter*, 5 Bing. 406. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

The plaintiff in this case had demised a house to the defendant, at a certain rent, clear of land tax and of all parochial taxes, by a written agreement. The defendant quitted the premises at the end of his year, having paid his rent, but leaving the land-tax and rates unpaid. The plaintiff relet the house; the new tenant was obliged to pay the land-tax; and the plaintiff's agent, under a local act of parliament, was distrained upon for the rates, and paid them: both these sums were repaid to the parties by the plaintiff. This action was brought to recover the amount of the land-tax and rates, as money paid to the defendant's use. It was objected, at the trial, that the form of action was misconceived, and that the defendant, though liable on his agreement to pay the whole amount of the rent, *including the rates, could not be charged with this money as paid to his use. My brother Patteson, being of this opinion, directed [*338 a nonsuit, which we think right.

The only doubt we felt in the course of the argument arose from the cases of *Brown v. Hodgson*, 4 Taunt. 189, and *Dawson v. Linton*, 5 B. & Ald. 521, which seemed nearly to resemble the present. In the former case the plaintiff, a carrier, having by mistake delivered A.'s goods to B., who made them his own, paid A. the price, and was afterwards allowed to recover it from B. as money paid to his use. But this was in fact money paid to his use, for it was in discharge of his debt to A.; and it may be fairly said to have been paid at his instance, because he knew that the plaintiff's mistake, in delivering the goods to him, made the plaintiff liable to pay the price to the true owner. His so receiving the goods may be considered as equivalent to saying, "If you pay him (as you may be compelled to do) for the goods, I will reimburse you." In the case before us, the defendant was not liable to pay the money to any one but the plaintiff, and that was by virtue of the agreement.

In *Dawson v. Linton*, 5 B. & Ald. 521, goods of the plaintiff, an out-going tenant, left by him on his farm, were distrained for a tax made payable by the tenant, but which the local act gave him power to deduct from his rent. The plaintiff paid the tax to redeem his goods, and the Court thought that money paid to the landlord's use, because the landlord was ultimately liable. The defence was, that the money was paid to the use of the tenant *for the time
*339] being, who was primarily liable. But here the plaintiff's payment relieved the defendant from no liability but what arose from the contract between them. The tax remained due by his default, which would give a remedy on the agreement; but it was paid to one who had no claim upon him, and therefore not to his use. Rule discharged.

PROMOTION.

In this term, *Basil Montagu*, of *Gray's Inn*, Esquire, was appointed one of His Majesty's Counsel.

END OF EASTER TERM.

*340]

*EASTER VACATION.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE KING'S BENCH.)

DOE on the Demise of JOHN ANDREW GALLINI against ARTHUR GALLINI, FRANCIS ALBERT GALLINI, and MARY GALLINI.
Thursday, May 14.

Testator, seized in fee of several estates, devised them to trustees in fee, upon trust to permit his sons and daughters respectively and severally to receive the rents and profits of the respective estates; with a clause for preserving contingent remainders. And from and immediately after the decease of any of his said children, the testator devised the estate limited to him or her for life unto or among his or her child or children living at his or her decease, for their natural lives as tenants in common, but with equal benefit of survivorship among the rest of the said children if more than one, and any one of them should die without leaving issue; the child or children of each son or daughter taking the rents and profits of his or her parent's estate only.

And from and after the decease of all the children of each of his sons and daughters without issue, he gave the estate or estates to them respectively limited, to and among all the issue of such child or children during their lives as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining.

And for default or in failure of issue of any of his said sons and daughters, he devised the estate limited to him or her dying without issue, to the survivors of his sons and daughters, for their respective lives, as tenants in common; and after their respective deaths to the children of the survivors of them during their respective lives as tenants in common, with such benefit of survivorship as aforesaid; and after the decease of all of them, to the issue of such children, in like manner as the testator had devised the original estate of each of the sons and daughters.

And for default or in failure of issue of all his sons and daughters but one he devised all the estates to that one in fee.

Held that, under this devise, a son of the testator did not take an immediate estate tail in the premises devised to him, but an estate for life, with remainder in tail to his children as tenants in common, remainder to himself in tail.

THE plaintiff in error brought ejectment against the defendants in error in the Court of King's Bench, for lands in the county of Berks. The cause came on for trial at the Berkshire Summer assizes, 1832, when a special verdict was agreed to. The verdict (a) stated *that Sir John Andrew Gallini, being seised in fee of [341 the premises after-mentioned, by his will, dated October 19th, 1799, devised all his lands in Berkshire, two messuages in Hanover Square, and also his estates in France, to certain persons named, and their heirs, in trust to permit his son Francis to receive the rents and profits of the said lands in Berkshire (except certain timber, which was devised to the trustees upon distinct trusts), for and during his natural life, he providing for the maintenance of the testator's wife, Lady Betty Gallini, during her natural life: and in further trust to permit the testator's daughter Jesse to receive the rents and profits of one of the messuages in Hanover Square, and to have the use of the stable, &c., behind the same, for and during her natural life: and upon like trusts as to the other parcels of the devised premises severally, for his daughter Louise and his son John respectively, for and during their respective natural lives. The will then (after a clause for preserving contingent remainders) proceeded as follows:

"And from and immediately after the decease of any or either of my said children Francis, Jesse, Louise, and John, or in case of such forfeiture" (as after mentioned), "I give and devise the estate or estates to him, her, or them respectively limited for life as aforesaid, unto and among all and every his, her, or their child or children lawfully begotten, which shall be living at the time of his, her, or their decease, or born in due time afterwards, for and during their natural lives as tenants in common, and not as joint tenants, but nevertheless with an equal benefit of survivorship among the rest of the said children, if more than one, and any one of them shall die without leaving lawful issue, the child or children of each of my said sons and daughters taking the *rents and [342 profits of his, her, or their parents' estate or estates only. And from and after the decease of all the children of each of my said sons and daughters without issue, I give and devise the estate or estates to them respectively limited as aforesaid unto and among all and every the lawful issue of such child or children during their lives as tenants in common, and so descend in like manner to the issue of my said sons and daughters respectively, so long as there shall be any stock or offspring remaining. And for default or in failure of issue of any of my said sons and daughters, I give and devise the estate or estates so limited to him, her, or them dying without issue unto the survivors of my said sons and daughters, during their respective natural lives, in equal shares as tenants in common, subject to the forfeiture hereinafter declared; and after their

(a) The verdict in *Doe v. Alfred Lambert Gallini*, which was very nearly the same as in this case, will be found more fully stated in 5 B. & Ad. 621. That case is reported, by mistake, as *Doe v. Francis Albert Gallini*.

respective deaths I give and devise the same to the children of the survivors of my said sons and daughters during their respective lives, as tenants, in common with such benefit of survivorship as aforesaid: and after the decease of all of them to the issue of such children, in like manner as I have before devised the original estate of each of my said sons and daughters. And for default or in failure of issue of all my said sons and daughters except one, I give and devise all my said freehold estates unto my only surviving son or daughter, to hold him or her, and his or her heirs and assigns for ever."

A clause was added, forbidding any of the sons and daughters, or their issue to bargain, sell, assign, release, or convey, or to charge with mortgages, &c. their interests under the will, and declaring the said interests forfeited in such event.

*343] The testator died, seised, in 1805. There was issue of the testator, living at the time of his decease, Francis Cecil Gallini, in the said will called Francis Gallini, his eldest son and heir at law, and the said two daughters of the testator, Jesse and Louise. John Gallini died in the testator's lifetime. Francis Cecil Gallini had lawful issue living at the time of the testator's death, viz. the lessor of the plaintiff, the defendants Mary and Arthur, and another daughter.

Francis Cecil Gallini died in 1815, intestate as to real property. He left issue John Andrew Gallini the lessor of the plaintiff (his eldest son), the defendants Mary, Arthur, and Francis Albert Gallini, and another son, Alfred Lambert Gallini, all of whom are now living and of age. Francis Cecil Gallini died possessed of the Berkshire estates. The lessor of the plaintiff is the heir of the body of Francis Cecil Gallini; and on coming of age in 1822, he was, by a decree of the Court of Chancery, put into possession of the rents and profits of an undivided fifth part of the said Berkshire estates; and the three defendants, on their coming of age, were, in like manner, respectively put into possession of three other undivided fifth parts of the said estates, which they respectively claim under the will, and still hold, adversely to the lessor of the plaintiff. The present ejectment was brought to recover the three fifth parts. Another ejectment was brought, under circumstances precisely similar, to recover the remaining fifth part from Alfred Lambert Gallini, and in this also a special verdict was taken.

The case was argued in the Court of King's Bench, upon the special verdicts, by *Lynch*, for the lessor of the plaintiff, *Talfourd*, Serjt. and *Coote*, for the *344] defendants; and judgment was given for the defendants below *in Michaelmas term, 1833. (a) The present case was argued, on writ of error, in the Exchequer chamber, in Hilary vacation, 1835. (b)

Lynch, for the lessor of the plaintiff, contended, as, before, that Francis Cecil Gallini, the father of the lessor of the plaintiff, took an immediate estate tail under the will. He argued that the paramount intent of the testator, as evinced by the will, was, that all the lineal descendants of the sons and daughters respectively should take, from generation to generation, without preference, interruption and postponement, the estate not going over till there should be a total failure of issue of the sons and daughters: that the testator always appeared to have intended his descendants to take successively for life only (according to the mode of limitation in *Humberston v. Humberston*, 1 P. Wms. 332, a purpose which, as tending to a perpetuity, could not be carried into effect; and that the legal and paramount intention, to which the other must yield, was to be effectuated by holding that the testator's sons and daughters took estates

(a) Doe dem. Gallini v. Gallini, 5 B. & Ad. 621.

(b) Feb. 2d, before Tindal, C. J., Lord Abinger, C. B., Park, Bosanquet, and Gaselee, J., and Bolland, B. The case was argued in great detail on both sides, but it has not been thought necessary to follow the argument throughout, as many parts of it were urged in the case in K. B.; and the clauses of the will are very fully discussed in the judgment of the Court of Error.

tail. On the subordination of the secondary to the principal intent, and the mode of construing a will so as to render the principal intent effectual, he cited, in addition to other cases referred to in his former argument, (a) the judgment of *Wilmot, C. J. in *Roe dem. Dodson v. Grew*, 2 Wils. 823; Wright v. Pearson, Amb. 358, the judgment of Lord Keeper Henley in *King v. Burchell*, 1 Eden's Ca. Oh. 481; *Franklin v. Lay*, 2 Bligh. 59, note, and the comment upon *Doe dem. Strong v. Goff*, 11 East, 668, by Lord Redesdale in *Jesson v. Doe dem. Wright*, 2 Bligh. 58: also the rule there stated by Lord Redesdale, (page 57,) "that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise;" and he observed that, if the paramount intent were not to be considered as governing the whole construction of a will, courts of law would be involved in niceties on this subject, resembling these which have arisen in courts of equity upon the distinction between a legal devise and an executory trust; *Papillon v. Voice*, 2 P. Wms. 471. He urged, that it would be contrary to the testator's intention to hold, that upon the deaths of his sons and daughters the estates should go to such of their children as might survive the parents, and to those children only, in tail; a construction which would exclude, or at least postpone to an indefinite period, the descendants of a child not so surviving. He also observed, that the judgment of the court below left it undecided what estate the surviving children were to take; and that if they took estates for life only, the subsequent limitations of the will, being to the issue of unborn children, would be void. But he contended that, even assuming the words of the will to be such *as of themselves would give an estate to those children of the testator's sons and daughters who survived their parents, [*346 still, to accomplish his paramount intent, and to avoid excluding the issue of grandchildren not surviving their parents, it must be held that estates tail were given by implication to the sons and daughters. To this point he cited the cases (not referred to in his argument below) of *Langley v. Baldwin*, 1 Eq. Ca. Abr. 185; *The Attorney-General v. Sutton*, 1 P. Wms. 754, 3 Bro. P. C. 75; *Evans dem. Brooke v. Astley*, 3 Burr. 1670. [*BOSANQUET, J.* It is questioned in 2 *Powell on Devises*, 583, (3d ed.) whether that case be not overruled by *Foster v. Lord Romney*, 11 East, 594]. The words "for default of such issue" distinguish that case from the present. But, in fact, the words here do not give any estate to the surviving grandchildren exclusively. The words, "and from and after the decease of all the children of each of my said sons and daughters without issue, extend the previous devise, by implication to all those children; *Hutton v. Simpson*, 2 Vern. 723. The decision of the court below would tend to shake that in *Jesson v. Doe dem. Wright*, 2 Bligh. 1, which settled the law, after some uncertainty had been introduced into it by the case of *Doe dem. Strong v. Goff*, 11 East, 668.

Coote, for the plaintiffs in error, contended that Francis Cecil Gallini took a life estate only, with contingent remainders to his children surviving him, in tail; cross remainders between such surviving children, in tail; remainder to Francis Cecil Gallini, in tail (to let in *the children of any of his children who might not survive him); remainder to the other sons and daughters of the testator for their lives; remainder to their children in tail; remainder, ultimately, to the surviving son or daughter of the testator, in fee. He admitted that the doctrine of a paramount intent superseding an inconsistent particular intent was not to be controverted, if taken with the qualifications given to it by successive cases, since it was first introduced; and that the rule upon the subject was correctly laid down in *Jesson v. Doe dem. Wright*, 2 Bligh. 57, by Lord Redesdale, whose

(a) *Robinson v. Robinson*, 1 Burr. 38. *Doe dem. Blandford v. Applin*, 4 T. R. 82. *Doe dem. Candler v. Smith*, 7 T. R. 531. *Doe dem. Cock v. Cooper*, 1 East, 229. *Frank v. Stovin*, 3 East, 548. *Murthwaite v. Jenkinson*, 2 B. & C. 357. *Wollen v. Andrews*, 2 Bing. 126. *Mortimer v. West*, 2 Sim. 274.

statement of it was, in substance, repeated in the judgment of the Court of King's Bench in the present case, 5 B. & Ad. 640. [Lord ABINGER, C. B. It is almost a truism.] He then proceeded to contend that the doctrine, as to general and particular intent, had originally been only descriptive of the operation of the rule in *Shelly's Case*, 1 Rep. 104 a; in the course of which argument he referred to *Robinson v. Robinson*, 1 Burr. 38, Doe dem. *Garrod v. Garrod*, 2 B. & Ad. 87, and Doe dem. *Jones v. Davies*, 4 B. & Ad. 48; also to Doe dem. *Dodson v. Grew*, 2 Wils. 822, (commented upon, as illustrating the doctrine in *Shelly's Case*, in *Fearne's Cont. Rem.* 182, 9th ed.), Doe dem. *Blandford v. Applin*, 4 T. R. 82, and Doe dem. *Candler v. Smith*, 7 T. R. 531; and to 2 Powell on *Devises*, c. xxvii. s. 5., (P. 552, 3d ed. by Jarman,) where the same line of argument is pursued, and the cases are remarked upon. He then summed up the rules by which this case was to be decided, as follows:—That in wills technical *348] words are in all cases *to be taken in their plain and natural sense, except when the context shews clearly that the testator meant to use them in a different sense, and then they are to be taken in that sense. That expressions inconsistent with the sense to be so given to the technical words are to be rejected; but that effect must be given to every word in a will, so far as is practicable and as the rules of law will permit. And he contended that in this case the intention of the testator, without reference to general or particular intent, would be best effectuated, according to these rules, by construing the will in the manner above stated. He further contended that the effect which the defendants here sought to give to the words of the testator were consistent with the decision in *Langley v. Baldwin*, 1 Eq. Ca. Abr. 185, which let in an estate tail in remainder to J. S., by implication from the words, "If J. S. should die without issue male;" the express devise there not being to all J. S.'s sons. And he referred to *The Attorney-General v. Sutton*, 1 P. Wms. 754, and *Stanley v. Lennard*, 1 Eden's Ch. C. 87, as similar cases. [BOSANQUET, J. In none of those is it said that an estate tail in remainder was given. Lord ABINGER, C. B. Lord Keeper Henley's judgment in *Stanley v. Lennard*, 1 Eden's Ch. C. 87, is in favour of an immediate estate tail.] Coote also referred to the cases, cited in the argument below, of Doe dem. *Bean v. Halley*, 8 T. R. 5, 3 Bro. P. C. 75, and *Parr v. Swindels*, 4 Russ. 288, and distinguished the present case from *Murthwaite v. Jenkinson*, 2 B. & C. 357, *Wollen v. Andrewes*, 2 Bing. 126, and *Mortimer v. West*, 2 Sim. 274, also discussed in the argument in the Court of King's Bench. And he further cited (as shewing that, by the terms *349] of the *devise to F. C. Gallini's children, F. C. Gallini could take only a life estate,) *Ives v. Legge*, 8 T. R. 488, note (a); (see *Fearne's Cont. Rem.* 377, 9th ed.,) and *Goodtitle dem. Cross v. Wodhull*, Willes, 592.

Lynch, in reply, commented on the cases cited, and denied that the doctrine as to general and particular intent could be identified with the rule in *Shelly's Case*, 1 Rep. 104 a, the first being a rule of construction merely, the latter a technical rule of tenure. *Cur. adv. vult.*

TINDAL, C. J. now delivered the judgment of the court.

This case comes before us on a writ of error, brought by the plaintiff below upon a judgment given against him by the Court of King's Bench; the question for our consideration being, whether that court has put the proper construction upon the will of Sir John Andrew Gallini set out in the special verdict.

The Court of King's Bench has decided that, under this will, Francis Cecil Gallini, the eldest son of the testator, did not take an immediate estate tail in possession, but an estate for life only; but that his children took several estates tail in undivided shares as tenants in common. And as John Andrew Gallini, the lessor of the plaintiff, is the eldest son and heir of Francis Cecil Gallini, and, in the character of heir in tail alone, claims the whole of the property in question, and as the defendants, being two brothers and one sister of the lessor of the plaintiff, claim adversely to him three undivided fifth parts of the property

devised, the judgment *of the Court of King's Bench must be affirmed, [*350 if Francis Cecil Gallini took for life only, and not in tail.

And we are all of opinion that the construction put upon this will by the court below is the right construction.

We think it unnecessary, upon this occasion, to enter into the discussion, in what cases, and how far, the particular intent in a will must give way to the general intent of the testator appearing upon the same instrument, when the two intents are inconsistent with each other; because we think the construction which has been put by the court below upon this will is the only one which can give effect, if not to the whole of the will, at all events to so much of it as can be legally carried into effect.

The question is, whether the children of the testator took estates tail in the properties severally devised to them, or whether they took for life only with remainder to their children in tail, that is, considering the question with reference to the particular premises for which this ejectment is brought, whether the testator's son Francis Cecil Gallini took for life or in tail?

The testator first gives to his son Francis, that is Francis Cecil Gallini, an express estate for life, in the share of the premises devised to him; with remainder to trustees to support contingent remainders; with remainder unto and amongst all and every his children, which shall be living at the time of his decease, for and during their natural lives, as tenants in common.

If we pause here, every provision in the will points directly against an estate tail in Francis. There is an express estate for life: trustees to support contingent *remainders; remainder to such children only as should be living [*351 at his death; and to such children for life only, and to them as tenants in common.

The will then, after providing for the case of a survivorship amongst the grandchildren, proceeds thus: "and from and after the decease of *all* the children of each of my said sons or daughters *without issue*, I give and devise the estates to them respectively limited as aforesaid, amongst all and every the lawful issue of such child or children (during their lives) as tenants in common, and to descend in like manner to the issue of my said sons and daughters respectively, so long as there shall be any stock or offspring remaining."

It is very difficult, if not altogether impossible, to put any intelligible construction upon *the whole* of this clause. It is sufficient, however, to observe, that so far as we have proceeded at present, there is nothing to show an intention that Francis, the eldest son of the testator, should take a larger estate than the estate for life which had been originally expressly devised to him, or that the estates for life expressly devised to the grandchildren should be in any way defeated by enlarging the eldest son's estate for life into an estate tail. On the contrary, we hold the necessary construction of those words to be that of enlarging the estates for life previously given to the grandchildren, into estates tail.

The clause then follows, upon which the plaintiff mainly relies:—"and for default and in *failure of issue of any of my said sons and daughters*, I give and devise the estate so limited to him or them dying without issue to the survivors, &c.; and for default and in *failure of issue of all my said sons and daughters* except one, I give and devise all my freehold estates unto my only surviving *son or daughter, his or her heirs and assigns forever."

Under this clause, it is contended by the plaintiff, that the sons and [*352 daughters of the testator took immediate estates tail.

The words, undoubtedly, if they had occurred without any intervening devise to the grandchildren, would have been sufficient to have created immediate estates tail. But there has been in the foregoing part of the will, not only an express devise to the grandchildren for life, but also words sufficient to enlarge such estates for life in the grandchildren into estates tail. Admitting, therefore, the argument of the plaintiff's counsel to be just, that if we give to the words "*failure of issue*," when applied to the grandchildren surviving, the force of enlarg-

ing their estates for life into an estate tail, we ought to give the same effect to the same words at the end of the devise, when applied to the children of the testator, and consequently that their estates for life must be similarly enlarged, still the question arises, whether such estate tail in the sons and daughters of the testator is *immediate*, or whether it is not to be *postponed* until after the estate tail in the children of such sons and daughters has taken effect?

If we consider the clause of the will last referred to, as giving an *immediate* estate tail to the children, the previous devise to the grandchildren as tenants in common in tail is defeated. Whereas, if we hold the devise to the children of the testator to be an estate in tail, but to be a devise in *remainder only*, in that case the limitation for life to the children will take effect, and the devise to *353] the grandchildren as tenants in common in tail, in remainder; and the general remainder over, to *the children of the testator in tail, will also take effect, and will effectually secure the descent of the property in the line of the testator's family, as long (to use the testator's own expression in his will) as "there shall be any stock or offspring of the testator remaining."

It is objected against this construction, that if the estate tail is given to the grandchildren as purchasers, and one of them had died in the lifetime of the testator, and had left issue, that issue could not have inherited, but the devise, as to such grandchild, would have altogether failed as a lapsed devise.

It may be admitted, that such would be the consequence. But it is to be observed in reply, that as this supposed event takes place in the lifetime of the testator, it was open to him to make such new disposition of his property as he might think fit on this change in his family taking place; and the argument, therefore, is not entitled to the same weight as where the construction put upon a will is such that a failure in the manifest intention of the testator must necessarily follow by an event which takes place after his death; at which time he can have no control over, and no means of applying a remedy to, the contingency which has taken place. And, again, it is clear, that even in the case just above supposed, after failure of the issue of all the other grandchildren, the issue of the grandchild so dying in the lifetime of the testator would ultimately take under the estates tail limited to the sons and daughters of the testator, which would then come into operation. It may, indeed, be urged, that a difficulty of a similar nature may take place under the construction adopted by the Court, by the failure of an estate on a contingency which may happen *after the death* of the testator. *For, suppose the grandchildren are held to take as *354] purchasers in tail, then the devise being limited to such grandchildren as shall be living at the death of their respective parents, if any grandchild should die, living his parent, and leaving issue, such issue would not take. To which difficulty the only answer is, that this is an *express contingency* created by the testator himself, and he cannot, upon any principle of construction, be held to have been insensible to that which was its natural and necessary consequence; and in this case also, as in the last, the issue of the grandchild so dying might ultimately take under the devise in tail in remainder to the children of the testator.

The two cases of *Murthwaite v. Jenkinson*, 2 B. & C. 857, and *Wollen v. Andrews*, 2 Bing. 126, which were relied upon by the counsel for the plaintiff in the argument in the Court below, and, again, in the argument before us, have been so well and clearly distinguished from the present, by the judgment given by the Court of King's Bench, that we feel it unnecessary to add any thing upon that point, or, indeed, to give any further observations on the case before us, except that we think the judgment of that Court the right judgment, inasmuch as it proceeds upon the construction of the will which gives the utmost possible effect to all and every the devices contained therein.

We therefore think the judgment of that Court must be affirmed.

Judgment affirmed.

C A S E S
 ARGUED AND DETERMINED
 IN THE
 COURT OF KING'S BENCH,
 AND
 UPON WRITS OF ERROR FROM THAT COURT
 TO THE
 EXCHEQUER CHAMBER,
 IN
 Trinity Term,
 IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who usually sat in Banc this term were,

LORD DENMAN, C. J.
 LITTLEDALE, J.

PATTESON, J.
 WILLIAMS, J.

DOBELL *against* **HUTCHINSON and HOLDSWORTH, TWO, &c.**
Wednesday, May 27.

Where a contract in writing, or note, exists, which binds one party to a contract, under the Statute of Frauds, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them.

The purchaser of lands by auction signed a memorandum of the contract, indorsed on the particulars and conditions of sale, and referring to them. Afterwards he wrote to the vendor, complaining of a defect in the title, referring to the contract expressly, and renouncing it. The vendor wrote and signed several letters, mentioning the property sold, the names of the parties, and some of the conditions of sale, insisting on one of them as curing the defect, and demanding the execution of the contract: Held, that these letters might be connected with the particulars and conditions of sale, so as to constitute a memorandum in writing, binding the vendor under stat. 29 Car. 2, c. 3, s. 4, although neither the original conditions and particulars, nor the memorandum signed by the purchaser, mentioned, or were signed by, the vendor.

On a sale of a leasehold interest of lands, described in the particulars as held for a term of twenty-three years, at a rent of 55*l.*, and as comprising a yard, one of the conditions was, that if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made, to be settled by arbitration. The yard was not, in fact, comprehended in the property held for the term at 55*l.*, but was held by the vendor from year to year, at an additional rent. It was essential to the enjoyment of the property leased for the twenty-three years. It did not appear that the vendor knew of the defect. Held, that this defect avoided the sale, and was not a mistake to be compensated for under the above condition; al-

though, after the day named in the conditions for completing the purchase, and before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, and offered it to him.

ASSUMPSIT. The first count charged that the defendants, to wit on the 11th June 1832, put up for sale by public auction certain premises stated and re-
 *356] *presented by the defendants to "consist of a valuable leasehold public house, or small tavern, known as the Aberdeen Arms," &c., "held for a term of which twenty-three years were unexpired at Lady-day then last past, at the low rent of 55*l.* per annum," &c., and to "comprise on the ground floor a commodious bar," &c., "a small yard and washhouse," &c., subject to certain conditions: namely, amongst others, the highest bidder to be the purchaser; that the auction duty should be paid in equal moieties by vendor and purchaser; and that the purchaser should immediately pay a deposit of 20*l.* per cent., in part payment of the purchase money, into the hands of the auctioneer; also one moiety of the auction duty; and sign an agreement for payment of the residue on or before the 25th of June 1832, at which time the purchase was to be completed: that, within one week from the day of sale, the vendors should, at their own expense, deliver an abstract of the lease to the purchaser; that it should not, however, be required that any other title anterior to the lease should be produced; and that upon payment of the remainder of the purchase money at the time before mentioned, the lease should be assigned to the purchaser at his ex-
 *357] pense. The plaintiff *then averred that he became the purchaser of the premises on their exposure to sale, upon the said conditions, for the price of 94*l.* 10*s.*, and paid 18*l.* 18*s.* for the deposit in part of the purchase money, and 2*l.* 5*s.* 3*d.* as his moiety of the auction duty: the declaration then stated mutual promises by the parties to perform all things on their several parts as purchasers and vendors respectively to be performed; and that the plaintiff had been always ready to perform, on his part, and to pay the remainder of the purchase money, and complete the purchase; that a week from the day of sale had elapsed; that nevertheless the defendants had not delivered an abstract of the lease; and the plaintiff had expended a large sum in endeavouring to procure the abstract and get the purchase completed, and had lost the benefits of the purchase and the use of the moneys paid by him for deposit and duty, and kept for the completion of the purchase. In the second count the agreement was laid as in the first count, and performance by the plaintiff averred: and the breach was laid, that the defendants had not, at the time of making the promise, a valuable leasehold public house, &c. (following the representation as in the first count), nor had the said defendants the premises at the low rent of 55*l.*, but the same were at a much higher and larger rent, to wit 65*l.*, whereby the purchase was disadvantageous and of no use to the plaintiff. The third count laid the breach, that the defendants had not authority to sell the public house and premises, nor were possessed of the term therein, absolutely and without condition, or at the low rent of 55*l.* There was also a count for money lent, money paid, money had and received, and on an account stated. Plea, non assumpsit, and issue thereon.

*358] *On the trial before Patteson, J., at the Middlesex sittings in Trinity term 1834, it appeared that the defendants, who were in partnership as attorneys, being possessed of certain premises, advertised them for sale by auction on the 11th of June 1832. The particulars of sale described the premises conformably to the representation set out in the first count of the declaration; and, for particulars of the premises, reference was made (among other places) to the office of the defendants. The conditions of sale were on the same sheet as the particulars, and contained the conditions mentioned in the first count of the declaration, besides the following, which was the ninth condition:—That if any mistake should be made in the description of the property, or any other error

whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation or equivalent should be given or taken as the case might require, such compensation or equivalent to be settled by two referees or their umpire: and that the decision of the referees or umpire, as the case might be, should be final. The property was put up to sale on the 11th of June: and the plaintiff was declared the highest bidder and purchaser at 94*l.* 10*s.* He paid the 18*l.* 18*s.* for the deposit to the auctioneer, and he also paid the 2*l.* 7*s.* 8*d.* for the moiety of the auction duty. He at the same time signed an agreement indorsed on the particulars and conditions of sale, which agreement was as follows:—

"I do hereby acknowledge myself the purchaser of the property described in the within particulars, at and for the price or sum of 94*l.* 10*s.*: and I do hereby *undertake and agree to perform my part of the conditions therein specified; in furtherance of which I have this day paid the sum of 18*l.* 18*s.*, [*359 being the amount of the deposit, as also the sum of 2*l.* 7*s.* 8*d.*, being my moiety of the government duty. As witness my hand this 11th day of June, 1835. (Signed) Isaac Dobell (the plaintiff). Witness G. M. Sheppard."

The attesting witness was the clerk of the auctioneer,^(a) but was not so described in the attestation. Neither the defendants, nor the auctioneer, nor any one on behalf of the defendants, signed this agreement; nor was their name mentioned in the agreement, or the conditions, or in the particulars, except that, in the last, the defendants were referred to for particulars as above mentioned. An abstract of the lease was in due time delivered; when it appeared that the small yard mentioned in the particulars was not comprised in the lease, but was held from year to year at an annual rent of 8*l.*, the remainder of the premises being held at the 55*l.* for the term as described in the particulars. It did not appear that this defect was known at the time of the sale to the defendants, who had but recently become owners of the term. There was, in fact, a yard originally mentioned in the lease: but this yard had been built over; and the yard mentioned in the particulars was an additional one. On the discovery of these facts the plaintiff refused to complete the purchase; and his attorneys wrote to the auctioneer, demanding a return of the money paid for deposit and auction duty. The auctioneer referred them to the defendants, upon which the plaintiff's attorneys sent the following letter to the defendants:—

*"20th June, 1835. [*360
"Gentlemen,—We are instructed to inform you that Mr. Dobell, in consequence of your not having shewn a good title to the premises offered for sale on the 11th instant, as described in the particulars, declines taking to the property; and we have to request that you will direct Mr. Richards" [the auctioneer] "to return the deposit and duty received by him of Mr. Dobell, and that you will remit to us the expenses incurred in this matter, and make some arrangement for the payment thereof."

On the 2d of July, the defendant Hutchinson sent a letter, signed by him, to the plaintiff's attorneys, in which he mentioned his having stated "the case to counsel relating to our sale to Mr. Dobell;" and added, "having obtained counsel's opinion thereon, I beg to acquaint you, we are advised that the reasonable and just compensation, to which Mr. Dobell is entitled on our securing him a lease of the yard and wash-house adjoining the Aberdeen Arms, is an abatement of one eighth of the purchase-money (94*l.* 10*s.*) bid by him for the premises, say 11*l.* 16*s.* If he is willing to accede to this, the business may be completed without further delay; if not, we beg to be understood as now calling on Mr. Dobell to appoint a referee to meet one on our part, and settle the compensation or abatement to which he is entitled. If he declines this, we presume you will accept Chancery process for him at our suit."

(a) See *Goobell v. Archer*, 2 A. & E. 500.

On the 11th of July, the defendants sent a letter to the plaintiff's attorney from which the following is an extract :—

*361] “Messrs. Hutchinson and Holdsworth have also to request to be favoured with a decisive answer on the part of Mr. Dobell in the course of this week, or they must presume he refuses to complete his purchase, and proceed accordingly.”

On the 12th of July, 1882, one of the plaintiff's attorneys wrote to the defendants requesting a copy of a plan of the premises, and adding,

“On being furnished with such copy, I will take the opinion of counsel on behalf of Mr. Dobell, and in a very few days send you Mr. Dobell's determination, whether he will or not take the premises on the terms you propose.”

On the 13th of July, 1882, the defendants sent a letter signed by them to the plaintiff's attorneys, from which the following is an extract :—

“The time already occupied by Mr. Dobell to deliberate about the course he will adopt is far beyond reason; and we shall therefore proceed to such measures as we may be advised on Monday, unless we hear from you on or before that day.”

On the 20th of September, 1882, the plaintiff's attorneys sent a letter to the defendants, offering, without prejudice, that the contract should be rescinded on the defendant's returning the money paid for deposit and auction duty.

On September 24th, 1882, the defendants sent the following letter, signed by them, to the plaintiff's attorneys :—

*362] “Gentlemen,—On considering the terms proposed by you of rescinding the contract, we cannot accede thereto, inasmuch as we are advised, we have full power to compel the fulfilment of it, subject to the abatement of about one-seventh of the premium, viz. 13*l.* 10*s.* in respect of the larger rent, to which the premises appear to be liable, than was stated in the particulars of sale, viz. 63*l.* instead of 55*l.* : whereas, if we were to release your client on the terms proposed for returning his deposit, we find, on calculation, the effect would be, that over and above the 13*l.* 10*s.* reduction in the premium, we should have one quarter's rent and other outgoings in respect of the house, and the charges of a man keeping possession for thirteen weeks at 4*s.* a day. These amount to 18*l.* 4*s.*, which with 16*l.* 2*s.* 6*d.*, the quarter's rent, makes together, 34*l.* 6*s.* 6*d.* Unless, therefore, Mr. Dobell consents to give up the deposit, we shall forthwith, after shewing our title to the premises contracted to be sold, call on him to nominate a referee to ascertain the amount of the allowance to be made to him in respect of the increased rent; and, in default of his doing so within a reasonable time, we shall, according to the conditions of sale, treat the deposit as forfeited, and proceed to a resale of the premises. On the other hand, if Mr. Dobell consents to give up the deposit, we will release him. Writing without prejudice,” &c.

In the meantime the defendants had been in treaty with the owner of the freehold of the yard in question, and obtained from him a lease of it, for the term for which the lease of the public-house had then to run : and, on the 25th of September, they sent an abstract to the attorneys of the plaintiff, who returned it to them.

*363] On the 27th of September, the defendant Hutchinson sent a letter, signed by him, to the plaintiff's attorneys, from which the following is an extract :—

“Hutchinson and Holdsworth,
at.
Dobell.”

“I apprehend there must be some mistake in your returning the additional abstract of the title which I sent, as it was intended to complete the title to the premises sold to your client. I therefore send it again; and, pursuant to the ninth condition of the sale, I beg to propose, on behalf of Mr. Holdsworth and myself, to refer the question of the abatement, to be made on account of the

higher rent to which the premises are subject, to two referees or their umpire. On hearing from you, that you accede to this arrangement, I will furnish you with the name of our referee."

On the 29th of September, the defendant Hollingsworth wrote to the plaintiff's attorneys a letter signed by himself, from which the following is an extract:—

"Self and Holdsworth,

ats.

Dobell."

"I have been expecting to be favoured with your reply, whether you accept the notice of our proposal to refer the question of abatement of the premium, on behalf of your client, or whether it must be served personally upon him."

The plaintiff's attorneys wrote, in answer, that they had not yet an opportunity of seeing Dobell; but that when they did, they would communicate the result.

On the 2d of October, the defendant Hutchinson wrote to the plaintiff's attorneys as follows:—

"*Ourselves and Mr. Dobell.

[*364

"Your note received yesterday evening, without date, leaves us so entirely in uncertainty, not only whether we are likely to come to any terms, but also when it may suit Mr. Dobell to give us an answer, that we are driven to act on our right. Considering, therefore, that a reasonable time has elapsed since we proposed a reference as to the abatements in the premium, and that the neglect on his part amounts to a declining of the reference, we feel that we can only treat the deposit as forfeited, and proceed to a resale, which we shall accordingly do." (Signed by Hutchinson.)

On the 13th of October, the defendants sent a note, signed by them, to the plaintiff's attorneys, from which the following is an extract:—

"Having understood that Mr. Dobell has refused to refer the question of abatement to arbitration, or complete his purchase on any terms, Mr. Hutchinson and Mr. Holdsworth have acted on that understanding."

The present action was shortly afterwards commenced.

It was proved that the possession of the yard was essential to the enjoyment of the premises. The money paid by the plaintiff to the auctioneer had not been handed over to the defendants.

The defendants' counsel contended that the plaintiff must be nonsuited; first, for want of a written agreement or memorandum to satisfy the fourth section of the Statute of Frauds; secondly, because the ninth condition of sale entitled the defendants to the benefit of a reference as to the compensation to be awarded on account of the yard not being included in the lease, and *prevented the defect in this particular from being a breach of the contract. They also contended that the count for money had and received could not be supported in respect of the deposit, which the defendants had never received. The learned Judge refused to nonsuit, but reserved leave to move on all the points; and a verdict was taken for the plaintiff for the amount of the deposit, the moiety of the duty, and the expenses incurred by the plaintiff, subject to the taxation of the plaintiff's attorneys' bill by the Master. [*365

In Trinity term 1834, *Kelly* obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, or why the damages should not be reduced by deducting the 1*l.* 18*s.* paid to the auctioneer as a deposit in part of the purchase money.

R. V. Richards shewed cause, in Easter last (May 4th) (a). First: There was a good written memorandum with the Statute of Frauds. The whole of the letters must be taken together. The plaintiff's letter of 20th of June refers to the sale expressly. By the letter of 2d July, the defendants refer

(a) Before Lord Denman, C. J., Littleale, Patteson, and Williams, Js.

to "our sale," mention the premises, the names of both parties, and the amount of the purchase money, and insist on the contract, referring to the ninth condition of sale: and the subsequent letters of the defendants refer to every particular necessary for identifying the contract, and they therefore constitute "a memorandum or note" of the "agreement" upon which the action is brought, in writing, and signed by the party to "be charged therewith," according to the *366] words of stat. 29 C. 2, c. 3, s. 4. The signature of the party need not be on the particular instrument: it is enough if he sign any document from which the contract can be collected. In *Jackson v. Lowe*, 1 Bing. 9, it was held that the seventeenth section was satisfied by a letter of the plaintiff, describing the contract, and an answer of the defendants stating that they had "performed their contract," as far as it had gone, and were ready to complete the remainder; the court considering that there was enough to warrant the jury, who had found for the plaintiff, in referring the two letters to the same contract. In *Saunderson v. Jackson*, 2 B. & P. 238, a letter of the defendant, referring to the order given by the plaintiff, was connected with a bill of parcels given by the defendant to the plaintiff at the time when the order was given. In *Allen v. Bennet*, 3 Taunt. 169, a seller's agent wrote an order for goods in a book belonging to the buyer, not naming the buyer; and afterwards the seller wrote to his agent mentioning the name of the buyer; and the jury having found a verdict for the buyer (the plaintiff,) the Court held that the letter and the order might be connected, so as to satisfy the statute. The present is a much stronger case.

Secondly: The ninth condition applies merely to cases of misdescription, and not to the want of that which is essential to the enjoyment of the whole subject of purchase. If the extent of premises, for instance, were somewhat less than that described in the conditions of sale, that would be a misdescription admitting of a compensation in money; but a failure which affects the essence of the thing *367] contracted for, cannot admit of compensation: it avoids the whole contract. This is always the criterion, in courts of equity, where bills are filed for a specific performance. In *Sherwood v. Robins*, M. & M. 194, (S. C. 3, C. & P. 339,) Lord Tenterden held that such a condition applied only where the difference of value between the thing described and the thing sold could be the subject of computation: and this is adopted in 1 Sugden on Vendors and Purchasers, (Ch. 1. (iii.) ed. 9, 1834,) p. 43. As for the lease which was afterwards obtained of the yard, that was not procured till after the time at which the contract ought to have been completed, and after the right of action had become vested.

Thirdly: Although the auctioneer has not actually paid the deposit to the defendants, yet the latter, in the correspondence, speak of it as their property, and cannot now, as between themselves and the plaintiff, disclaim the possession of it.

Kelly and C. Cooper, contra. First: There was no agreement or memorandum, or note thereof, in writing, and signed by the parties charged, or any person authorized by them. The cases, as to making good a contract otherwise imperfect by written documents referring to it, are not uniform: but, upon the words of the statute, it is not reasonable that, a definitive contract being once concluded, a subsequent admission of its existence, even though made in writing, should satisfy the statute, if the original contract did not. The letters, at the utmost, merely recognize the previous contract as valid; now that contract is actually in evidence, and appears to be *invalid under the statute. In *368] *Richards v. Porter*, 6 B. & C. 437, it was held that a letter, referring to an invoice, did not, with the invoice, constitute a written memorandum to satisfy the seventeenth section; though it is clear that the invoice, in itself, must have been good under the statute, except as to the want of the signature of the defendant, which the letter was required to supply. In *Boydell v. Drummond*, 11 East, 142, the defendant signed a book entitled "Shakspeare subscri-

bers, their signatures;" and the plaintiff wished to connect the book with a prospectus; but parol evidence for this purpose was held not admissible, the book containing no express reference to the prospectus. The evidence, by which such a connection must be established, is, in fact, that which the legislature meant to exclude. If, in the present instance, all the documentary evidence were set out in a special case, there would be nothing to connect it with the conditions of sale, except evidence of this objectionable kind. In *Goss v. Lord Nugent*, 5 B. & Ad. 58, the Court refused to permit parol evidence to be given of a part waiver, by parol, of written conditions of sale on the ground that the contract sought to be enforced must be writing only. Here the original contract does not show the name of the party selling at all, and therefore is invalid: *Champion v. Plummer*, 1 N. R. 252, *Wheeler v. Collier*, M. & M. 128. And thus the subsequent letters refer to a contract not valid in itself. Besides, the first letter from the plaintiff rescinds the contract: and the rest are not sufficient to constitute a contract, if none existed before. And the admission of a contract, not good *under the statute, does not preclude the defendant from availing himself of the statute. In an answer to a bill in equity, [*369 he might admit a parol contract, yet insist on the statute; 1 *Sagden's Vend. and Purch.*, p. 112, &c., (Ch. III., sect. 3, (ii.) 9th ed. 1834.) [Lord DENMAN, C. J. He might do so: but here he insists on the validity of the contract.] He insists upon a contract which the plaintiff is not now suing on; if this be taken as an admission, it is an admission only of a contract admitting of compensation under the ninth condition of sale: and the plaintiff must take all together.

Secondly, as to the effect of the ninth condition. The defect must be now admitted to be essential; but the condition provides that mistake or error shall not vitiate the sale. Now mistake and error included what is essential misdescription. [LITTLEDALE, J. Suppose there had been no cellar.] The house could not then have been used as a public-house. [PATTERSON, J. Then it would come to a question of degree.] The cases wherein this kind of condition has been held inapplicable have been instances of wilful misrepresentation: as in the *Duke of Norfolk v. Worthy*, 1 Campb. 340. Besides, the lease of the yard having been procured, the difference is easily reducible to computation; and it is no objection that this has taken place since the sale; *Thompson v. Miles*, 1 Esp. 185. It is said that it took place after the time for completing the contract; but the defendants have as much right to avail themselves of it, as the plaintiff has to use the letters which are subsequent to that time.

*Thirdly, as to the money in the hands of the auctioneer. That was held by him as agent to both parties. The plaintiff directs him not to [*370 pay it over to the defendants, and thus make him, not the defendants, the debtor. The money does not belong to the vendor till the purchase is completed; *Harrington v. Hoggart*, 1 B. & Ad. 577. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the nature of the action, his lordship said:—

Three questions arose: 1st, Whether there was a contract binding upon the defendants within the Statute of Frauds. 2dly, Whether the defect of title was the subject of compensation within the terms of the ninth condition of sale. 3dly, Whether, in case the special contract was not proved, an action for money had and received would lie against these defendants.

As to the first question the facts were, that the plaintiff had signed a written contract on the back of printed conditions of sale, in which conditions the names of the vendors appeared as solicitors only, and not as vendors. Nothing was signed by the vendors or by the auctioneer. An abstract of title was sent, on the face of which it appeared that a yard, which was proved to be an essential part of the premises, was held from year to year only as a separate rent of 8*l.*, in addition to a rent of 55*l.*, at which the conditions described the whole premises to be held for a term of twenty-three years. The plaintiff's attorney wrote

and rejected the title, demanding a return of the deposit. The defendants wrote in answer, and several letters passed between the parties, the letters of *371] the defendants insisting that the defect was matter of compensation within the conditions of sale, calling on the plaintiff to perform the contract, speaking of our sale to Mr. Dobell, and mentioning the premises by name and the price contracted for, and threatening to file a bill for a specific performance; they were signed by one of the defendants (they being attorneys) for both. They now contend that there is no contract binding them with in the Statute of Frauds.

The cases on this subject are not at first sight uniform; but, on examination, it will be found that they establish this principle, that where a contract in writing or note exists which binds one party, any subsequent note in writing, signed by the other, sufficient to bind him, provided it contains in itself the terms of the contract, or refers to any writing which contains them. Here the letters of the defendants refer expressly and distinctly to the conditions of sale, and they had in their hands, or in the hands of their auctioneer, at that very time, the conditions of sale signed by the plaintiff, to which reference is made, so that no parol evidence of any kind was requisite to shew a contract binding both parties, except evidence of the handwriting of each, which must be adduced in all cases. In the case of *Boydell v. Drummond*, 11 East, 142, the book signed by the defendant did not refer to any prospectus or contract. In *Richards v. Porter*, 6 B. & C. 487, the letter of the buyer referring to the invoice sent by the seller expressly repudiated the contract. In *Champion v. Plummer*, 1 N. R. 252, a memorandum signed by the seller only was held insufficient to charge even him, because the buyer's name did not appear on it, or on any other paper to which it referred. In *Wheeler v. Collier, M. & M.* 123, the same circumstance occurred, namely that the seller's name did not appear on the conditions of sale signed by the buyer; and Lord Tenterden thought that the seller could not sue: but the case was decided on another point. On the other hand the cases of *Saunderson v. Jackson*, 2 B. & P. 238, *Allen v. Bennet*, 8 Taunt. 169, and *Jackson v. Lowe*, 1 Bing. 9, shew clearly that a subsequent letter may be a sufficient note to bind the writer, where the requisites above mentioned are found, even where it is written after a dispute has arisen.

For these reasons we are of opinion that there is a sufficient contract in this case within the Statute of Frauds.

As to the second question, we are of opinion that the yard, being proved to be an essential part of the premises, and being held only from year to year, instead of a term of twenty-three years as stated in the particulars, and at a separate rent, the defect was clearly not matter of compensation.

The third question does not arise, as we are of opinion for the plaintiff on the other two, and the rule must be discharged. Rule discharged.

*The KING against The Inhabitants of ST. GEORGE, EXETER. [*878
Wednesday, May 27.

Under stat. 43 Eliz. c. 2, s. 5, and before stat. 56 G. 3, c. 139, parish officers had power to bind apprentice the child of a person settled in, and receiving relief from, the parish, the child being also settled in the parish, though such child, at the time of the binding, resided out of the parish, and was not a party to the indenture; and though the child at the time of such binding was not a burthen to the parish. And the binding was good under the former statute, though the master was neither an inhabitant nor occupier within the parish, provided he became a party to the indenture:

On appeal against an order of two justices, whereby Mary Lee was removed from the parish of St. George in the city and county of Exeter to the parish of

Crediton in the county of Devon, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The settlement of the pauper depended upon that of John Lee, her deceased husband. He was born in the parish of Crediton of parents legally settled in that parish. When he was about twelve years old, and an indenture (bearing date the 15th October, 1811) was executed by the parish officers of Crediton, for the purpose of binding him an apprentice to William Mugford, who was his uncle, and resided in the parish of St. George, Exeter. At the time of the execution of this indenture his father was at sea, and his mother having other children living with her in Crediton, was in the receipt of relief from that parish. John Lee himself was not residing with her, but had lived for a twelve-month or more with his uncle (Mugford) in the parish of St. George. The indenture was executed by the churchwardens and overseers of Crediton, at the pay table of that parish, neither Mugford nor Lee being present, nor the magistrates who signed the allowance of the indenture; and it did not appear at what time or in what place, they signed it: but it bore the signature of two magistrates of the county of Devon. A counterpart was executed *by Mugford at his house in Exeter; but Lee was not present when he executed it, and was not a party to it, nor to the original indenture. He continued to reside with Mugford, serving him in his business of a thatcher, till some months after he had attained the age of twenty-one. [374]

The question for the opinion of the Court was whether this was such a binding of John Lee, as that the residence and service under it would confer a settlement; he lived in the parish of Crediton a full year before the indenture was executed.

The case was argued in the last term (May 2). (a)

Bartow and *Escott* in support of the order of sessions. The binding having taken place before stat. 56 G. 2, c. 139, the case depends upon stat. 43 Eliz. c. 2. By the first section of that act, the overseers are to take order "for setting to work the children of all such whose parents shall not by the said churchwardens and overseers, or the greater part of them, be thought able to keep and maintain their children." The fifth section gives them power, with the assent of justices, "to bind any such children, as aforesaid, to be apprentices, where they shall see convenient." It is objected that the pauper, in this case was not corporeally in the parish at the time of the binding. That must often happen; and it cannot be necessary that, on all occasions of binding, the child should be sent for to the parish, in order that he may be present. The principle is established by *Rex v. St. Nicholas, Nottingham*, 2 T. R. 726, where it was held that an apprentice might be bound, by the parish officers, to a master residing in a different parish.

**Crowder* and *Praed*, contra. The officers had no power to bind under these circumstances, nor was the master liable to receive. It is clear that the only children whom the churchwardens and overseers can set to work, under the first section of stat. 43 Eliz. c. 2, are the children whose parents the said churchwardens and overseers consider unable to keep and maintain them. The parish officers here could not judge whether the parents could maintain a child living at a distance, nor could they set such a child to work; but it is also clear that the power to bind under the fifth section extends only to such children, that is, children whom they have power to set to work. Lord Kenyon, in *Rex v. St. Nicholas, Nottingham*, 2 T. R. 730, lays great stress on the personal knowledge of the parish officers; and so, in *Rex v. Clapp*, 3 T. R. 113, he points out that the generality of the application of the act is limited by the want of power to compel a mere stranger to receive the apprentice. When this statute passed, the law of settlement and removal (as Lord Kenyon points out in *Rex v. Clapp*, 3 T. R. 113, had not been defined as it afterwards was by [375]

(a) Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

stat. 13 & 14 Car. 2, c. 12; parish officers had therefore nothing to do with children who were not actually in their parish, for such only could be burthen-some to the parish. Even now, relief given out of the parish is a misapplication of the fund, except in those cases where the party relieved is legally removable to the removing parish, as in the case of a suspended order, under stat. 35 G. 3, c. 101, s. 2. For the statute 13 & 14 Car. 2, c. 12, s. 1, only gave a power of removal to the place of legal settlement; it did not order relief to be given to *persons not within the parish, till they were brought *376] within the parish by the removal. The legislature seems to have assumed, in provisions respecting parochial administration, that, in order to belong to a parish, it was necessary to be within it: thus in stat. 7 Jac. 1, c. 8, s. 4, provision is made that, if there be not found fit persons to be bound apprentices "within the said cities, towns, and parishes," (where money is given for apprenticing children) then "the poorest children of any of the parishes next adjoining shall be bound apprentices;" where *within* the parish, and *of* the parish, are evidently expressions with the same meaning. The statute of Elizabeth, if interpreted in the sense contended for on the other side, could not be enforced: what power could the officers have to compel a child to come from one part of the realm to another? How could they have compelled Magford to give up the child, if they had chosen to bind him elsewhere? [Lord DENMAN, C. J. Might not the binding be good, as against the parish, although the child could not have been compelled to be bound, nor the uncle to give him up?] The compulsory power is clearly the only power spoken of in the fifth section, just as the power to set to work, in the first section, is compulsory. Besides, the officers have no power to bind except where they can compel the master to take. This appears by the explanatory provision in stat. 8 & 9 W. 3, c. 80, s. 5. Now here the master was not within the parish. It is true that *Rex v. St. Margaret's* in Lincoln, Bur. S. C. 728, and *Rex v. St. Nicholas, Nottingham*, 2 T. R. *377] 726, authorize the position that, even where a master is not *compellable to receive a parish apprentice, the apprenticeship confers a settlement if the master do in fact assent to receive him: but those cases may deserve reconsideration: they are inconsistent with stat. 8 & 9 W. 3, c. 80, s. 5, which makes the liability to receive commensurate with the power to bind. [PATTESON, J. By stat. 20 G. 3, c. 36, s. 2, *no person* is liable to receive an apprentice bound by the officers of an incorporated hundred or district, unless he reside in the parish to which the child belongs.] In *Rex v. Clapp*, 3 T. R. 107, (Hil. T. 29 G. 3), it was held that an occupier of lands, not being resident, was compellable to receive a parish apprentice. [COLERIDGE, J. This case was reserved on the express understanding that the only point to be raised should be the absence of the child from the parish.] (a) PATTESON, J. And that is the only point presented for our opinion at the end of the case.] Then the question is whether there was any power of binding this child. From *Rex v. Coleorton*, 1 B. & Ad. 25, it appears that the power of the officers to bind children who are in the parish, does not depend upon their being settled there: so that a decision in favour of a binding where the child was not resident, would give a concurrent power to the parishes, which can hardly have been the intention of stat. 43 Eliz. c. 2, s. 5. But, further, it appears that, though the mother was a pauper, the child was maintained by the uncle. If any of these objections be good, the settlement fails for want of due assent by the child, which can only be by deed; *378] **Rex v. Arnesby*, 3 B. & Ald. 584. That case appears to overrule the dictum there cited from 4 Com. Dig. Justices of Peace (B. 55), that a parent may bind his infant son, by common law, without his assent. And in

(a) The case was sent up from the sessions held for the city and county of the city of Exeter, December, 1833; at which Coleridge, J., before his elevation to the bench, sat as Recorder of Exeter. For this reason the learned judge now took no part in the decision of the case.

devised, the judgment *of the Court of King's Bench must be affirmed, [*350 if Francis Cecil Gallini took for life only, and not in tail.

And we are all of opinion that the construction put upon this will by the court below is the right construction.

We think it unnecessary, upon this occasion, to enter into the discussion, in what cases, and how far, the particular intent in a will must give way to the general intent of the testator appearing upon the same instrument, when the two intents are inconsistent with each other; because we think the construction which has been put by the court below upon this will is the only one which can give effect, if not to the whole of the will, at all events to so much of it as can be legally carried into effect.

The question is, whether the children of the testator took estates tail in the properties severally devised to them, or whether they took for life only with remainder to their children in tail, that is, considering the question with reference to the particular premises for which this ejectment is brought, whether the testator's son Francis Cecil Gallini took for life or in tail?

The testator first gives to his son Francis, that is Francis Cecil Gallini, an express estate for life, in the share of the premises devised to him; with remainder to trustees to support contingent remainders; with remainder unto and amongst all and every his children, which shall be living at the time of his decease, for and during their natural lives, as tenants in common.

If we pause here, every provision in the will points directly against an estate tail in Francis. There is an express estate for life: trustees to support contingent *remainders; remainder to such children only as should be living [*351 at his death; and to such children for life only, and to them as tenants in common.

The will then, after providing for the case of a survivorship amongst the grandchildren, proceeds thus: "and from and after the decease of *all* the children of each of my said sons or daughters *without issue*, I give and devise the estates to them respectively limited as aforesaid, amongst all and every the lawful issue of such child or children (during their lives) as tenants in common, and to descend in like manner to the issue of my said sons and daughters respectively, so long as there shall be any stock or offspring remaining."

It is very difficult, if not altogether impossible, to put any intelligible construction upon *the whole* of this clause. It is sufficient, however, to observe, that so far as we have proceeded at present, there is nothing to show an intention that Francis, the eldest son of the testator, should take a larger estate than the estate for life which had been originally expressly devised to him, or that the estates for life expressly devised to the grandchildren should be in any way defeated by enlarging the eldest son's estate for life into an estate tail. On the contrary, we hold the necessary construction of those words to be that of enlarging the estates for life previously given to the grandchildren, into estates tail.

The clause then follows, upon which the plaintiff mainly relies:—"and for default and in failure of issue of *any of my said sons and daughters*, I give and devise the estate so limited to him or them dying without issue to the survivors, &c.; and for default and in failure of issue of *all my said sons and daughters* except one, I give and devise all my freehold estates unto my only surviving *son or daughter, his or her heirs and assigns forever."

Under this clause, it is contended by the plaintiff, that the sons and [*352 daughters of the testator took immediate estates tail.

The words, undoubtedly, if they had occurred without any intervening devise to the grandchildren, would have been sufficient to have created immediate estates tail. But there has been in the foregoing part of the will, not only an express devise to the grandchildren for life, but also words sufficient to enlarge such estates for life in the grandchildren into estates tail. Admitting, therefore, the argument of the plaintiff's counsel to be just, that if we give to the words "failure of issue," when applied to the grandchildren surviving, the force of enlarg-

ing their estates for life into an estate tail, we ought to give the same effect to the same words at the end of the devise, when applied to the children of the testator, and consequently that their estates for life must be similarly enlarged, still the question arises, whether such estate tail in the sons and daughters of the testator is *immediate*, or whether it is not to be *postponed* until after the estate tail in the children of such sons and daughters has taken effect?

If we consider the clause of the will last referred to, as giving an *immediate* estate tail to the children, the previous devise to the grandchildren as tenants in common in tail is defeated. Whereas, if we hold the devise to the children of the testator to be an estate in tail, but to be a devise *in remainder only*, in that case the limitation for life to the children will take effect, and the devise to *353] the grandchildren as tenants in common in tail, in remainder; and the general remainder over, to *the children of the testator in tail, will also take effect, and will effectually secure the descent of the property in the line of the testator's family, as long (to use the testator's own expression in his will) as "there shall be any stock or offspring of the testator remaining."

It is objected against this construction, that if the estate tail is given to the grandchildren as purchasers, and one of them had died in the lifetime of the testator, and had left issue, that issue could not have inherited, but the devise, as to such grandchild, would have altogether failed as a lapsed devise.

It may be admitted, that such would be the consequence. But it is to be observed in reply, that as this supposed event takes place in the lifetime of the testator, it was open to him to make such new disposition of his property as he might think fit on this change in his family taking place; and the argument, therefore, is not entitled to the same weight as where the construction put upon a will is such that a failure in the manifest intention of the testator must necessarily follow by an event which takes place after his death; at which time he can have no control over, and no means of applying a remedy to, the contingency which has taken place. And, again, it is clear, that even in the case just above supposed, after failure of the issue of all the other grandchildren, the issue of the grandchild so dying in the lifetime of the testator would ultimately take under the estates tail limited to the sons and daughters of the testator, which would then come into operation. It may, indeed, be urged, that a difficulty of a similar nature may take place under the construction adopted by the Court, by the failure of an estate on a contingency which may happen *after the death* *354] of the testator. *For, suppose the grandchildren are held to take as purchasers in tail, then the devise being limited to such grandchildren as shall be living at the death of their respective parents, if any grandchild should die, living his parent, and leaving issue, such issue would not take. To which difficulty the only answer is, that this is an *express contingency* created by the testator himself, and he cannot, upon any principle of construction, be held to have been insensible to that which was its natural and necessary consequence; and in this case also, as in the last, the issue of the grandchild so dying might ultimately take under the devise in tail in remainder to the children of the testator.

The two cases of *Murthwaite v. Jenkinson*, 2 B. & C. 357, and *Wollen v. Andrews*, 2 Bing. 126, which were relied upon by the counsel for the plaintiff in the argument in the Court below, and, again, in the argument before us, have been so well and clearly distinguished from the present, by the judgment given by the Court of King's Bench, that we feel it unnecessary to add any thing upon that point, or, indeed, to give any further observations on the case before us, except that we think the judgment of that Court the right judgment, inasmuch as it proceeds upon the construction of the will which gives the utmost possible effect to all and every the devices contained therein.

We therefore think the judgment of that Court must be affirmed.

Judgment affirmed.

and tax the costs and expenses of Henry Pringle Bruyeres, Esquire, returning officer at the last election of barons to serve in Parliament for the town and port of Dover, incurred by him in opposing the petition of John Halcomb, Esquire, complaining of an undue election and return of Sir John Rae Reid, Baronet, have reported to me the amount thereof: Now I do hereby certify, that the said costs and expenses allowed in the said report amount to the sum of 341l. 3s. 9d., and that the said John Halcomb is liable to the payment of the said costs and expenses. Given under my hand the 22d day of April 1881.

“Charles Manners Sutton, Speaker.”

*Soon after the determination of the committee the parliament was dissolved. During the next session of parliament the defendant had prepared a petition to the house against the decision and certificate, but the presenting of it was, for various reasons, deferred till the close of the session; and the Speaker had expressed his opinion to the defendant, that the present parliament could not rescind the decision of a committee in the preceding one, and the Speaker's certificate founded on it.

The present action was brought by the returning officer to recover the costs due to him, payment of which had been duly demanded and refused.

Sir *W. W. Follett* shewed cause in last Easter term.(a) This is a motion to enter up judgment under stat. 9 G. 4, c. 22, s. 63.(b) The Court will not in-

(a) May 11th. /Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Ja. This case had been argued in Hil. T. 1832 (Jan. 30th), before Lord Tenterden, C. J., Littledale, and Taunton, Ja., but no judgment had been given; and, there being now only one judge on the bench who had heard the case discussed, the court directed it to be re-argued.

(b) Stat. 9 G. 4, c. 22, ss. 57, 58, 59, gives costs to the successful party in the respective cases where the petition against a return, or the opposition to such petition, is reported to be frivolous and vexatious. Sect. 57, is as follows:—“And be it enacted, that whenever any committee appointed to consider the merits of any petition complaining of an undue election or return, or of the omission to return,” &c. “shall report to the house with respect to any such petition (except as is hereinbefore excepted) that the same appeared to them to be frivolous or vexatious, the party or parties, if any, who shall have appeared before the committee in opposition to such petition, shall be entitled to recover from the person or persons, or any of them, who shall have signed such petition, the full costs and expenses which such party or parties shall have incurred in opposing the same, such costs and expenses to be ascertained in the manner hereinafter directed.” Sect. 60, enacts that on application to the speaker, within three months after the determination of the merits of such petition, by the petitioner or other party, for ascertaining the costs of prosecuting or opposing any petition presented under this act, the speaker shall direct the same to be taxed by two persons, of whom the clerk or one of the clerks assistant of the house shall be one, and one of other officers mentioned in this clause, shall be the other: “and the persons so authorised and directed to tax such costs, expenses, and fees shall and they are hereby required to examine the same, and to report the amount thereof, together with the name of the party liable to pay the same, to the speaker of the said house, who shall, upon application made to him, deliver to the party or parties a certificate, signed by himself, expressing the amount of the costs, expenses, and fees allowed in such report, together with the name of the party liable to pay the same;”—“and such certificate so signed by the speaker shall be conclusive evidence of the amount of such demands, in all cases and for all purposes whatsoever; and the witness, officer, or party claiming under the same shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same.”

Sect. 63, enacts, “That it shall and may be lawful for the party or parties entitled to such costs and expenses, or for his, her, or their executors or administrators, to demand the whole amount thereof, so certified as above, from any one or more of the persons respectively who are hereinbefore made liable to the payment thereof in the several cases hereinbefore mentioned, and in case of nonpayment thereof to recover the same by action of debt in any of his majesty's courts of record at Westminster, in which action it shall be sufficient for the plaintiff or plaintiffs to declare that the defendant or defendants is or are indebted to him or them in the sum to which the costs and expenses, ascertained in manner aforesaid, shall amount, by virtue of this act; and the certificate of such amount, so signed as aforesaid by the speaker, shall have the force and effect of a warrant to confess judgment; and the court in which such action shall be commenced shall, upon motion,

*384] terfere *unless it sees that the provisions of the statute have not been complied with. The certificate is wrong both in substance and in form. The substantial objection is, that where no person has appeared to support the petition within the time specified by the act of parliament, (a) there is no power *385] to appoint a committee, *and, consequently, there can be no regular certificate for costs. It is clear, from the several sections relating to this subject, that the committee cannot be formed unless the petitioner, his counsel or agent, attend. By sect. 18, the parties are required to be present at the bar when the ballot is taken. By sect. 30, as soon as thirty-three members have been chosen by lot, the petitioner and sitting member, their counsel or agents, are to withdraw; and, each party being furnished with a list of thirty-three, they are alternately to strike off names till the number is reduced to eleven, *386] which eleven *are then to be sworn, and shall be deemed and taken to be a select committee legally appointed to try the merits of the return or election from the time of their having been sworn. In the present case that proceeding could not be gone through; the petitioner did not attend or withdraw, receive a list, or strike off any names. Sect. 33, also shows that the presence of the parties is contemplated. Sect. 34, prescribes a mode of proceeding where the party opposing the petition does not appear, but not in the absence of the petitioner. By sect. 40, every *such* select committee (that is, appointed as before required) shall try the merits of the return or election, and report to the House, and a provision is made in case of no person appearing to oppose the petition, but none in case of default by the petitioner. Then, as to costs, sects. 57, and 58, give them to the respective parties in case of the petition or opposition being reported frivolous and vexatious; and sect. 59, gives costs to the petitioner where no person appears in opposition, and the election or return, or other proceedings petitioned against, is reported to have been vexatious or corrupt: but there is no corresponding provision in case of the petitioner's non-appearance. For ascertaining the costs, sect. 60, introduces a new regulation. Two officers are appointed to examine the costs, and to report the amount, with the name of party liable, to the Speaker, who is, upon application made,

and on the production of such certificate, enter up judgment in favour of the plaintiff or plaintiffs named in such certificate, for the sum specified therein to be due from the defendant or defendants in such action, in like manner as if the said defendant and defendants had signed a warrant to confess judgment in the said action to that amount."

(a) Sect. 2, directs that whenever a petition complaining of an undue election or return, &c., shall be presented to the house within the proper time, a day and hour shall be appointed by the house for taking the same into consideration, and notice given by the speaker to the petitioners and sitting members, &c. By sect. 3, the house may alter the day and hour, giving notice to the parties; "and if within one hour after the time fixed in the manner hereinafter directed for calling in the respective parties, their counsel or agents for the purpose of proceeding to the appointment of a select committee, the petitioner or petitioners, or some one or more of them who shall have signed any such petition, shall not appear, by himself or themselves, or by his or their counsel or agents, the order for taking such petition into consideration shall thereupon be discharged, and such petition shall not be further proceeded upon."

Sect. 5, enacts, "That no proceeding shall be had upon any such petition, unless the person or persons subscribing the same, or some one or more of them, shall, within fourteen days after the same shall have been presented to the house, or within such further time as shall be limited by the house, personally enter into a recognizance to our sovereign lord the king, according to the form hereunto annexed, in the sum of 1000*l.*, with two sufficient sureties in the sum of 500*l.* each, or four sufficient sureties in the sum of 250*l.* each, for the payment of all costs, expenses, and fees which shall become due to any witness summoned in behalf of the person or persons so subscribing such petition, or to any clerk or officer of the house, upon the trial of such petition, or to any party who shall appear before the house, or any committee of the house, in opposition to such petition in case such person or persons shall fail to appear before the house at such time or times as shall be fixed by the house for taking such petition into consideration; or in case such petition shall be withdrawn by the permission of the house; or in case such committee shall report to the house, that such petition appears to them to be frivolous or vexatious."

to give a certificate expressing such amount and name to the parties. His certificate, however, ought to be merely the echo of the report made by the officers; he has no authority of himself to say who shall be liable. The act says that his certificate "shall be conclusive evidence of the amount of such demands, in all cases and for *all purposes whatsoever:" but that can only be applied to cases provided for by the act; not, therefore, where the committee has been formed in a manner not contemplated by the statute. In such a case this Court cannot act upon the certificate as upon a warrant to confess judgment, according to sect. 63. And it is to be observed that sect. 60, makes the certificate conclusive as to the amount only, not as to the person liable. The case of a petitioner not appearing is provided for by sect. 3, which directs that if, within one hour after the time fixed for calling in the parties to proceed to the appointment of a select committee, the petitioner shall not appear by himself, his counsel or agent, the order for considering such petition shall be discharged. And the costs of the opposing party up to that time are provided for by sect. 5, which directs that no proceeding shall be had upon such a petition, unless the petitioner shall, within the time there mentioned, enter into a recognizance with sureties, for payment of all costs which shall become due to the opposing party, in the case, among others, of his non-appearance at the time fixed for considering the petition. [*387]

It will be contended that, although the House may have proceeded in a manner contrary to the act, the Speaker's certificate is conclusive, and that to contest it would be an interference with the privileges of the House. Such an argument cannot be available where this Court is asked to lend its own process for the purpose of making the certificate effectual: the question being, not whether the Court shall oppose the House of Commons in the exercise of their privileges, but whether it shall itself proceed to enforce a demand not sanctioned by law. The act says, that the certificate shall have the effect of a warrant to confess judgment; but it must mean a certificate regularly granted; if a certificate was given when there had been no committee appointed, no ballot, or no petition, it cannot be contended that this Court should overlook the defect. The certificate is open to any objections that might be made to a warrant of attorney. And if the Court were precluded from questioning the certificate, it would be only as to the amount. In *Strachey v. Turley*, 7 East, 507, upon a special case, this Court took notice that the Speaker's certificate was not conformable to the act 28 G. 3, c. 52, although by that statute, sect. 23, it was declared that the Speaker's certificate of the amounts of costs (with an examined copy of the entries in the journals of the resolutions of the select committee) should be "deemed full and sufficient evidence in support of such action." And upon a case stated in a second action, *Strachey v. Turley*, 11 East, 194, on a new certificate by the Speaker of a subsequent parliament, the Court inquired into the validity of that certificate, and held it to be good. The functions of the Speaker in granting it, was there considered to be ministerial only. In *Margrave v. White*, 8 B. & C. 412, the Speaker's authority to certify for costs in a particular case was discussed, and pronounced upon by the Court. In *Ex parte Williams*, 8 Price, 3, where a petition was declared frivolous and vexatious, and the petitioners did not attend to hear the decision, the Speaker certified the recognizances into the court of Exchequer, under stat. 28 G. 3, c. 52, s. 9; and that Court considered itself authorized, upon hearing the case, to vacate the recognizances although the statute declared that the certificate should be conclusive evidence of the default. [PATTERSON, J. It is not stated there that the Speaker certified the recognizances to have been broken]. [*388]

But, further, it is an objection in form, that the Speaker does not certify that the two officers appointed under the act, have adjudged as to the liability of any party to costs. Such an adjudication is necessary before the certificate can issue. [PATTERSON, J. The want of it would be a defect in substance. Lord DENMAN, C. J. Must not we presume every thing to have been done that was necessary

to authorize the certificate?] It does not recite an adjudication upon the amount of costs; the want of such recital as to the party is *prima facie* proof that no adjudication was made on that head.

D. Pollock, contra. As to the first point, the stat. 9 G. 4, c. 22, s. 68, directs expressly, that on motion, and on the production of such certificate (that is, a certificate of the amount of costs, signed by the Speaker, as before directed,) the Court *shall* enter up judgment for the sum therein specified. Those words do not leave the Court at liberty to inquire into the grounds of the certificate. Where the effect of the certificate has been made a matter of discussion in this Court, the objection has been raised by the instrument itself. In *Strashey v. Turley*, 7 East, 507, the Speaker had made a certificate of joint costs, which the stat. 28 G. 3, c. 52, did not allow to be done. In *Margrave v. White*, 8 B. & C. 412, the question discussed was raised by the statement of the certificate, that the witness was summoned for the sitting member; and, on *390] other points, the certificate was deemed conclusive. In *Ex parte Williams*, 8 Price, 8, it is stated that the recognizances were certified into the Exchequer upon a report, which showed a specific reason for their being estreated: by stat. 28 G. 3, c. 52, s. 9, recognizances certified into the Exchequer as there directed were to have the same effect as if estreated from a court of law: and the question was, whether the general jurisdiction of the Court to discharge recognizances, under stat. 38 H. 8, c. 39, was taken away by stat. 28 G. 3, c. 52, or 58 G. 3, c. 71. The Court held that it was not, and, upon grounds shown by affidavit, they vacated the recognizances. But this Court is told by the stat. 9 G. 4, that, in the case there pointed out, it *shall* enter up judgment as if the defendant had signed a warrant of attorney. [COLERIDGE, J. Then are we not in the same situation as to entering up the judgment, as the Court of Exchequer is with respect to estreating the recognizances?] This Court is directed to enter up the judgment; the words "in like manner" refer only to the mode of doing it. The observations as to the improper appointment of the committee *can*, at all events, apply only to the subsequent costs; but, by sect. 5, of the act, it is clear that the petitioner is also subject to the costs up to the time of his making default, and it does not appear that the costs taxed in this case were not such. Upon the Speaker's certificate, it is to be taken that the proper costs were taxed. [PATTERSON, J. The taxation of costs under sect. 60, is to take place on application "within three months after the determination of the merits of such petition."] In this case there has been, at all events, a committee in *391] fact appointed, and the petition has been gone into. The costs ought to be given. [Lord DENMAN, C. J. There was no appointment of a committee under the act. PATTERSON, J. No committee ought to have been appointed. And the prior expenses would be covered by the recognizances.] The petition must be taken to have been determined upon the merits, within the meaning of the act; the abandonment of the petition was a giving up of the merits.

As to the second point, sect. 60, requires the speaker to give a certificate expressing the amount of costs allowed in the report of the taxing officers, "together with the names of the party liable to pay," but, as to the name, it does not require him to make any reference to the report; and the court will not presume, from the absence of such statement, that the speaker violated his duty by certifying the name of a party not found liable by the officers.

Cur. adv. vult.

Lord DENMAN, C. J., in this term (June 15th), delivered the judgment of the court as follows. This was an action of debt, founded on the sixty-third section of stat. 9 G. 4, c. 22, "To consolidate and amend the laws relating to the trial of controverted elections or returns of members to serve in parliament." That section enacts,—(His lordship here read the section.) The speaker's certificate was produced, finding a certain amount of costs, and that the defendant was liable to pay them to the plaintiff. Some objections were made to the form

of it, which we need not consider, as our judgment proceeds upon other grounds, and we assume, for the purpose of this argument, that the certificate was correct in its form within the sixtieth section, *which further enacts, that the speaker's certificate shall be conclusive evidence of the amount of such [*392 demands in all cases and for all purposes whatsoever.

The enactment by which the certificate is made available for rendering a party liable to costs, is the fifty-seventh section, providing, that whenever any committee, appointed to consider the merits of any petition complaining of an undue election, shall report to the house that the same petition appeared to them to be frivolous or vexatious, the party opposing such petition shall recover from any who signed it the full costs of opposing it, to be ascertained in manner therein-after directed. For the amount of costs thus ascertained the plaintiff obtained a rule to shew cause why judgment should not be entered up; against which cause was shewn upon affidavits, from which it plainly appeared that the committee itself was not legally formed within the statute. For the third section expressly enacts:—(His lordship here read the enactment.) Now the affidavits clearly shew that no petitioner did appear either in person or by deputy, within one hour of the time specified, or indeed at any time. The statute, therefore, expressly required that the order should be discharged, and the petition no further proceeded upon.

The same affidavits, however, state that a committee was, in fact, appointed; but it could not be reduced from thirty-three to eleven, as the act requires, in the manner directed by the thirtieth section, for that assumes the presence of some person acting for a petitioner, who is to strike off names alternately with other parties. The committee, however, were sworn, met, appointed a day for trying the merits, and on that day voted the defendant's petition frivolous and vexatious, in his *absence, and without the presence of any person autho- [*393 rized by him.

It was objected at the bar that none of the courts in Westminster Hall are at liberty to inquire into the legality of proceedings by the House of Commons, nor can do so consistently with the respect due to the privileges of that body. It is unnecessary to enter upon that general question in the present case, for in this instance, at least, we are bound to institute the inquiry, as our assistance is prayed, to give effect to the speaker's certificate; and we should be unwarranted in issuing our process to that end, unless we saw that his certificate was founded on a proceeding legal by the act of parliament, and in compliance with those general principles of justice which are binding on all jurisdictions. The certificate by itself possesses no authority to issue process; recourse must be had to the act for that purpose; and obviously that can only be in cases where the act applies. If this were otherwise, the speaker's certificate that A. owed B. a sum of money, without more, would authorize, nay, compel, the court to issue execution against B., to seize his goods, and throw him into prison.

But the speaker's certificate here produced plainly refers to the sixtieth section of the statute, for it recites a report of examiners appointed under its provisions, and by them empowered to tax the costs of prosecuting or opposing any petition presented under the provisions of that act. But these costs become due by the fifty-seventh section, already cited, the words of which, it is true, apply to "any committee appointed to try the merits," but we think they must be confined to committees *duly* appointed under the act, and possessing *the [*394 powers it confers. The House of Commons does not, by virtue of this act, lose its power to appoint an unsworn committee to try the merits of an election, by the examination of witnesses not upon oath: many cases may be supposed in which this ought to be done: but, though the decision of such a committee should be that a petition was frivolous and vexatious, it is clear that the liability to pay costs would not ensue, nor, if they should be awarded, could payment be enforced in a court of law.

The thirtieth section has also been supposed to give validity to any committee

de facto appointed, and supersede all inquiry into the process actually pursued in appointing it. The words are, "the said eleven members shall be sworn at the table well and truly to try the matter of the petition referred to them, and a true judgment to give according to the evidence, and *shall be deemed and taken to be a select committee legally appointed to try and determine the merits of the return or election appointed by the house to be by them taken into consideration, from and after the time of any such select committee having been sworn at the table.*" And these words may possibly have been introduced with the intention of dispensing with the necessity of proof of the facts which must concur to give a committee jurisdiction, though they are not very well selected for the purpose. But they do not exclude proof that the preliminary facts never took place, nor prevent the consequence that the jurisdiction never was created. The proof in the present instance is, that the committee was appointed in such a state of things that the statute positively required that it should not be appointed; it therefore had no power over the petitioner: their report *that his petition was frivolous and vexatious they had no right under the statute to make: the speaker could not lawfully put the examiners in motion to tax the costs: their report was an unauthorized statement of an immaterial fact, and the speaker's certificate of its being made could give it no authority.

The party in this case is not without a remedy for his costs under the fifth section, (if he brings himself within the third section), on the recognizances thereby required: but it follows, in our opinion, from the previous examination, that, as the Speaker's certificate to which the act assigns the effect of a warrant of attorney, must be one founded on the report of a committee appointed in conformity with the act, and, as this committee has not been so appointed, the rule for entering judgment in this case must be discharged.

Rule discharged.(a)

*396]

*HARRISON *against* DOUGLAS.

A policy of assurance on a ship, contained, at the foot of it, a condition (among others) that all ships were to be inspected and approved of by a majority of the committee of the insurers before admission; that all ships should be well found, &c. and otherwise in a seaworthy state, as to the committee or their inspector should from time to time seem proper; that vessels should have a certain specified quantity of rope or chain cable according to their several burthens, "and all chain cables to be properly tested;" ships to be subject to survey by the committee or their inspector at specified times: and, in case of non-compliance with orders to repair, made by the committee or inspector, the parties neglecting to be uninsured.

An action was brought on the policy, and for money had and received and on an account stated: and money was paid into court on two counts, one of which was on the policy, averring generally a performance by the plaintiff of all things in the policy contained to be performed on his part, and a compliance with all the conditions, &c. thereby referred to, and thereby subjoined. Held,

1. That the testing of the chain cable was not by itself a condition precedent, but only a direction to the committee.
2. That, if it had been a condition precedent, the non-performance was in the nature of unseaworthiness, and was a question for the jury; and that the payment of money into court waived any objection as to the non-performance.

The policy declared that certain rules should be deemed a component part of the policy. By one of the rules, the assured was not entitled to be paid, in case of a loss, till a period which was made contingent upon certain events. The evidence shewed that this period had not arrived before the action was brought; but left it uncertain whether the whole payment was to be made at once, or by instalments. Held,

3. That the payment of money into court admitted that something was due to the plaintiff on the policy at the time of the action brought, and was so far a waiver of the objection that the action was brought too soon. And,

(a) See *Ranson v. Dundas and Kelly*, in C. B. Trin. T. 1836.

4. That it lay on the defendant to prove that a part of the sum recoverable on the loss could be claimable by the plaintiff, without the whole being due; and that, therefore, in the absence of such proof, the objection was waived as to the whole sum.

IN Trinity term 1834, (May 23d)(a), *Cresswell* and *W. H. Watson* shewed cause against a rule obtained in this case by *Holt* in Michaelmas term 1833, and *Sir James Scarlett*, *Holt*, *Alexander*, and *Tomlinson*, argued in support of it. The Court having taken time to consider, judgment was delivered in this term, June 16. The judgment will be found to contain all the material facts, and the points argued and decided upon.

LORD DENMAN, C. J. This was an action on a policy of insurance on the plaintiff's ship, which was tried before my brother Bolland at Durham, at the Summer assizes of 1833.

*The policy was not a common marine policy; but it was one on which the plaintiff, the defendant and a great many other persons, were mutual insurers on their respective ships for the period of one year. This policy contained several rules and stipulations which do not exist in the common maritime policies. In the body of the policies there is the following clause:—"And we, the subscribers hereunto, do hereby elect, nominate, and appoint, Messrs. John Bell, William Adamson, Thomas Douglass, Thomas Brown the younger, William Ord, George Harrison and John Brown, to be a committee and general referees between and amongst all and every of us the said subscribers, in all and every matter and thing relating to our respective assurances hereby made; and any three of the committee or referees for the time being are hereby authorised to adjust, settle, and determine all controversies and disputes, and all accounts, demands, and transactions whatsoever, by and between all or any of us the said subscribers to this policy, touching and concerning all and every or any of the insurances hereby made, or other matter or thing relating to or concerning the same, or this policy; and the determination or determinations from time to time to be made and signed by any three of the committee or referees for the time being, according to the terms of this policy, and the warranties, rules, terms and conditions hereto subjoined (*which are deemed a component part of this policy*) shall be and is are hereby agreed and declared to be final and conclusive to the several subscribers hereunto respectively, and their respective heirs, executors, administrators, and assigns, who are hereby declared to be bound thereby. And it is mutually agreed that, in case any of the said *committee or referees shall die, or become incapacitated, or refuse or decline to act, before the expiration of the said twelve calendar months, then and in such case and so often as the same shall happen, it shall be lawful to and for the surviving or continuing committee, by writing under their hands, to choose and appoint any other or others of us to supply the vacancy or vacancies to be occasioned as aforesaid, and after such said appointment, the person or persons so to be chosen shall be vested with the same powers and authorities in every respect as are hereby given to or vested in the committee or general referees herein above named; and all acts or orders to be made or signed by such of us as shall or may be chosen and appointed in manner aforesaid shall have the same force and effect as if the same had been made by the said committee or general referees herein above named."

At the foot of the policy there was a heading of Exceptions, Warranties, Rules, Terms, Conditions, and Agreements referred to and subjoined: and, amongst them,

1. "All ships to be inspected and approved of by a majority of the committee before admission; and no ship registered at any other port than Sunderland shall be admitted for a larger sum than the interest of the owner resident at the port of Sunderland. All ships hereby insured to be well found and fitted

out with all necessary tackle and materials, and otherwise in a sea worthy state, as to the committee or their inspector shall from time to time seem proper. Vessels not exceeding twelve keels in burthen to have one hundred and eighty fathoms of rope cable, or one hundred and sixty fathoms of chain; and, if above *899] that burthen, two hundred fathoms *of rope cable, or one hundred and eighty fathoms of chain; and all chain cables to be properly tested, and the windlasses of such ships as shall have chain cables to be properly secured; all ships to be subject to survey by two or more of the committee and the surveyor in the autumn of the present year, and at such other times as the committee shall think proper. And subscribers neglecting to get such repairs done to, and stores and materials for, their respective ships, as shall from time to time be ordered by the committee or their inspector, after notice for that purpose from the secretary, to be uninsured until the same shall be got or done, although subscriber, in the interim, liable to other losses."

25. "A proportion not exceeding 1*l*. 5*s*. per cent. of the total and partial losses (except salvage as hereinafter named) shall be called upon the subscribers liable to the same at every forty days, and for which receipts shall be prepared by the secretary and given to the several sufferers to receive their proportion of the same; and salvages for money paid for getting any ship off a strand, or for assisting any ship in distress, shall be paid ten days after settled by the committee, if the same shall amount to 100*l*. And where two or more averages or losses shall be put together in one receipt, for greater ease in collecting the same of subscribers, and any subscriber having to pay the sum shall fail, or of whom payment cannot be obtained, in such case the several sufferers whose averages or losses shall have been so put together, shall pay back to the holder of such receipt their several proportions or sums which shall have been included in any such receipt, provided such receipt shall be returned to the secretary within ten *400] days after the same shall become due; but if kept *longer by the holder, he to take the risk of the whole amount of the receipt upon himself. Any subscriber not paying to the secretary, on demand, his proportion of any receipt to be returned as aforesaid, to be uninsured until the same be paid, although he shall, in the interim, be liable to other losses."

The first count of the declaration contains allegations adapted to the particular stipulations of the policy, and, amongst others, that she was provided with such cables as the rules in the policy require; it states a total loss by the perils of the sea; that the plaintiff revoked the power and authority of the committee; and that the proportion of the loss which the defendant was liable to pay amounted to 4*l*. 13*s*. 9*d*.

The second count is a more general one; (a) it does not contain any allegation that the plaintiff revoked the power and authority of the committee; and it claims a nominal sum of 20*l*., as the defendant's proportion of the loss which he was liable to pay. The third count was for money had and received, and on an account stated. The defendant pleaded the general issue, and paid 1*l*. 10*s*. into court on the last two counts.

On the 1st April, 1833, the plaintiff's ship got on shore and was stranded near Sunderland, and she was got off on the 20th. Notice of abandonment was given before the 20th, and which was declined; and, on the 25th, a second notice of abandonment was given. The committee met to investigate the loss; and, on the 21st *of June, a notice was served on the plaintiff of a *401] meeting of the committee to make their award. The committee met on the 22d. The plaintiff attended, and said he was not then prepared to go into his case, in consequence of the absence of his attorney, who had his papers.

(a) The averment as to the performance of the conditions precedent, in the second count, was merely that the plaintiff had always performed and fulfilled all things in the policy of assurance contained, on his part and behalf to be performed and fulfilled, and had complied with and observed all the exceptions, warranties, rules, terms, conditions, and agreements thereby referred to, and thereto subjoined.

The chairman asked him if he wished to have it adjourned; he said yes, and it was adjourned to the 27th: the plaintiff made no objection to it. On the 25th, the plaintiff sent a notice withdrawing from the arbitration. On the 27th the committee met, examined the surveyor, and made their award; and, by that award; they determined that the plaintiff was not entitled to abandon the ship and to recover for a total loss; and they accordingly dissented from such abandonment; and they determined that the damage amounted to a partial loss, and they awarded and determined that the underwriters should forthwith contribute and pay to the plaintiff the sum of 85*l.* 8*s.* 7*d.*, being the amount of their proportion, as ascertained by the seventeenth rule. The defendant's proportion under the award would be 1*l.* 4*s.* 3*d.*, and that sum was more than covered by the money paid into court on the two last counts, which was 1*l.* 10*s.* The jury found that the loss was total, and that the sum which the defendant was liable to pay was 4*l.* 13*s.* 9*d.*

On the trial it appeared that, according to the course of proceedings under the 25th rule, in consequence of prior losses in the club which had been drawn for, the losses which happened on the 1st of April (which was the day the plaintiff's ship was stranded) would be drawn for at the earliest at forty days after the 22d July, and would have to become payable to the assured on the 31st of August; and the club *would not have been in funds earlier than that [*402 day to pay the present loss.

The defendant, on the trial, submitted that the plaintiff should be nonsuited on two grounds; first, that the chain cable of the ship was not properly tested according to the first rule; and, secondly that the action was brought too soon under the twenty-fifth rule, as the club would not be in funds to pay the loss till the 31st of August;(a) and the learned Judge gave leave to the defendant to move the Court on both these grounds.

On the first of these points, we are of opinion that the chain cable being properly tested is not, taken by itself without more, a condition precedent: it is true that, in that part of the first rule which immediately precedes the testing the chain cable, there is nothing said about the committee or their inspector; but, both at the beginning of the rule, and also in the latter part of the rule, the committee are mentioned; and, on the whole of the rule, we are of opinion that what is said about the chain cable is only a direction to the committee as to what they were to point their attention to. But, suppose it were otherwise, it is in the nature of a want of sea-worthiness; and the opinion of the jury should have been taken upon it: and independently of that, we think, by payment of money into court, the objection, if it ever existed, is cured; for that admits that the plaintiff is entitled to recover something, which he could not be if the vessel was not seaworthy.(b)

*As to the second ground of nonsuit, there is no doubt but the action is brought too soon; and it would be a cause of nonsuit, if it was not for [*403 the paying money into court. That admits, to some extent at least, that the plaintiff was entitled to recover. It does not appear from the evidence whether, supposing the loss to be total, the whole of the money, which the plaintiff would be entitled to receive, became due on the 31st of August, or whether the sum was divisible, to be paid at different times; if the whole was to be paid at once, as one entire sum in which no distinction could be made between one part and the rest, then, as the payment of money into court admitted part to be due, it would constitute an admission of the whole; but not so, if it was to be paid by instalments. It lay upon the defendant to have this distinctly ascertained, because the admitting of part unexplained would operate as an admission of the

(a) The declaration was entitled of the 3d of July, 1833.

(b) As to the effect of the admission by payment of money into court, in superseding dispute as to the performance of a condition precedent, *Meager v. Smith* (4 B. & Ad. 673,) *Lundie v. Robertson*, (7 East, 231,) and *Earley v. Bowman*, (1 B. & Ad. 889,) were cited.

whole. We think, therefore, that there is no ground for a nonsuit on either of the points reserved.

The rule was only granted on these two grounds; and therefore we are of opinion that it should be discharged

Rule discharged.

*404]

*IN re FENTON. *Wednesday, May 27.*

This court will not, in a summary way, compel an attorney of the court to pay over money to a party entitled to it, though the attorney has received it from a client to be paid out such party, if the application is not made on behalf of the client.

SIR JOHN CAMPBELL, Attorney-General, moved for a rule to shew cause why an attorney of this court should not pay over to the stamp office a certain sum of money received by him. It appeared by affidavit that the attorney had been employed in the settlement of the estate of a deceased person, by the executor; that he had, in his account with the executor, taken credit for a sum due for legacy duty on the residue of the estate, but that he had not paid this sum over, though he still held money in his hands to the amount. The Attorney-General made the application, as he stated, on behalf of the stamp Office, urging that the Judges had jurisdiction, in a summary way, over an attorney of their own court, who had received the money in his professional character.

Lord DENMAN, C. J. It appears to me that the court ought not to grant this application. It is not made on behalf of the attorney's client.

LITTLEDALE, J. The motion is quite new in its nature. When such an application is made by a party who has employed the attorney and has been induced to trust him in consequence of his professional situation, the Court may interfere; but this is a different case.

PATTESON and WILLIAMS, Js. concurred.

Rule refused.

*405]

*PERRIN *against* WEST. *Thursday, May 28.*

A defendant in actual custody of the sheriff of a county upon process of an inferior court, having removed himself into this court by habeas corpus cum causa directed and delivered to the sheriff only, and having been thereupon committed to the custody of the marshal, moved to be discharged on affidavit entitled as of the cause in this court. Held, that the affidavit was rightly entitled, though no step in the cause had been taken in this court.

The defendant was arrested in Gloucestershire, in an action of debt instituted in the court of the chancellor of the University of Oxford, and on a warrant, issuing from that court, and reciting that the plaintiff had sworn that the defendant was a member of the university, was suspected of flight, and, as deponent believed, would not appear, but would withdraw himself out of the precincts of the university. Nothing further appeared as to the defendant's residence, either by the warrant, or other proceedings in the Chancellor's Court, or by the affidavits and sheriff's return to the habeas corpus in this court: Held, that the defendant was entitled to his discharge, for want of proof of residence, and this, independently of the question whether or not the process of the Chancellor's Court could be executed at the place in question.

After the arrest, the defendant had appeared in the Chancellor's Court, waived the objection to the jurisdiction, and entered into the merits; upon which a decree was given that he should pay the debt, and remain in custody till he paid it, which was sworn to be conformable (as the deponent believed) to the practice of the court. After this the habeas corpus issued: Held, that the habeas corpus was not too late; and that the defendant might still insist before this court on the want of jurisdiction.

SIR JOHN CAMPBELL, Attorney-General, had obtained a rule in Easter term last to shew cause why the defendant should not be discharged out of the custody

of the marshal. The rule was obtained on the affidavit of the defendant, which was entitled in the cause in this Court, and stated that, on the 23d of June 1834, the defendant was arrested at Cheltenham, on a writ or process, which was as follows:—

“Chancellor’s Court of the University of Oxford. The most noble Arthur Duke of Wellington, K. G. Chancellor of the University of Oxford, to the yeomen bedells of the University, our officers, ministers, and servants in this behalf, jointly and severally, and especially to Thomas James our yeomen bedell in the faculty of law, or his lawful deputy executing these presents, and also to the keeper of the Castle goal in the city of Oxford, greeting. Whereas, on the 1st day of November, in the year of our Lord 1833, Thomas Perrin, *of the city of Oxford, stable keeper, came before John David Macbride, D. C. [*406 L., assessor, and then and there instituted an action of debt to the value of 110*l.* 16*s.* 8*d.* against James Fletcher West, of Brazen Nose College, Master of Arts, and did allege and make oath before him the said assessor, that the said J. F. W. was by him suspected of flight, and that he verily believed, if the said J. F. W. was to be cited to appear in our court there to answer the said Thomas Perrin in his action aforesaid, he would by no means appear, but would rather withdraw himself out of the precincts of the said University; and that he had no other hopes of obtaining payment of the said debt than by arresting the body of the said J. F. W., according to the forms of the registry: the Judge aforesaid did decree according to this petition: by virtue, therefore, of the decree aforesaid, these are to command you, and each and every of you, jointly and severally, that you arrest and take the body of the said J. F. W., and him safely keep in your, any or either of your, custody or custodies, until he shall have paid the said debt, with costs of suit, or shall find good and sufficient security for his appearance on the court day next after the execution of these presents, by stipulation, according to the form of the registry, and the custom and usage of the University: and in case the said J. F. W. shall neither satisfy or pay the said debt, with costs of suit, nor find sufficient security or stipulation to the effect afore mentioned, and then you, or any or either of you, so arresting the said J. F. W. as aforesaid, do convey and deliver over the body of the said defendant into the custody of the keeper of the Castle goal aforesaid; and you, the keeper of the Castle goal aforesaid, are hereby authorized and required to *take, [*407 as aforesaid, and in safe custody keep the body of the said J. F. W., so arrested as aforesaid, until he shall be from thence discharged according to law. Given under our hand and the seal of our office, this 23d day of June 1834.”—“This agrees with the decree of the Judge. Philip Bliss, registrar. John David Macbride, assessor. Debt, 110*l.* 16*s.* 8*d.*; costs, 3*l.* 12*s.* 6*d.*”

The defendant was detained in the county gaol of Oxfordshire till the 23d of November; when he was removed by a writ of habeas corpus cum causa, directed to the sheriff of Oxfordshire, and was brought before Williams, J., who committed him to the custody of the marshal.

The rule obtained as above was enlarged upon the affidavits filed by the plaintiff, also entitled in the cause in this Court. By other affidavits, similarly entitled, it appeared that the proceedings were commenced in the Chancellor’s Court, on the 1st of November, 1833, the defendant a master of arts of Brazen Nose College, Oxford; and that a warrant to apprehend him was then issued; that the officer not having been able to arrest the defendant, and the warrant having become illegible, a fresh warrant issued on the 23d of June, 1834, under which the defendant was arrested; that, at a special court held on the 28th of June, 1834, the defendant’s proctor waived the objection to the arrest, and entered on the merits of the case; and it was decreed that the debt and costs should be paid, or the defendant remain in custody according to the usage of the court. The affidavits contained allegations as to the extent of the privilege of the Chancellor’s Court; and one of them stated that, according to the deponent’s belief,

*408] when a decree is made that a party, already in custody under *process of the court in the suit, shall pay a debt, and shall remain in custody till payment, no fresh writ is required, by the practice of the court, to authorize the detention of the party. No affidavit stated positively whether the defendant was or was not resident at the time of the commencement of the suit; but it was sworn that the debt was contracted by the defendant in Oxford while he was a member of the University. The sheriff of Oxfordshire returned to the writ of habeas corpus, that the defendant "was received into his Majesty's gaol in and for the said county of Oxford, on the 24th of June, in the year of our Lord 1834, and was there detained in the said gaol under my custody by virtue of a certain writ," which was then set forth in the return as above.

Chilton now showed cause. (a) First, the affidavits are improperly entitled as if the cause were in this Court. The defendant, upon a habeas corpus cum causa, directed to the sheriff of Oxfordshire, issued by a judge of this Court, has been brought before a judge of this Court, and by him committed to the custody of the marshal, and the judge of the Court below has no notice of the proceedings. Such a proceeding does not remove the cause, but only the body. To remove the cause, the writ should have been directed to the judge of the inferior court. Of this there are many precedents given in Tidd's Forms, (ch. xvi. s. 18, p. 156, ed. 1828.) In Com. Dig. Habeas Corpus (A.) it is said, "An habeas corpus is a writ for bringing the body of him, who is imprisoned, before the Court, cum causa detentionis. And it may be granted, in respect of

*409] *an unlawful commitment, or in respect of a privilege, which the party claims, to be imprisoned elsewhere." And, again (G. 1), it is said, "such writ goes to every inferior court." In a case in the Year Book, Mich. 9 H. 6, 44, the writ went to the Chancellor of Oxford. [PATTERSON, J. You say, the writ removes the body, but not the cause: what does it signify, as to this argument, how it is directed?] If the direction were to the judges, they could certify the cause, and the state of the proceedings. In Com. Dig. Habeas Corpus (C.) it is said, "By the statute 2 H. 5, 2, Stat. 1, none shall be discharged, or bailed upon an habeas corpus cum causa, &c. If it be returned, that he is in prison on condemnation by judgment against him, but he shall be remanded and kept in safe custody till agreement of the party, or payment of the sum adjudged." Now here the Chancellor, had the writ been directed to him, would have returned the fact of the condemnation, if it were so. Comyns also says, Habeas Corpus (O), that if the writ "be used for avoiding a lawful suit, upon shewing of this at the return, the Court will grant a procedendo." That shews that, in order to remove the cause, the writ should be directed to the Court below, which can shew, by the return, the nature and state of the proceedings. In *Fasacharly v. Baldo*, 1 Salk. 852, Holt, C.J., speaking of a habeas corpus directed to and returned by the sheriffs of London, said that "the record itself is never removed by a habeas corpus, as it is on a certiorari, but remains below, and the return is only an account or history of their proceedings stated and sent up to the superior court to judge and determine the matter there: therefore if

*410] a *cause be removed hither by habeas corpus, the plaintiff here must begin de novo and declare against the defendant as in custod. Mar." Accordingly, in that case, though the return was filed, a procedendo was afterwards awarded. [Lord DENMAN, C.J. Then is it quodammodo in both courts?] The court below cannot go on, because the defendant's person is taken from their jurisdiction. In Bacon's Abridgment, Habeas Corpus (A) (vol. iv. p. 114, 7th ed. 1832), it is said, "The habeas corpus ad faciendum et recipiendum issues only in civil cases, and lies where a person is sued and in goal, in some inferior jurisdiction, and is willing to have the cause determined in some superior court, which hath jurisdiction over the matters, in this case the body is to be removed by habeas corpus, but the proceedings must be removed by certiorari." Again, (C), p.

(a) This case was partly heard on May 27th.

150, "if the writ be disallowed by the judge of the inferior court for any of the causes above specified, it must be returned to the court above with the *special* matter. The causes referred to, are the restrictions upon the removal of the cause, imposed by different statutes; 43 Eliz. c. 5, s. 2; 21 Jac. 1, c. 23, ss. 2, 3, 4, 6; 12 G. 1, c. 29, s. 3; 19 G. 3, c. 70, s. 6. The disallowance or allowance by the judge below cannot take place, nor the special matter be returned by him, unless the writ be directed to him. In *Ellis v. Johnson*, Cro. Car. 261, a habeas corpus had been delivered to the mayor and principal officer of an inferior court, and had been accepted and allowed; and, the inferior court afterwards proceeding to trial and judgment, it was held to be error; and the Court said, "if it were not true that it was delivered to the mayor and allowed, it *ought to have been denied." This again throws the allowance on the Court itself. [LITTLEDALE, J. Suppose a habeas corpus were directed [*411 to the warden of the Fleet to bring up a prisoner in his custody in execution, your argument would go to this, that the affidavits could not be entitled of the cause in this Court, till you had declared against him *de novo*]. The argument does go that length: some step must be taken here. [LITTLEDALE, J. Suppose after the body were brought up, the defendant were to apply for a super-seedeas, on the ground that he had not been declared against in time]. The plaintiff might in that case have the prisoner taken back to the Common Pleas by habeas corpus, and declare against him in the original suit. [LITTLEDALE, J. How is the defendant to get out of custody?] It does not follow, at any rate, that this Court would interfere upon affidavit entitled in the cause in this Court. Besides, the plaintiff does not lose the opportunity, in such a case, of proceeding in the Court from which the removal takes place. Again, at this stage of proceeding, the writ cannot remove the cause at all; for the statute 43 Eliz. c. 5, enacts that the judge, &c., of the Court below shall not receive or allow the writ, unless it be delivered before the jury has appeared, and one of them has been sworn. In the Chancellor's court there is no jury; but judgment has been given: the writ, therefore, has been delivered too late. *Lawes v. Hutchinson*, 1 Cr. M. & R. 766, (S. C. 5 Tyrwh. 236,) shows that the writ cannot take effect at this stage. Then, as to the sufficiency of the return. It is certainly necessary, to bring the case within the privilege, that the defendant should be, not only a scholar of the University, but residence there at the commencement of the *suit. Such residence is indeed not positively sworn to; but oath was made that the defendant was likely to withdraw himself out of [*412 the precincts of the University; from which his residence at the time may be inferred. But in fact the defendant, who is disputing the propriety of the proceeding, ought to show that he was not a resident. (See *Castle v. Litchfield*, Hardr. 509.) This is not a case of claim of cognizance, which would throw the onus on the University. Now the defendant swears only that he was non-resident at the time of the arrest, not at the commencement of the suit. [Lord DENMAN, C. J., In *Smith v. Boucher*, (a) which was a case on the very statute, 13 Eliz. c. 29, and custom upon which you must rely here, Lord Hardwicke held that the oath upon which the arrest is grounded ought to state *belief* that the defendant would withdraw himself, not simply *suspicion*. That was on an action for false imprisonment; and it shows that complete strictness is required in the justification.] At any rate, that case shows that an affidavit of belief that the defendant will withdraw is sufficient, which is the very form pursued in this case. Again, the question of jurisdiction might have been discussed before the Chancellor; but it was waived, and the case decided against the defendant on the merits. It is now too late to raise the point; *Lucking v. Denning*, 1

(a) Ca. Temp. Hardw. 62. S. C. 2 Str. 993. By the record in this cause (not given in the above reports) it appears that the arrest took place within the precincts. A part of the record is given in 2 Kelyng, 144, and Cunningham. 89.

Salk. 202. (He then proceeded to argue on the question of the privilege,^(a)
 *413] *but, as the judgment of the Court did not decide this point, the argument is omitted.)

Sir John Campbell, Attorney-General, contra. The objection as to the title of the affidavits is at any rate not to be favoured, especially where liberty is concerned; and here the enlargement of the rule took place on affidavits on the part of the plaintiff entitled in the same way. But the title is correct, and the writ was rightly directed; for the defendant was in the sheriff's custody, and therefore the sheriff was the party to whom the order of this court was to go. In 1 Tidd's Practice, p. 349, Ch. xv., 9th ed., it is said, "The writ of habeas corpus cum causa should be directed, to the sheriff, or other officer in whose custody the defendant is detained." The Judge of the court, not having the custody, can have nothing to do with the writ. The practice never is to issue two writs, one to the Judge and the other to the officer having custody; the removal of the cause is incident to the removal of the body. *Lawes v. Hutchinson*, (1 Cr. M. & R. 766, S. Cr 5 Tyrwh. 236,) proves only that the bail of a defendant in this court cannot bring a cause in the Palace Court, in which the same party is defendant, back to this Court by habeas corpus, when the latter *414] cause has been previously removed hither, remanded back by *procedendo, and interlocutory judgment signed, and a writ of inquiry executed below. (He was then stopped by the Court.)

Lord DENMAN, C. J. With respect to the objection taken to the title of the affidavits, it appears to me that, when a party is here by habeas corpus, the cause is here for all purposes. Then, as to the sufficiency of the return. The question is, whether the defendant is rightfully in custody, and the return must shew that he is so. (His lordship here read the return.) Now it does not appear, either by the return or the affidavits, that the party arrested was resident at the commencement of the suit. It is true that oath is made that he was likely to withdraw. But it is impossible for us to presume that the plaintiff meant by this to swear expressly that the defendant was resident; it is not a distinct allegation of residence at the commencement of the suit. We cannot make the inference suggested, against liberty, or in favour of the privilege. I do not now decide as to the power of arrest without the precincts.

LITLEDALE, J. The first objection is, that the affidavits are not entitled properly. I think that, for this purpose, they may be entitled in the cause in this court. During this argument I suggested the case of a prisoner in the custody of the warden of the Fleet being removed hither by habeas corpus, and the plaintiff not proceeding; and I asked, how the defendant, if he wanted his liberty, was to proceed; I think that he might entitle the affidavits in the cause in this court, for the cause is here, though no actual proceedings have taken place in *this court, an instance of which is in *Sowerby v. Woodroff*, 1 *415] B. & Ald. 567. With respect to the other question, we cannot here decide on the extent of the privilege. It must appear that the defendant was resident in the university, as was decided in *Hayes v. Long*, 2 Wils. 310. The party may possibly have been resident, in the present case; but that fact does not appear in the return or the affidavits.

PATTESON, J. I am entirely of the same opinion. It is immaterial to whom the habeas corpus is directed, or whether it be directed to both the Judge and the officer having the custody. After the removal, the case is here for any purpose. If not, I do not know what answer could be given to the question put

(a) Citing a charter of 15th July, 14 R. 2. (set out by inspeimus in the charter of 1 H. 5, given in p. clxxviii. of the appendix to the second volume of Ayliffe's Oxford); letters patent of 1st April, 14 H. 8; st. 13 Eliz. c. 29; Com. Dig. University, (C); ib. Courts, (M); Ralph Bradwell's case, Litt. Rep. 9, and Thomas Wilcock's case, ib. 40; S. C. Hetley, 25, and as Wilcocks v. Bradell, Cro. Car. 73; Rush v. The Chancellor and Scholar of Oxford, 1 Salk. 343; Castle v. Lichfield, Hardr. 505; Hayes v. Long, 2 Wils. 310; Yearb. Mich. 9 H. 6. 44.

by my brother Littledale; nor how it is that the marshal is entitled, after the removal, to keep the prisoner at all. As to the other matter, it did not appear that the defendant was resident, and that ought to be shewn. It is said that the objection was waived. If there had been a waiver, and the defendant had submitted to the jurisdiction, and a decree had afterwards been made against him, and he had then been taken, perhaps the question as to the custom might have arisen. But the supposed waiver happens after the arrest: now that arrest is illegal, and it is as if none had taken place. If the plaintiff meant to take advantage of the waiver, he should have charged the defendant in execution. In that case, I think the question of the custom would have arisen.

WILLIAMS, J. Mr. Chilton says that the defendant's objection comes too late. But we are bound to see that *there is sufficient cause for the arrest. It was properly admitted, that the defendant must be resident at [*416 the commencement of the suit; and it does not appear that he was so. Then it is said that this may be collected inferentially; but there are no sufficient grounds for such an inference; and the fact of the defendant being away from the University at the time of the arrest, is, as far as it goes, inconsistent with such an inference. Rule absolute.

The KING against JEYES. *Thursday, May 28.*

The court will not grant a mandamus to compel the treasurer of a district to pay the expenses of a prosecution for misdemeanor, in obedience to the order of the Court of Assize, under stat. 7 G. 4, c. 64, s. 23; the proper remedy is to indict the treasurer, if he refuse to pay.

Where a prosecutor is not bound over to prosecute at the assizes, quære, whether the Court of Assize has power to grant his expenses under the above section?

But, in such a case, if the witness be subpoenaed, the court of assize may grant their expenses under the same section. Per Lord Denman, C. J., and Littledale, J.

WADDINGTON obtained a rule in last Hilary term, calling upon Theophilus Jeves, Esq., town clerk and town treasurer of Northampton, to shew cause why a mandamus should not issue, commanding him to pay to Henry Becke, the attorney of John Grimshaw, the two several sums of 49*l.* 6*s.* and 58*l.* 12*s.*, for loss of time, and expenses of witnesses, in prosecuting an indictment for riot, tried at the then last assizes for the said town, and for the charges and expenses attending the said prosecutions, pursuant to the two several orders of court made at the said assizes for that purpose.

It appeared that John Grimshaw was bound in his own recognizance, on 30th December 1832, before three justices of the town of Northampton, to prosecute Samuel Smith for a misdemeanor at the next general sessions for the said town; that, at those sessions, the recognizance* was respited to the Spring sessions 1833; when it was again respited to the Summer sessions 1833, at [*417 which sessions it was discharged by consent: and Grimshaw had preferred no indictment against Smith at any general sessions for the town. At the Northampton Spring assizes 1833, Grimshaw indicted Smith and eleven others for a riot (being the misdemeanor before mentioned,) and the trial took place at the Northampton Summer assizes 1834, when Smith and seven others were convicted, and the other four acquitted. No person was bound over to prosecute at these assizes, but the witnesses were subpoenaed to appear both at the Summer assizes 1833, and the Spring and Summer assizes 1834. The prosecutor applied to the Judge at the trial (Park, J.,) for the costs and expenses of witnesses, which his lordship at first refused, not thinking the case within the statute 7 G. 4, c. 64, s. 23 (a) but *afterwards granted; and two orders [*418 were accordingly made upon the town treasurer of Northampton for the

(a) Stat. 7 G. 4, c. 64, s. 22, enacts, " That the court before which any person shall be prosecuted or tried for any felony is hereby authorised and empowered, at the request of

payment of the sums of 49*l*. 6*s*. and 53*l*. 12*s*. to Becke, the attorney of Grimshaw; the first for the witnesses, for their loss of time, trouble, and expenses; the second for the prosecutor, for his charges and expenses. The riot was committed in the borough of Northampton, which does not contribute to the county rate of Northamptonshire, but raises a rate in the nature of a county rate, of which the treasurer of the town has the charge. Jeyes, the treasurer, refused payment, the magistrates of Northampton, to whom he had submitted the demand, not being satisfied as to the Judge's power. The affidavit in support of the rule imputed the refusal to political partiality on the part of the treasurer and magistrates, which was denied by the affidavit in answer.

*419] *N. R. Clarke and Miller* now shewed cause. First, supposing that the judge had power to make the order, this is not a case for a mandamus. In *Rex v. Bristow*, 6 T. R. 168, the Court refused to issue a mandamus to the treasurer of a county to pay an allowance granted by the quarter sessions to the keeper of the goal, and held that the proper remedy was indictment. In *Rex v. The Treasurer of the County of Surrey*, 1 Chit. R. 650, the Court refused a mandamus to pay money allowed to a witness by the Borough Court of Sessions. In *Rex v. Johnson*, 4 M. & S. 515, the remedy was by indictment. Secondly, the judge had no power here to order payment of the prosecutor's expenses. The Stat. 7 G. 4, c. 64, s. 23, gives the power to order expenses where the prosecutor, or any other person, appears on recognizance or subpoena. Here no one appeared on recognizance; and, although the witnesses did appear on subpoena, yet the words must be taken, *reddendo singula singulis*; the statute therefore applies where the prosecutor appears on recognizance, or the witnesses on subpoena. [LITTLEDALE, J. Where a case is removed by the prosecutor, by certiorari, the statute has been held not to apply.] That was the decision in *Rex v. Richards*, 8 B. & C. 420.

Sir John Campbell, Attorney-General, and Waddington, contra. As to the

the prosecutor or of any other person, who shall appear on recognizance or subpoena to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein."

Sect. 23, enacts, "That where any prosecutor or other person shall appear before any court or recognizance or subpoena, to prosecute or give evidence against any person indicted" . . . "of any riot," (enumerating also other misdemeanors) "every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony;" . . . "Provided, that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate."

Sect. 24, enacts, that the order shall be made upon and the payment made by, the treasurer of the county, riding, or division in which the offence shall have been committed, or shall be supposed to have been committed.

Sect. 25, "And whereas felonies and such misdemeanors as are hereinbefore enumerated may be committed in liberties, franchises, cities, towns, and places which do not contribute to the payment of any county rate, some of which raise a rate in the nature of a county rate," . . . "and it is just that such liberties," &c. "should be charged with all costs, expenses and compensations ordered by virtue of this act, in respect of felonies and such misdemeanors committed therein respectively; be it therefore enacted, that all sums directed to be paid by virtue of this act, in respect of felonies and of such misdemeanors as aforesaid, committed or supposed to have been committed in such liberties," &c. "shall be paid out of the rate in the nature of a county rate, or out of any fund applicable to similar purposes, where there is such a rate or fund, by the treasurer or other officer having the collection or disbursement of such rate or fund," . . . "and the order of court shall in every such case be directed to such treasurer," &c.

first objection. A mandamus is the only efficient remedy: an indictment gives no remedy to the prosecutor, but merely punishes the defendant. In a highway indictment, indeed, the sentence of the Court may afford some remedy; but that is not so here. *Rex v. Bristow*, 6 T. R. 168, was only a case of disobedience of an *order of quarter sessions. But the ruling there is not consistent with later decisions; and Lord Kenyon's reasoning, that because the [*420 writ was very beneficial, it should be sparingly applied, seems liable to objection. He says, further, that it would be descending too low to grant a mandamus to inferior officers to obey the order of justices; and that the Court might as well issue such a writ to a constable, or other ministerial officer, to compel him to execute a warrant. But there is no analogy between the breach of duty by such an officer, and the refusal to carry into effect an order made under the special provisions of a statute. It seems there to have been assumed that a liability to indictment was inconsistent with a liability to a mandamus. That doctrine has been exploded. In *Rex v. The Commissioners of Dean Inclosure*, 2 M. & S. 80, where a party claimed to have a road set out under a private act, Lord Ellenborough said, "that an indictment would not afford that convenient mode of remedy which might be obtained by mandamus." In *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646, it was held that a mandamus might issue to compel a company to reinstate a railway, which, by the act incorporating the company, the public were entitled to enjoy, though the Court was pressed with the argument that the proper remedy would be by indictment. In *Rex v. The Commissioners of the Navigation of the Rivers Thames and Isis*, (a) Lord Boston, who claimed to be entitled to compensation from the commissioners, and had, under an act of parliament, obtained* an order [*421 of the court of quarter sessions for payment of a sum of money to him, applied for a mandamus directing the commissioners to pay it; and it was objected there that the proper remedy was by indictment, which certainly might have been brought; but the Court said that the indictment would not benefit Lord Boston, and made the rule for a mandamus absolute. Mandamus is, in fact, the appropriate mode of enforcing an act of parliament. An indictment does not terminate the question; it may be delayed by certiorari; and the party prosecuting is not entitled to costs from the county: whereas the Court has a discretionary power as to the costs of a mandamus, under stat. 1 W. 4, c. 21, s. 6. That act shews that it is the general policy of the legislature to promote this remedy; and a mandamus here offers the most convenient method of bringing in question the validity of the order. Secondly, the Judge had full power to make the order. One of the alternatives of the statute has been complied with, as the witnesses appeared on subpoena. It is impossible to separate the question as to the prosecutor's costs, from that as to the costs of the witnesses, about which there can be no doubt.

Lord DENMAN, C. J. As to one of these orders, there may be, perhaps, some doubt; but none as to the other. The judge clearly had a power to order the payment of the costs of the witnesses who had been subpoenaed. As to the propriety of a mandamus, the first question is, whether this court should interfere by that process, in the case of an inferior officer amenable to others. Before the case of *Rex v. Bristow*, 6 T. R. 168, an *application was made for a [*422 mandamus against a treasurer, in *Rex v. Shaw*, 5 T. R. 549: that case was, however, ultimately decided upon facts which do not occur here. In *Rex v. Bristow*, 6 T. R. 168, Lord Kenyon objected to descending too low, and put, as an instance, the case of a constable. It is true that, in *Rex v. The Commissioners of Dean Inclosure*, 2 M. & S. 80, Lord Ellenborough observed that an indictment was a less convenient remedy than a mandamus. That may be some-

(a) Not reported. The rule for a mandamus was made absolute in Trinity Term, 1834; and the validity of the return was argued in Trinity Term, 1836, when the court took time to consider.

times true; yet, on the whole, we do not think the present a case for a mandamus. *Rex v. The Treasurer of the County of Surrey*, 1 Chit. Rep. 650, is precisely in point; and there the court referred to *Rex v. Johnson*, 4 M. & S. 515. *Rex v. The Treasurer of the County of Surrey*, 1 Chit. Rep. 650, was a case upon stat. 58 G. 3, c. 70, s. 4, which is an act using the same language, and imposing the same direct duty, as stat. 7 G. 4, c. 64, ss. 22, 23. The case is therefore, in truth, a decision on the last act. We are not to carry the remedy by mandamus so far as to issue the writ wherever any officer has neglected his duty: this court ought not to be called upon in every case of that kind. Even if an indictment be an imperfect remedy, it is some remedy: we must suppose that a respectable party, if convicted, will perform the duty; and, if he did not, the court would take some step which would enforce it. In one respect, an indictment is a more efficacious remedy than a mandamus; for, if a party has neglected his duty from corrupt motives (and partiality would be a corrupt motive), an indictment would not only be an indirect means of obtaining the money, *but an effectual method of reaching the party who had subjected him-

*423] self to the criminal proceeding.

LITTLEDALE, J. In *Rex v. Bristow*, 6 T. R. 170, Lord Kenyon clearly and distinctly lays down the principle, that a mandamus is not to be granted to compel the execution of a duty by an inferior officer. The only difficulty here is, that the act contains a special direction to the officer to pay; and therefore it may be contended that the case is without Lord Kenyon's rule. But *Rex v. The Treasurer of the County of Surrey*, 1 Chit. R. 650, was upon an act precisely corresponding to that in the present case: there the Court refused the mandamus; and so, therefore, must we. I agree in the doctrine of these two cases: the treasurer is merely the servant of the magistrates. As to the case of *Rex v. The Commissioners of the Navigation of the Rivers Thames and Isis*, ante, p. 420, n. c. that falls within a class of cases in which the court grants a mandamus. The writ there goes to the principal, who pays over in his public capacity: the present case is one of a servant to the magistrates. With respect to the power of the Judge, the expenses of the witnesses who appeared upon subpœna are clearly within the statute. But there is much doubt in my mind as to the expenses of the prosecutor. At present I think that he is not entitled to them. The words of the act are [His lordship here read the twenty-third section.] It seems likely that the legislature meant to give expenses to the prosecutor, only where he goes before a magistrate, who binds him over. A magistrate, on hearing the complaint, frequently dismisses *it: if the

*424] prosecutor then goes to the grand jury, I think he ought not to be paid by the treasurer.

PATTESON, J. *Rex v. Shaw*, 5 T. R. 549, is a very early, if not the earliest case where a mandamus was applied for against a treasurer; and it was refused, not on the ground of the treasurer being a ministerial officer, but because the foundation of the rule failed, the treasurer having already paid over the money in obedience to authority which he could not resist. But afterwards, in *Rex v. Bristow*, 6 T. R. 168, the Court decided against granting the writ, on the broad ground that the party applied against was a ministerial officer. That was followed up by *Rex v. The Treasurer of the County of Surrey*, 1 Chit. R. 650. We know that, where a party is indicted for not making such a payment, he may be fined, and that the prosecutor, by applying to the crown, gets the fine: that is a quicker and better remedy than a mandamus. In *Rex v. The Commissioners of Dean Inclosure*, 2 M. & S. 80, there was a work to be done; and in *Rex v. The Commissioners of the Navigation of the River Thames and Isis*, ante p. 420, n. c., the parties applied against were not servants.

WILLIAMS, J. The case of *Rex v. Bristow*, 6 T. R. 168, is decisive. It has been argued that a mandamus is the more convenient remedy; but I observe that, in *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646, Abbott, C. J. said that he had entertained considerable doubts in the course of

the discussion, whether the Court ought to grant a mandamus to compel the doing of an act, the *omission to do which might be prosecuted by indictment. The object of that application was very different from the [*425 object here; and the case did not fall within the rule, laid down in *Rex v. Bristow*, 6 T. B. 168, of not granting a mandamus against an officer simply ministerial. Rule discharged.

The KING *against* FRANCIS HUGHES, the Mayor, and JOHN ROGERS, one of the Justices of the Borough of STAFFORD. *Thursday, May 28.*

By a local act commissioners were empowered to make paving rates, and to hear and relieve parties complaining of such rates. The act gave an appeal from the commissioners to the sessions. And it provided that, on nonpayment of rates for seven days after personal demand, it should be lawful for certain justices, upon proof on oath of such demand and nonpayment, to issue a distress warrant. Justices, being applied to for such warrant, refused to grant it, but stated that they would do so if a proper information were sworn, and the party summoned before them.

The court refused a mandamus to compel the justices to issue a warrant without summoning the party.

Supposing that the act authorised the justices to grant a warrant without summons (a). Held, nevertheless, that they acted rightly in not so granting it.

A rule was obtained in a preceding term, calling on the above magistrates to shew cause why a mandamus should not be granted, requiring them to issue a warrant for levying on the goods of John Ward, 6l. 17s. 6d., being his proportion of rates made under an act, 11 G. 4, xlv. (local and personal, public), for paving and lighting the streets of the said borough. The rule was grounded on an affidavit of the collector, stating that the rates had been duly made, and demanded of Ward, but not paid; but the defendant laid an information before Hughes and Rogers, justices of the borough, for the purpose of obtaining a distress warrant against Ward's goods, and proved on oath before them the making of the rates, and a demand upon *Ward more than seven days [*426 before that application; and that the justices refused such warrant; and that the act gave no other remedy for the recovery of the rates. Mr. Rogers in opposition to the rule, made affidavit as follows:—"That the practice in such cases has hitherto been to grant a summons prior to a distress warrant, which upon a proper information being sworn before them, he and the said Francis Hughes are now willing and ready, to do, believing that in so acting they are complying with the provisions of the said act of parliament."

Whateley now shewed cause. The magistrates are not obliged to grant a distress warrant without having first issued a summons and heard cause shewn. It is true that the act, (a) in sect. 119, which authorises the *levy by [*427 distress, does not expressly require a summons before issuing a war-

(a) But see the next case, p. 433.

(b) 11 G. 4, c. xlv. (local and personal, public) sect. 109, empowers the commissioners (appointed by sect. 1, for putting the act in execution) to make rates for the purposes of the act; and sect. 119, enacts, that in case any person assessed to any rate to be made as before mentioned, shall refuse or neglect to pay his proportion of any of the said rates to the collector or collectors for seven days next after personal demand, or demand in writing left at his usual or last place of abode, "it shall be lawful for any justice or justices of the peace of the said borough, upon proof made upon oath of such demand and nonpayment, (which oath any such justice or justices is and are hereby empowered and required to administer,) by warrant under the hand and seal, or hands and seals, of such justice or justices, (which he and they is and are empowered to grant), to authorize and direct the said collector or collectors to levy such rate or moneys so in arrear, together with the costs and charges attending the same, to be ascertained by such justice or justices, by distress and sale of the goods and chattels of the person or persons so refusing or neglecting," &c., "and in default of such distress it shall and may be lawful to and for such

mat; but it does not take away that mode of proceeding, nor oblige the justices to grant a warrant without it. In *Rex v. Benn*, 6 T. R. 198, this Court would not issue a mandamus to justices to grant a distress warrant for a poor rate without summons; and Lord Kenyon said, "A summons must precede a warrant of distress, which is in the nature of an execution. On the summons, the party may shew a sufficient reason to the magistrates why a warrant of distress should not issue; as for instance, that he has already paid the assessment *428] to one *of the parish officers, who has not accounted for it. But it is an invariable maxim in our law that no man shall be punished before he has had an opportunity of being heard: whereas if a warrant of distress were to be issued without any previous summons, the party would have no opportunity of shewing cause why the execution should not issue against him." Justices have been held liable, by criminal information and indictment, for convicting, or making an order in the nature of a conviction, without having summoned the party: *Rex v. Allington*, 2 Stra. 678. (S. C. as *Rex v. Venables*, 2 Lord Ray. 1405. And see *Rex v. Venables*, 1 Stra. 630); *Rex v. Constable*, 7 D. & B. 663; *Rex v. Commins*, 8 D. & B. 844. In the present case an action would lie for issuing the warrant; and where that may reasonably be apprehended, the Court will not grant a mandamus: *Rex v. The Justices of Buckinghamshire*, 3 Nev. & M. 68. S. C. as *Rex v. Morgan and Another*, 2 A. & E. 618, note (a). (See *Rex v. Dyer and Another*, 2 A. & E. 606, and the cases there referred to; *Rex v. Broderip*, 5 B. & C. 239. The statute clearly contemplates a summons, because it enacts, (sect. 187,) that a distress shall not be deemed unlawful for any defect in the summons.

R. V. Richards, who was to have supported the rule, was absent.

Lord DENMAN, C. J. I think the justices have done that which was perfectly right. It may be that the act of parliament was intended to give them more than the ordinary powers in cases of this kind: but, if that is so, they have properly limited those powers by saying, "we will not issue a distress *429] warrant till we have heard the *party." He might be able, upon the hearing, to prove that he had paid, or to give a reason for not paying.

LITTLEDALE, J. It may be a question whether the justices might exercise this authority or not; but at all events a mandamus ought not to issue.

justice or justices to commit such person or persons to the common gaol or house of correction for the said county of Stafford, there to remain without bail or mainprize for any time not exceeding three calendar months, or until payment of such sum or sums of money as shall have been found due and in arrear upon all or any such assessment or assessments as aforesaid, together with all costs, charges, and expenses, to be ascertained by the said justice or justices."

Sect. 120, enables any person who shall think himself aggrieved by any rate or assessment under the act, to apply to the commissioners (appointed by sect. 1,) at their first or second meeting after the demanding of such rate, and empowers the commissioners to relieve such party if they shall think him aggrieved. It also enables the party, if dissatisfied with their determination, to appeal to the quarter sessions, whose determination shall be final.

By sect. 129, all fines, penalties, and forfeitures (of which there are many, for various offences), imposed by the act, are (where it is not otherwise particularly directed) to be levied and recovered by distress and sale of the offender's goods, by warrant of any justice of the peace for the said borough, &c., (which warrant the justice is thereby required to grant,) upon confession, or information on oath, &c.

Sect. 132, enacts, "that in all cases in which by this act any penalty or forfeiture is imposed and made recoverable by information before a justice of the peace, it shall be lawful for any justice of the peace to whom complaint shall be made of any offence against this act, to summon the party complained against before him, and on such summons to hear and determine the matter," &c., "although no information in writing shall have been exhibited or taken by or before such justice," &c.

Sect. 137, enacts, "that when any distress shall be made for any sum or sums of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers, on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceedings relating thereto."

PATTESON, J. The only question is, whether the act is obligatory or not. There are no words to make it so. It may have been contemplated that circumstances might arise in which a summons might operate merely as a notice to the party to get out of the way, and it would therefore be desirable that a distress warrant should be issued at once: but the act does not oblige the Justices to issue it.

WILLIAMS, J. I am of the same opinion; and I think that if the justices might have issued the warrant, they have exercised their discretion very wisely in not doing so.

R. V. Richards, being in court shortly afterwards, obtained leave to support the rule. The magistrates have only a ministerial duty to perform in enforcing payment of the rate. It cannot have been meant that they should revise and correct the assessment. They state that they are willing to grant a summons; but it would be ineffectual, as they have no power to vary or modify the rate. If it had been intended that cause should be shown before a distress warrant issued, the act might have directed a summons and hearing before the commissioners (who, by sect. 120, have power to relieve parties aggrieved;) but this is not done. In cases *where the justices have to convict, and award the penalties, they, being the proper parties to hear and deter- [*430 mine, are properly directed to issue the summons; but here, if a summons were required, it clearly ought not to be issued by them. As to sect. 137, which enacts that when any distress shall be made for any sum to be levied by virtue of the act, the distress shall not be deemed unlawful on account of any defect in the summons, that does not necessarily apply to distresses for non-payment of rates, because the act gives powers of distress for levying penalties and forfeitures on convictions; and those convictions take place upon summons.

[PATTESON, J. How does this case differ from that of a distress for a poor-rate? There the justices having nothing to do with making the rate, and no control over it; and the clause, 43 Eliz. c. 2, s. 4, empowering them to distrain, makes no mention of a summons. Yet it had been repeatedly held that a summons must issue before the warrant of distress for a poor-rate.] Here a tribunal (that of the commissioners) is expressly constituted for the purpose of hearing any complaint against the assessment. [PATTESON, J. In the other case the sessions are such a tribunal.] Here the enactments are such that the commissioners and magistrates form, as it were branches of one court. The magistrates have no discretionary power as to granting a warrant. The act, indeed, would be nugatory if they might take the rate into consideration when called upon to grant a warrant. [PATTESON, J. The defendant might insist on many things independent of the propriety of the rate; for instance, that it had never been demanded of him.]

*Lord DENMAN, C. J. Upon the main point in the case, not the least doubt has been raised. The inference drawn from that clause of the act [*431 which declares that a distress shall not be invalidated by a defect in the summons, has been answered by Mr. Richards: convictions may take place on summons, and be enforced by distress; therefore the clause may apply to them. But it appears to me that this statute and the act 43 Eliz. c. 2, stand on precisely the same footing as to the point in question. By that act the overseers are empowered to make rates; an appeal to the sessions is given; if the rate is not appealed against, or is confirmed, two justices, upon non-payment, may issue a distress-warrant. The same provisions are contained in this act, the commissioners here making the rate, as the overseers do under 43 Eliz. c. 2. But, under the act of Elizabeth, it has often been held that a summons must issue before the warrant of distress; not in order that the magistrates may exercise any authority over the rate, but that the party charged may be enabled to shew whether or not he has paid the rate, and to make any defence which may arise upon the simple circumstance of a summons to show cause why he should not pay the rate. Why should we suppose that the legislature intended any differ-

ent mode of proceeding under the present act? Nothing can be more unreasonable than the course here proposed; and, unless it were expressly directed by act of parliament, I should think that magistrates ought not to proceed to the arbitrary act of issuing a warrant without calling upon the party to shew whether he had or had not, in fact, paid the rate, or why it had not been paid. In my opinion the magistrates in this case have done themselves honour by
 *432] refusing so to proceed. The rule will be discharged, and with costs, almost as a matter of course.

LITTLEDALE, J. I am of the same opinion. The statute in question is like 43 Eliz. c. 2; and it is reasonable that there should be a summons before a distress issues.

PATTESON, J. It is not necessary to the construction we are giving the statute, to say that the justices are invested with a power over the rate; nor are they. The whole object of the summons would be, that the party might be heard to show cause why he should not pay the rate. At all events the act does not compel the justices to issue a warrant without calling the party before them.

WILLIAMS, J. My mind remains without a particle of doubt on this subject. The act is, at any rate, not imperative: it only says that "it shall be lawful" for the justices to issue their warrant. The analogy between this case and that of a poor-rate is complete. Suppose it to be true that under this act the commissioners only, and not the justices, are enabled to relieve against the rate: under the statute of Elizabeth, the justices who issue the distress warrant cannot relieve, but the party must appeal to the sessions. According to the argument in support of this application, if there were no appeal, or an unsuccessful one, against a poor-rate, nothing would remain for the justices, upon nonpayment, but to grant their warrant. *Rex v. Benn*, 6 T. R. 198, however, is a sufficient authority to shew that the answer here given by the magistrate is a complete one.

Rule discharged with costs.

*433] [The following case, argued and decided in Trinity term, 1836, may conveniently be introduced here.]

PAINTER *against* The LIVERPOOL Oil Gas Light Company. *Friday, May 27.*

By statute establishing a gas light company, it was enacted, that if any person should refuse or neglect, for ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company or their clerk by warrant of any justice of peace for the town, &c., and it should be lawful for the company, or their clerk, or any person acting under their authority, with such warrant, to levy the sum so due by distress and sale of the goods of the party so neglecting or refusing to pay, or the same might be recovered by action, &c.

Held, that a warrant so issued by a justice, without previously summoning and hearing the party to be distrained upon, was illegal, though a summons and hearing were not in terms required by the act.

Where a magistrate grants a warrant in the nature of execution, he is bound first to summon and hear the parties, unless the statute under which he acts clearly renders the discharge of that function ministerial only, or in some other manner dispenses with the summons and hearing.

In *trover* for distraining plaintiff's goods, the company justified under the above warrant, and stated that it was issued on the complaint of their collector, and that he, by virtue of it and under their authority, seized the plaintiff's goods for the purpose of levying a sum owing by him to them, and duly demanded according to the act.

Held, that the warrant, although it would have protected the clerk or an officer, was no justification to the company, they not having acted in obedience to it, but having put it in force as parties.

VOL. XXX.—14

TROVER for coaches, horses, and harness. Plea, that the plaintiff after the passing of an act, 4 G. 4, c. xxxix. (local and personal, public), for lighting the town of Liverpool with oil gas, and before the time when &c. to wit, on, &c. was indebted to the defendants in a large sum, to wit, &c. for gas supplied by contract, and that afterwards, and while the plaintiff was so indebted, to wit, &c., William Henry Parkinson, the collector for the defendants, left, at the place of business of the plaintiff, a demand in writing of the said sum so due and owing from him to the defendants: "and afterwards, and more than ten days after the leaving the said demand at the said places of business of the said plaintiff as aforesaid, he, the said W. H. P., then being such collector, [*434] and so acting under the authority of the said defendants as aforesaid, to wit, on, &c. preferred a complaint against the plaintiff for the premises aforesaid, before James Aspinall, then being one of his Majesty's justices of the peace in and for the county of Lancaster; and, thereupon, afterwards, the said J. A., so being such justice for the said county as aforesaid, and before the said several times, when, &c. to wit, on, &c., according to the form of the statute in such case, &c. duly made and caused a certain warrant under his hand and seal, directed to the sub-bailiffs, head constables and assistant constables in and for the borough of Liverpool, and also to the said W. H. P. and John Hampson and their assistants; and thereby then authorised and commanded them, every or any of them, that upon the goods and chattels of the said plaintiff, they should levy the said sum of 12*l*. 18*s*., for that he, being a person who had contracted with the said defendants, to take the benefit of the gas from the said defendants, did refuse and neglect, after demand(a) left in writing at the place of business of the said plaintiff, to wit, on, &c., to pay the sum of 12*l*. 18*s*., being the rent due to the said defendants from the said plaintiff for gas consumed by the plaintiff, contrary to the form of the statute, &c. whereof he, the said plaintiff, was duly convicted, and for the levying thereof they were to seize, take, and carry away the said goods and chattels; and if, in five days after such seizure, the said sum of 12*l*. 18*s*., together with the reasonable charges, &c." "should not be paid, then, and in such case, after the expiration of *the said five days, they were to make [*435] sale thereof, or of so much thereof as should be sufficient to levy the said sum," &c. Then followed directions as to the disposal of the overplus, and the return to be made to the warrant if the distress should not be sufficient. The plea then stated that Parkinson, so being clerk and acting under the authority of the defendants, did seize, take, and carry away, under and by virtue of the said warrant, certain goods and chattels of the plaintiff, being the goods and chattels in the declaration mentioned, for the purpose of levying the said sum, &c.; and did afterwards, and more than five days after such seizure, to wit, on, &c. sell, &c., for the purpose of satisfying and discharging the said sum, &c. Replication, that the plaintiff was not, at any time before the said James Aspinall made the said warrant in the said plea mentioned, summoned or warned to answer the said complaint of the said, W. H. Parkinson, against the plaintiff, for the said supposed debt, before the said J. A. or any other of his Majesty's justices of the peace, nor did he before then have any notice of such complaint, nor did he appear, before the said J. A. or any other of his Majesty's justices of the peace, or any officer or person whatever authorised or empowered to hear the said complaint, to answer the said complaint, and the said warrant was made and issued against him as aforesaid, without his having had any means or opportunity to hear or answer the said complaint; wherefore the defendants, of their own wrong, &c. Rejoinder, that the gas was supplied after the passing of the act, and that Parkinson, as such collector, &c. left a demand in writing at the place of business of the said plaintiff, thereby re-

(a) Littledale, J. observed that the warrant, as set out, did not shew a default "after the space of ten days after demand made," according to the act. See sect. 72, post, p. 436, note (b).

*436] quiring him to *pay the said sum, &c. so due and owing from the said plaintiff to the said defendants, as in the said last plea mentioned; conclusion to the country. Demurrer, because the rejoinder neither confesses nor avoids, nor traverses nor denies the matter of replication, and because it tenders an immaterial issue. Joinder.

Wightman, in support of the demurrer. The point taken by the plaintiff is that, before a warrant was granted, he ought to have been summoned, or to have appeared without summons, before the magistrate, to answer the complaint. The defendants contend that no summons was necessary, either by the statute or otherwise, and that the demand by their collector was sufficient ground for a warrant. Unless the local act expressly takes away the proceeding by summons, the case falls within the principle of *Rex v. Benn*, 6 T. R., 198. But the act gives no authority for dispensing with a summons. By the clause for *437] recovery of rents (a), sect. 72, it *is enacted, that they shall and may be recovered by warrant of a justice, but it does not say that the justice shall proceed without summons and hearing. And other modes of recovering the debt are given in that section, viz., by action, bill, plaint, or information. Now, in any of those proceedings, the defendant must of course have been heard; and the legislature cannot have meant that he should have that advantage or not, according to the course adopted by the company. In an action he might allege payment, or some matter in excuse; why should he be debarred from doing so before a justice? But, unless summoned, he has no opportunity. [LITTLEDALE, J. He cannot know what justice the opposite party may apply to.] Although the act does not expressly say how the warrant is to be obtained, it must mean that this shall be done in a regular manner, and according to the rules which guide this Court. The present act must be construed, as to the *438] clause in question, like 43 Eliz. c. 2, *s. 4, which empowers justices to issue a distress warrant for poor-rates, and under which a summons has always been held necessary. [LITTLEDALE, J. The warrant there is to be granted against "every one that shall refuse to contribute," which may imply a refusal before justices; here the words are more general, "in case any party shall refuse or neglect." Lord DENMAN, C. J. I think you cannot bring the case

(a) 4 G. 4, c. xxxix. (local and personal, public), sect. 72, enacts, "that in case any party or parties who shall contract with the said company," (established by sect. 1,) "or agree to take, use, or enjoy the benefit of the said gas, shall refuse or neglect after the space of ten days after demand made or left in writing at the place or places of abode or business of such party or parties, to pay the rents or sum or sums of money then due for such gas to the said company, according to the terms and stipulations of the said company, it shall be lawful for the said company" to separate his gas-pipes from their mains; "and that the rent or rents, sum or sums of money then due from any such party or parties to the said company for such gas, as also any other rent or rents, sum or sums of money due and owing to the said company for gas supplied by them to any person or persons, shall and may be recovered by the said company or their clerk or superintendent, or any person or persons acting under their authority, by warrant under the hand and seal of any justice of the peace for the said town of Liverpool or county of Lancaster (as the case may require); and it shall be lawful for the said company, or their clerk or superintendent, or any person or persons acting under their authority, with such warrant, to levy the said sum or sums so due or owing as aforesaid by distress and sale of the goods and chattels of the party or parties so neglecting or refusing to pay the same, rendering the overplus, if any, to such party or parties, after deducting the necessary charges of such distress and sale, or the same may be recovered in the borough court of Liverpool, or in any of his majesty's courts of record in England, by action of debt, or on the case, bill, plaint, or information," &c.

By Sect. 74, any person "thinking himself aggrieved by any rule, bye-law, or order of the said company, or anything done in pursuance thereof, or by the order or determination of any justice or justices of the peace in pursuance of this act," may appeal to the sessions. No further power is given, to justices or others, of relieving parties aggrieved by any thing done under the act.

There are many clauses in the act directing summary proceedings for the recovery of penalties, compensations, &c. They are noticed in the judgment of Pattenon, J., but need not be more particularly stated.

within the authority of those under the statute of Elizabeth : you must rely on the general principle.] The legislature cannot have intended that, in any case, execution should issue without the party being summoned. It is an invariable maxim that no man shall be punished without being heard. No precise form of words is requisite in a statute to enforce this rule ; but the strongest language would be necessary to sanction a departure from it. *Rex v. The Justices of Stafford*, 5 Nev. & M. 94, (antè, p. 425, as *Rex v. Hughes and Rogers*), was a similar case to this, and is an authority for the plaintiff. [Lord DENMAN, C. J. We did not mean there to lay down a general rule : we thought it reasonable and just that the magistrates should have refused to grant a warrant without previous summons ; but it would not follow from that decision that the issuing of a summons would be necessary to the defence in an action like this. In the present case the more general question is pressed upon us.]

Cowling, contra. First, even admitting that a summons was necessary, the proceedings were so far valid as to justify persons acting under this warrant. If the case fell within the jurisdiction of the magistrates, which the facts here shew that it did, the proceedings and warrant, *though erroneous, are not void. In *The Case of the Marshalsea*, 10 Rep. 76 a, it is said, "a difference [*439] was taken when a court has jurisdiction of the cause, and proceeds *inverso ordine* or erroneously, there *the party who sues*, or the officer or minister of the court who executes the precept or process of the court, no action lies against them. But when the court has not jurisdiction of the cause, there the whole proceeding is *coram non jndice*, and actions will lie against them without any regard of the precept or process." In *Dr. Webb v. Batchelour*, 1 Vent. 278, (S. C. *Freem.* 396, 407, 457, and 488, where the special verdict is set out,) which was an action of trespass for taking cows, it was found, by a special verdict, that the plaintiff was called upon to perform statute duty under stat. 22 Car. 2, c. 12, but omitted to do it, whereupon a justice of the peace made a warrant to the defendant to distrain upon him under the authority of the act. The warrant was made without summoning the plaintiff, though the statute, sect. 9, empowers the justices to grant warrants only against parties in default, "not having a reasonable excuse to be allowed by the said justices ;" which makes the case stronger than the present. Yet the court there held, that the defendant, who made the levy, was protected by the warrant, saying, "The officer that executes the warrant (though unduly made for the cause alleged) is not answerable, for he is not to judge, but to execute the matter, it being within the jurisdiction of the justice of the peace." The defendants there were surveyors of highways, who had procured the warrant. It is suggested here, that the *party, if [*440] summoned, might have proved that he had already paid, or was excused from paying ; but, in the case just cited, (*Freem.* 490,) Hale, C. J., said, "You might have gone to the justice, though after the distress, before it was sold, if you had any excuse." And here the warrant directed that the goods should be kept five days between the seizure and sale. [LITTLEDALE, J. How could the justice have relieved the plaintiff, if he had applied to him in that interval ?] The plaintiff might have called upon the justice to order a restoration of the goods. At all events the present remedy is not a proper one. There is no hardship on the plaintiff, who must be taken to owe the money ; and, even if there were, he might have obtained redress if the proceeding was improper, by an action on the case against the Company, for procuring a warrant to issue without a previous summons. A conviction may be set aside for such a cause, as in *The Queen v. Dyer*, 6 Mod. 41 : or the court may refuse to enforce the granting of a warrant by mandamus ; but the party acting under the warrant is not a trespasser. Powell, J., said, in the case last cited, "that if an action were brought against an officer upon the execution of this conviction, it would not lie, for an erroneous conviction would justify him." As to the effect of the want of summons, supposing it to be a material error in the proceedings, *Ackerley v. Parkinson*, 3 M. & S. 411, is a case in some degree analogous, where a party was

excommunicated for disobeying a citation which proved to be void; but it was held that, although the proceeding was irregular, there was no want of original jurisdiction, and therefore that the vicar-general *and surrogate, who had

*441] excommunicated the plaintiff, were not liable to an action on the case.

But further, the magistrates were not bound to summon before issuing their warrant. The decisions on this point, which refer to the granting of a mandamus, are inapplicable, and the statute 43 Eliz. c. 2, has already been distinguished from the act now in question. Magistrates, in respect to clauses like the present, do not act in a strictly judicial capacity, but in a ministerial one, nearly resembling a judicial. In modern acts it is usual to say that the magistrate shall convict, or to give a form of a conviction, when it is so intended. But the intention of the present and similar clauses is to give the same remedy as a landlord has for the recovery of his rent; by which name, indeed, the gas company's dues are spoken of in the very clause in question. Then, to avoid breaches of the peace, the statute, instead of giving an immediate power of seizure, requires the intervention of a magistrate's warrant, to give an ostensible sanction to the proceedings. It is argued here, that the warrant might be issued though the party had paid; but so also it may be said that a landlord might seize for rent, though none was due. If he did the party distrained upon would have his remedy by action; and here, the same remedy may be taken if a warrant is obtained improperly. [PATTERSON, J. The justice, in this warrant, has given five days for payment, acting as if under stat. 27 G. 2, c. 20. The local act does not call upon him to give any time; he therefore exercises a discretion in this respect, as against the parties obtaining the warrant. Then can it be said that he merely acts ministerially? Throughout the warrant he

*442] affects to act judicially.] It must be admitted that the warrant contains superfluous matter: but if the magistrate proceeded judicially, the omission to summon is only an error, and does not affect the party acting under the warrant; if ministerially, that party is not liable, because the justice then was not bound to summon. It may be better, in a case like this, that a summons should issue; but the proceedings are not void for want of it. If a capias issued out of an inferior court without a previous summons, an arrest under it is not void so as to give the party an action for false imprisonment; note (1) to *Pitt v. Knight*, 1 Wms. Saund. 90.

Wightman in reply. The warrant, here, showed upon the face of it an excess of jurisdiction, and trespass would have lain for enforcing it; *Groome v. Forrester*, 5 M. & S. 314. The defendants here do not stand in the situation of officers executing process, but of parties procuring it to be sued out. That distinction was taken in *Parsons v. Lloyd*, 2 W. Bla. 845, where De Grey, C. J. said, "If the defendant" (the plaintiff in the suit then before the Court) "is injured, he is entitled to a remedy somewhere: but not against the sheriff or his officer, who are bound to obey the writ."—"The officer not being liable, the plaintiff must be. He has procured the writ to be sued out, and is answerable for all its consequences." (a) An officer justifies under the warrant; a

*448] plaintiff under the judgment. It is said that the present act was intended to give the same remedy to the company which a landlord has for his rent; but the remedy is a more summary one, for the distress may be sold immediately; and according to several authorities, such a distress would be irreplevisable. (See *Wilson v. Weller*, 1 B. & B. 57.

Lord DENMAN, C. J. The first question is, whether the warrant in this case was a good warrant, justifying any person who acted under it? It is said to be so, under the seventy-second section of the statute 4 G. 4, c. xxxix. In order

(a) Patterson, J. inquired if the warrant in *Webb v. Batchelour* was void upon the face of it? *Cowling* answered, that it did not appear that any summons was mentioned in the warrant (see *Freem.* 489); but that, if it had, the justices could not have given themselves jurisdiction by reciting a false fact: *Welsh v. Nash*, 8 East, 403, per Lawrence, J.

to decide this point, we are called upon to consider, on general principles, whether justices authorized by statute to proceed by warrant, in execution, may do so without a previous summons to the party to be affected. No case, as yet, has furnished an express authority on this subject, for, although Lord Kenyon intimated an opinion upon it in *Rex v. Benn*, 6 T. R. 198, it was not necessary for the decision which the Court there came to, that this point should be determined. But, in the present case, I am of opinion that the warrant ought to have been issued upon summons of the party. The warrant states that the plaintiff, having contracted with the defendants for a supply of gas to them, refused, after demand made in writing, to pay the rent due to them for gas consumed by him, whereof he was duly convicted. The very terms of this warrant referring to a conviction, make it evident that the party ought to have been summoned to show either that he had not refused to pay, or that he had an excuse for not paying. Therefore we are called upon by general principles to say *that this warrant is illegal, because the party against whom it issued [444] had no opportunity given him of showing that he ought not to be convicted. But then the question is, whether the warrant, though improperly issued, will protect these parties. A warrant is a justification to officers, because they are not to canvas the legality of the process they have to execute. Acts of parliament have been passed for their protection, founded on that principle; and it is a just one; for it would be absurd that an officer charged with the execution of a warrant should have to pause and consider whether it was regularly issued or not. But here the parties relying on the warrant are not officers; it is not even the clerk of the company who justifies, but the company themselves who allege that their clerk, acting under their authority, and by their command, took the goods, by virtue of the warrant. The case, therefore, is like those where the question has been, not whether an officer was justified, but the parties who set him in motion. The decision in *Webb v. Batchelour*, 1 Ventr. 273, (Freem. 396, 407, 457, 488,) limits itself to the principle, that an officer is not liable for executing an irregular warrant; a doctrine also laid down by Powell, B. in *Gwinne v. Poole*, 2 Lutw. 935, 1560. Those cases would have resembled the present, if the defendants there had been parties intervening between the magistrate and the officer, and justifying themselves for employing the officer to act under the warrant. The plaintiff is entitled to judgment.

LITTLEDALE, J. I am of the same opinion. I think it was necessary, to render this warrant available, that *a summons should have issued first. [445] The case is like *Rex v. Benn*, 6 T. R. 198. The fourth section of stat. 43 Eliz. c. 2, empowers justices by their warrant to levy the poor-rate upon every one that shall refuse to contribute; by which a refusal before justice appears to be more plainly pointed out than in the early part of 4 G. 4, c. xxxix. s. 72, where it is said that if any party shall refuse or neglect after the space of ten days after demand, in writing, to pay the company's rents they may be recovered by warrant of a justice, though it may be observed that, in the part of the section which immediately follows the mention of proceeding before the justice, the words "so neglecting or refusing to pay" occur again. And the operation of both statutes, in this respect ought to be the same. In the case of malicious injuries punishable by summary conviction, under stat. 7 & 8 G. 4, c. 30, a justice is empowered (by sect. 30), on a charge being made before him, to issue his warrant for apprehending the party charged, without previous summons; but that is in the nature of a criminal proceeding, and the warrant issues only for the purpose of bringing the party before the justice. The warrant, here, is in the nature of an execution; and both upon the principle stated in *Rex v. Benn*, 6 T. R. 198, and in common justice, such process ought not to issue without a hearing of the party. Without a summons, the party has no opportunity of going to the justice. When the demand is made, he can apply only to the gas company themselves; for, at that time at least, no summons from a justice has issued. As to the legality of the warrant, there-

fore, I think that it ought not to have *been granted without a summons. *446] Then, as to the protection claimed by these defendants; it is true, that, according to *Webb v. Batchelour*, 1 Ventr. 273, (Freem. 396, 407, 457, 488,) an officer, in a case like this, would be protected, because it does not belong to him to say, "there is an error in the proceedings, therefore I will not execute the warrant." But this is an action against the company themselves; they are the persons who put Parkinson the collector in motion, and cause him to demand the rent, and seize the goods. It is not he that justifies, but they who allege that he acted under their authority: they adopt the warrant, and they identify themselves with him throughout the transaction. It was their duty, then, to see that the warrant was a proper one; and, as it is not so, for want of a summons, the judgment must be against them.

PATTESON, J. As to the first point; the statute of Elizabeth and that now in question are not analogous to each other in all respects, as perhaps no two acts are: but it is sufficient to say that on this act there is not the slightest doubt in the world that the party ought to have been summoned before a warrant was granted against him. There are many clauses in this act providing for the recovery of penalties and damages by summary proceeding before justices, and authorising them to issue warrants for levying the sums to be recovered; scarcely any two of them agree in their terms, and in none of them is a summons mentioned, except in sect. 70, which relates to compensation for damage *447] done to lamps. It cannot be supposed that the legislature *meant the justices to proceed upon summons in that case only; and, if in others, why not in this? Taking all the provisions together, the intention evidently is that the justices should issue their warrant for the recovery of these rents, after the proper steps have been taken, and not otherwise. The question raised by the defendants comes to this, whether the proceeding of the justices was judicial or ministerial; if it be judicial, the justices cannot have issued their warrant without having determined some point; and that should have been upon hearing the parties. Mr. Cowling says that the party distrained upon may apply to the justices after the distress: but that is not a satisfactory answer, for the goods may be sold immediately: the act says nothing of any time to be given, although the justice in this case allowed five days. In *Webb v. Batchelour*, 1 Ventr. 273; Freem. 396, 407, 457, 488, it was assumed throughout, that the warrant was bad for want of a previous summons. It is true that the particular case arose under a statute which contained the words "not having a reasonable excuse to be allowed by the said justices;" but the whole case shews that, even at that time, a summons was held to be necessary before a warrant issued in execution, which, as my brother Littledale has pointed out, differs much, in this respect, from a warrant in the nature of mesne process.

The remaining question is, whether the present defendants can justify under the warrant, it not having been directed to them but to their clerk. The reason for which such a warrant, though irregular, would be a protection to an officer, is, that he would not be entitled to set up his private opinion against that of the *448] justice *as to the goodness of the warrant. He is bound to obey it, and is, therefore, protected in doing so. But the company were not so bound. If they did not act upon the warrant they were in no way answerable; and they cannot justify under it if they have officiously used it. The case is not like that of persons called in to assist those who have a warrant to execute. This is an action of trover against parties who have received the fruits of the levy, and who plead that the goods were taken by their officer, and under their direction. They have officiously interfered in the execution of the warrant, and they have the proceeds. In *Webb v. Batchelour*, 1 Ventr. 273, Freem. 489, the parties held to be justified were those to whom the warrant was directed.

WILLIAMS, J. There is no doubt that this was a judicial act. By sect. 72 of the Gas Company's Act, no proceeding can be taken, whether summarily, or by the ordinary process of law, for recovery of the rents in question, until the

expiration of ten days after demand. A warrant, then, for the purpose of this levy, could not be claimed as matter of right, and without inquiry to satisfy the justice that it was grantable, any more than a warrant to arrest for felony. The act, therefore, being clearly judicial, the party against whom the application was made should have had an opportunity of shewing cause. *Rex v. Benn*, 6 T. R. 198, was decided under a different statute; and the judgment of Lord Kenyon, which had been referred to, went somewhat beyond the immediate question in the case: but I never heard the proposition doubted, that a party is not to suffer in *person or in purse without an opportunity of being heard. As to [449 the other point, the case of an officer executing process or a warrant bears no analogy to this. It would be wild work if the officer were entitled to scan the warrant delivered to him, for the purpose of ascertaining whether it was regular or not under the circumstances of the case. But here, the persons justifying are parties who allege that money was due to them, and that the warrant was executed under their authority, for the purpose of satisfying their demand. The argument, therefore, on this point, which depended wholly on the supposed analogy between the present case and that of an officer, fails.

Lord DENMAN, C. J. referred to *Harper v. Carr*, 7 T. R. 275, where Lord Kenyon said, "It is an essential rule in the administration of justice that no man shall be punished without being heard in his defence; the party must be summoned before a warrant of distress is granted, as we decide in *Rex v. Benn*; and on that summons many circumstances may appear to shew that a warrant of distress ought not to be granted." Judgment for the plaintiff.

*WENHAM against DOWNES. Friday, May 29.

[*450]

An interlocutory judgment having been set aside, with costs against the plaintiff, by a judge at chambers, and an attachment having issued for the nonpayment, another judge at chambers ordered that the defendant should have three days to rejoin, after the plaintiff should have purged his contempt. The court refused to set this order aside, it not appearing that the plaintiff was in custody, or had paid the costs, or was unable to pay them.

AN attachment had issued against the plaintiff for non-payment of costs taxed on setting aside an interlocutory judgment by Patteson, J. Afterwards (May 1st) Williams, J. made an order that the defendant should have three days to rejoin, after the plaintiff should have purged his contempt.

R. S. Richards now moved for a rule to shew cause why this order should not be set aside. The affidavit stated the above facts, and that no reason for the order had been given to the learned judge, or by him, beyond the non-payment of the above costs: nor was any thing alleged at all on oath to induce him to make it. It did not appear whether or not the plaintiff was in custody. And it was urged, in support of the application, that the remedy by attachment was sufficient to do justice in the case, without staying the proceedings, which was unusual.

PER CURIAM.(a) We cannot say that the learned judge had no reason for making the order. It does not appear that the attachment gives any remedy; for the plaintiff is not stated to be in custody: nor is it stated that the costs have been paid, or that the plaintiff is unable to pay them. If any steps are taken to enforce the attachment, you can apply again.

Rule refused.

(a) Littledale, Patteson, and Williams Js. Lord Denman, C. J. had left the court.

*BASTARD, Esquire, against TRUTCH. Friday, May 29.

Defendant being in the custody of the keeper of the prison of the sheriff of D., the keeper returned to a habeas corpus, that defendant was in his custody on a ca. sa. directed to the coroner of D., at the suit of plaintiff, which ca. sa. was set out in the return, with a certificate by the coroner that it was a true copy. It appeared by the affidavit that the plaintiff was sheriff of D., but this did not appear in the ca. sa. or return, nor did it appear that there was any entry on the roll suggesting the fact. On motion to discharge the defendant for irregularity: Held, that it was not requisite that the ca. sa. should mention the fact of the plaintiff being sheriff; and that a suggestion might at any time have been made on the record, if it had been necessary, since the rule Hil. 2 W. 4, s. 95.

It appeared by affidavit that the defendant being in the sheriff's custody at the suit of S., the ca. sa. at the suit of B., the now plaintiff, was lodged with the keeper of the gaol; but no facts were deposed to otherwise connecting the coroner with the keeper. Held, that the defendant was regularly charged at the suit of B.; for that it would be intended that the writ came to the coroner's hands, and it was not necessary that he should make a formal warrant to the keeper. The court refused to discharge the defendant.

THE defendant made affidavit to the following effect:—On the 20th of January 1834, he was arrested on a ca. sa. at the suit of a person named Slark, and lodged in the prison of the sheriff of Devonshire. In April, 1834, while he was in custody as above, he, being indebted to Mr. Bastard in the sum of 222*l.* 5*s.*, executed a cognovit for that amount to him, on which judgment was entered up in Easter term 1834; and a ca. sa. issued upon that cognovit, which was lodged with the keeper of the said prison, on the 3d of June 1834, and the defendant was there detained upon the last-mentioned writ. In October 1834 a habeas corpus issued, to which the gaoler returned the last-mentioned writ, setting it out in the return: the writ by the return appeared to be a ca. sa. directed to the coroner of the county of Devon, "to satisfy Edmund Pollexfen Bastard, Esq. for 222*l.* 5*s.*" &c. There was also, in the body of the return, a certificate by the coroner that this was a true copy of the writ. On this return the defendant, being taken before a Judge, was committed to the custody of the marshal. No further proceeding had taken place in the suit, Bastard *v.* Trutch, nor had any *452] roll been carried in, or proceedings entered up. On this affidavit, Archbold, in last term (11th May,) obtained a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of custody as to this action.

By the affidavits in answer, it appeared that the plaintiff was sheriff of Devonshire for the year 1834, on and before 11th of March 1834. That the defendant, being then in the plaintiff's custody, as such sheriff, in execution in two actions, one at the suit of a person named Davies, for 182*l.* 6*s.*, and the other at the suit of Slark for 48*l.* 8*s.* 6*d.*, escaped, involuntary and against the will of the plaintiff, on the said 11th of March. Davies called upon the plaintiff to pay, and he did pay, the 182*l.* 6*s.* The defendant was retaken, 11th of April 1834, and was sued by the plaintiff for his expenses, &c., and gave the cognovit, as before mentioned, for 222*l.* 5*s.*, debt and costs, upon which, default having been made, judgment was entered up in Trinity term last (not Easter, as stated by the defendant,) and the writ of ca. sa. issued, directed to the coroner (the plaintiff being still sheriff,) on the 30th of May 1834, and was lodged with the keeper of the prison on the 3d of June 1834. On the 23d of April 1834 the plaintiff carried in the roll. The affidavit did not state whether the roll contained an averment or suggestion that the plaintiff was sheriff.

Overder now shewed cause. First, the writ was properly directed to the coroner of Devonshire, the plaintiff being then sheriff. It is true that the writ does not state that the plaintiff was sheriff: but that appears by affidavit. It is not necessary that the fact should be *453] entered on the roll: in *Pariente v. Castle*, 2 B. & P. 163, the Court refused to discharge a prisoner out of

execution on the ground that no judgment was docketed and entered on the rolls. And, by the rule of Hil. 2 W. 4. s. 95, 3 B. & Ad. 388, "in order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record." The roll in fact was carried in; and, even if it do not state the fact that the plaintiff was sheriff, that does not make the process irregular. Secondly, it will be objected that the writ should not have been lodged with the keeper of the sheriff's prison, as it was directed to the coroner. But for this purpose the keeper is the coroner's officer also. This appears by the coroner's certificate in the return. And the Court will presume that whatever was necessary to constitute the keeper the officer of the coroner has been regularly done: the irregularity, if any, should appear by the affidavit on the other side.

Sir John Campbell, Attorney-General, and Archbold, contra. The return does not shew a sufficient cause of detainer. It is true that, if the sheriff be interested, the process should go to the coroner; and, if the coroner be interested, to two elisors. But, if it appeared, in the proceedings, merely that process was directed to two individuals, the proceedings would be irregular: it would not be presumed that the sheriff and coroner was interested, and that the Court had appointed the persons named, to be elisors. So here the writ should recite that the sheriff is interested. In *Done v. Smethier*, Cro. Car. 416, the Court said that the proper method was to take a writ directed to the coroners, on the surmise of the facts in chancery. [PATTESON, J. In the case of *jury [454] process, there is a suggestion entered.] That was done in *Rex v. War- rington*, 1 Salk. 152, which case was relied on in a case upon a *testatum capias*, *Letsom v. Buckley*, 5 M. & S. 144. So in *Rich v. Player*, 2 Show. 262, 286, there was a suggestion on the roll. The suggestion should be entered with a nient dedire. [LITLEDALE, J. Why cannot that be done verbally now?] Perhaps, on the authority of *Brand v. Mears*, 3 T. R. 388, if the plaintiff now produced to the Court the roll in the action, with the proper suggestion entered upon it, it would be sufficient, and the Court would not inquire when such entry was made: but it is not sufficient to say that the suggestion may be made: it must appear to the Court to be made, in order to warrant a writ directed to the coroner. But, secondly, the detainer by the keeper of the sheriff's prison, on this writ, is unwarranted. The defendant does not appear to be in the coroner's custody at all, in this suit. It does not appear that the writ was in the coroner's hands before it was lodged with the keeper, nor that anything passed between the coroner and the keeper. [PATTESON, J. The rule as to proceedings of this kind applies only where the defendant is already in the custody of the person in whose custody he is to be detained. But here the defendant was not in the custody of the sheriff, at the suit of Slark. LITLEDALE, J. The coroner might make out his warrant to the keeper.] The keeper is not connected with the coroner at all, on these proceedings.

LITLEDALE, J. (a) There are two objections made to the regularity of this proceeding. First, it is said, that *nothing appears to authorize the direc- tion of the writ to the coroner. I do not think it necessary that the [455] facts should be noticed in the ca. sa.; that may be in the common form. Any entry elsewhere, which may be necessary to authorize the proceedings, might be made now, as often is done, and as was said to be allowable in the case of a *feri facias*, to warrant a *testatum fieri facias*, in *Brand v. Mears*, 3 T. R. 388, referred to in the argument. But, by the rule Hil. 2 W. 4, s. 95, 3 B. & Ad. 388, the proceedings need not now be entered of record at all. The second objection is, that the defendant was never lawfully charged in execution in this suit. When a writ is directed to the sheriff, the mode of executing a person under it, who is already in the sheriff's custody, is to deliver it to the gailor: then the law considers the defendant in the sheriff's custody under the last writ.

That does not apply here, the writ being directed to the coroner. But it is said that there is no evidence that the writ ever reached the coroner. We must, however, give so much credit to the regularity of the proceedings, as to intend that it did come to him. Then, how was the defendant to be charged? The writ was taken to the sheriff's prison, where the defendant then was. What more could the coroner do? A warrant might indeed be made to the gaoler, but I think that it is not necessary: the coroner might go personally to him with the writ, without any warrant. [*Archbold* mentioned that the coroner had made no return.] The coroner certifies the copy of the writ which has issued from this Court: that is in the body of the gaoler's return.

*456] *PATTESON, J. There is no irregularity whatever. I take the fact of the suggestion for granted: it may be entered at any time, and need not be recorded. No entry on the roll is necessary; and the suggestion need not be on the writ. Then, as to the other objection, what is the coroner to do? He must bring the defendant to the county gaol. As to the argument, that it does not appear that the writ was ever in the coroner's hands, we cannot presume that the regular course has not been followed.

WILLIAMS, J. concurred.

Rule discharged.

The KING *against* RAMSDEN and Others.

Held by Littledale, and Patteson, Js., Lord Denman, C. J., dubitante, that a quo warranto information does not lie for the office of governor and director, elected annually by rated inhabitants, under a local act for the government of the poor, and the maintenance of the nightly watch; and having power to make orders to regulate the poor and the watching: to determine how much money shall be raised for the poor and the watch (for which amount the inhabitants are to make rates, subject to a power in the governors to rectify omissions or mistakes, and to an appeal at quarter sessions); to purchase and hold real and personal property, including all the money raised under the act; to erect buildings; to borrow money on the credit of the rates, for the purposes of the act; to appoint and remove treasurers, and salaried clerks, collectors, and other officers, who are to account to them; to appoint watchmen and beadles, who are to be sworn in as constables before a justice, and to be under their control; to name sixteen persons, from whom the justices are to select four overseers; and to sue and be sued in the name of one of themselves or of their clerk.

ERLE had obtained a rule, in Easter term last, calling upon the defendants to shew cause why an information or informations in the nature of a quo warranto should not be exhibited against them, to shew by what authority they respectively claimed to exercise the office of governors and directors of the poor of that part of the parish of St. Andrew, Holborn, which lies above bars, in the county of Middlesex, and St. George *the Martyr in the same county. *457] The rule specified various grounds of objection to the title of the defendants, which it is not necessary here to mention.

The defendants claimed to exercise their offices, as having been legally elected under the provisions of stat. 6 G. 4, c. clxxv, (local and personal, public), entitled "An Act for the better ascertaining, charging, and collecting of rates for the relief of the poor within that part of the parish of St. Andrew, Holborn," &c.; "for the better maintenance, employment and regulation of the poor thereof; and for regulating the nightly watch thereof." Section 5 of that act provides that the inhabitants of the places comprised in the act, and other persons assessed to the poor thereof, shall assemble annually, and elect persons to be governors and directors of the poor, together with the justices being resident householders, and the rectors, churchwardens, and overseers for the time being, who are made governors and directors ex-officio; which governors and directors (by the same and the fortieth sections) may make orders, rules, and regulations for the government, relief, maintenance, and employment of the poor, and for ascertaining,

charging, collecting, managing, and regulating the poor-rates, and for the appointment, regulation, and management of watchmen and beadles, and for the regulation of constables. By sect. 8, they are to present annually a list of sixteen persons to the justices, from whom the justices are to name four as overseers. By sect. 10, all messuages, watch-houses, edifices, and lands, used for the poor or the watchmen and the beadles, all moneys raised under the acts, and all other moneys, fixtures, furnitures, materials, and other things provided for the poor or the *watchmen and the beadles, are vested in the governors and directors for the time being, and are to be treated as their property, in [*458 civil or criminal proceedings; and the governors and directors may sue and be sued in the name of one of them, or of their clerk, and actions shall not abate by the death, removal from office, or default of the party. Sect. 12, provides that they shall calculate, ascertain, and settle the sums to be assessed and charged for the relief of the poor, for regulating and maintaining a nightly watch and beadles, and for discharging debts incurred by reason of deficiency of rates. Sect. 13, empowers the inhabitants afterwards to make rates to raise such sums, allowing for deficiencies in collection. Sect. 24, gives power to the collectors, to be appointed by the governors and directors, to levy the rates. Sect. 25, authorizes a justice to grant a distress warrant in cases of non-payment. Sect. 27, empowers the governors and directors to rectify omissions or mistakes in the rates. Sect. 28, empowers them to appoint, and remove, a clerk, collectors, treasurers, assistant overseers, inspectors, and such other officers and servants as they may deem necessary for the execution of the act, and to make allowances and give salaries to them (except the treasurers.) Sect. 29, directs that such officers, &c., shall account to them. Sect. 32, provides that they shall annually appoint a sufficient number of watchmen and beadles, who, with the constables of the places comprised in the act, shall be under their direction and control. Sect. 34, enacts, that "all watchmen, beadles, and patrols, shall and may be sworn in as constables before some justice," and "they are hereby invested with and shall have and enjoy the same powers, authorities, privileges, and immunities, *as any constable or constables is or are invested with, or shall or may have and enjoy by law." Sect. 36, empowers the governors and [*459 directors to repair, purchase, hire, or erect watch-houses, with the money raised under the act. Sect. 37, empowers them to appoint persons to remove paupers, in lieu of the overseers. Sect. 44, empowers them to purchase lands, &c., for enlarging the present workhouse, and building a new one, which lands, &c., by sect. 54, shall vest in them. Sect. 55, empowers them to borrow money not exceeding 6000*l.* on the credit of the rates. Sect. 56, authorizes them to grant annuities payable on the rates. Sect. 63, authorizes them to pay off debts. Sect. 69, gives them an appeal against rates, or in respect of any thing done by the act, under the act to the quarter sessions.

Sir *F. Pollock*, *Merewether*, Serjt., *Thesiger*, *Comyn* and *Espinasse* showed cause in Easter term last (May 12th). (a) This is not an office for which an information in the nature of a quo warranto lies. The officers are not a corporation; nor is their employment in the nature of a public trust. The information does not lie for the office of churchwarden; *Rex v. Dawbeny*, 2 Str. 1196, (S. C. more fully, 1 Bott. 347, pl. 358, 6th ed.), which was acted upon in *Rex v. Shepherd*, 4 T. R. 381. The office here is not connected with any franchise of the crown; it is merely a substitute for the offices of churchwardens and overseers. If the information were granted, any office might be held to be the subject of it; as, *for instance, that of a bank director. The office does not exist at common law, and is not so constituted by the statute as to be the [*460 subject of this information. And this is not a case without remedy. A mandamus might issue; or, as the tenth section vests property in the governors and

(a) Before Lord Denman, C. J., Littledale, and Patteson, Js. Williams, J. was sitting at Nisi Prius in London, and Coleridge, J. was sitting for him in the Bail Court.

directors for the time being, the title might be tried in an action of trespass. The information was refused in the case of a corporation, in *Rex v. The Corporation of the Bedford Level*, 6 East, 356. [PATTESON, J. That was on the ground that the officer in question was an inferior servant of the corporation.] It does not lie in respect of the office of clerk of the commissioners of land-tax. (*Rex v. Thatcher*, 1 D. & R. 426.) The question is not whether the jurisdiction be extensive, but whether it be of a public nature; in which latter case alone the information lies; as, for instance, in the case of the office of steward of a court leet, *Rex v. Bingham*, 2 East, 308; or the bailiff of a borough who has the return of members to parliament, *Rex v. Highmore*, 5 B. & Ald. 771: and *Rex v. McKay*, 4 B. & C. 351, is on the same principle. The language of the court in the more early cases was, that, even in cases of encroachment on the crown, they would not interfere, as a matter of course, by quo warranto. [PATTESON, J., referred to *Rex v. Badcock*, (cited in *Rex v. The Corporation of Bedford Level*, 6 East, 359).] That was decided on the ground of the officers possessing the power of taxation; but it is very shortly reported, and is in contradiction to the principle of the case in which it is cited. It is apparently *461] the case cited in the *unsuccessful argument in *Rex v. Shepherd*, 4 T. R. 381. Even the power which the officers here possess (under sect. 32), of appointing watchmen, does not give to the persons appointed the authority of constables, till they are sworn in (under sect. 34) before a magistrate. The governors and directors have no power to impose taxes or make rates; that is done by the inhabitants (sect. 18). They cannot distrain without the warrant of a justice of peace (sect. 25).

Sir John Campbell, Attorney-General, Sir W. W. Follett, Erle, and Jardine, contrâ. The case of a churchwarden (*Rex v. Dawbeny*, 2 Str. 1196, (S. C. more fully, 1 Bott, 347, pl. 358, 6th ed.) *Rex v. Shepherd*, 4 T. R. 381, is distinguishable. That is an office the right to which may be tried in the ecclesiastical courts. This, not being a recognised common law or parochial office is subject to no other proceeding than an information: the old doctrine was founded on the theory, that quo warranto lay only for an encroachment on the crown; but latterly the remedy has been applied to new offices, embracing extensive jurisdiction, but not encroaching on the crown, as in *Rex v. Nicholson*, 1 Str. 299, and in *Rex v. Badcock*, cited in *Rex v. The Corporation of the Bedford Level*, 6 East, 359; the ground of this last decision was that the officers had power to tax the king's subjects. A mandamus has been suggested; but to whom is it to be directed, or what is it to command? the swearing in and admission cannot be commanded, for the election invests the party with the office absolutely. *462] [PATTESON, J. In **Rex v. Wix*, 2 B. & Ad. 197, (a) a mandamus went to the inhabitants to elect a churchwarden.] Neither, again, would it be a convenient method of trying the title, that the opposing party should break open the vestry, for the purpose of laying the foundation of an action of trespass, or an indictment, to try the title. The remedy asked for is now speedy and economical. In *Rex v. Bingham*, 2 East, 308, the information was held to lie for the office of the bailiff of a court leet, who summoned and selected the jury; and in *Rex v. Goudge*, 2 Str. 1213, for the office of constable. Here the office is equally public. The governors fix the sums to be charged for the poor and the watch (sect. 12;) which is not a merely ministerial power, like that of assigning the proportions in which the individuals are to contribute to a given sum. Under sect. 32, they have a compulsory power to appoint watchmen and beaules; and the persons so appointed "shall and may be sworn in as constables," and are "hereby" invested with the authority of constables. Now,

(a) In *Rex v. The Churchwardens of St. Pancras* (1 A. & E. 80), the title of officers professing to act under an election by stat. 1 & 2 W. 4, c. 60, was discussed upon a motion for a mandamus directed to the churchwardens (who by the provisions of the act, sect. 12, were to summon the electors), commanding them to proceed to an election, on the ground that the previous election was invalid.

as an information will lie in respect of the office of constable, *Rex v. Goudge*, 2 Str. 1213, a fortiori it will lie in respect of that of the functionary appointing him. [PATTESON, J. Can you give any authority for that? Quo warranto lies in respect of the office of steward of a court leet; (See Com. Dig. Quo warranto, (A); *Rex v. Hulston*, 1 Str. 621); does it lie against the owner of the leet?] (See Co. Ent. Quo Warranto, pl. 2 f. 527, b.) The decision in *Rex v. The *Corporation of the Bedford Level*, 6 East, 356, shews only that an inferior [463
servant of a corporation does not hold an office liable to such information; there, too, the corporation did not exist for any public purpose.

Our. adv. vult.

Lord DENMAN, C. J. in this term (June 17th) delivered judgment as follows:—

The Court have made up their minds that, in this case, an information in the nature of a quo warranto does not lie. The question is in a narrow compass, and has been distinctly and fully argued. In the case of *Rex v. Hanley and Others*, (a) there was a difference *of opinion on this point. There [464
Lord Tenterden, Mr. Taunton, and my brother Patteson, thought that

(a) The KING against HANLEY and Others.

Held, per Lord Tenterden, C. J., Taunton and Patteson, Js., (Parke, J., dissentiente), that a quo warranto information does not lie for the office of trustees under a public local act, elected as vacancies occur, by occupiers in the parish, and taking an oath of office, with power to appoint salaried treasurers, collectors, &c. of moneys raised under the act, accountable to themselves; to pass bye-laws with penalties; to impose rates, in case of certain other functionaries not doing so; to supply omissions in the rates, and to relieve parties aggrieved or incompetent to pay; to appoint salaried watchmen; to purchase, hold, and manage certain property for the purposes of the act; to contract for the supply of the poor, remove nuisances, and apprehend for certain specified nuisances; to maintain the highways and prevent encroachments thereon; to superintend the lighting, paving, watching, and cleaning of the streets, &c., and to remove dangerous buildings, on complaint upon oath (which they were to administer); and to sue in the name of their clerk, or of one of themselves.

In Trinity term, 1830, *Joshua Evans* obtained a rule to shew cause why one or more informations in the nature of a quo warranto should not be exhibited against the defendants, to shew by what authority they severally exercised the office of a trustee of the parish of St. Mary, Islington, in the county of Middlesex.

The trustees are appointed under stat. 5 G. 4, c. cxiv. (local and personal, public). The fourth and fifth sections appoint trustees; the sixth prescribes qualifications for the trustees; the seventh imposes the oath of office; the eighth, ninth, and tenth prescribe the election of trustees to supply vacancies, and also to supply the place of the trustees named in the fourth section, by persons assessed to the poor rates at 30l. at least (sect. 27), to be elected by occupiers of lands, tenements, or hereditaments, qualified as in the act mentioned. By sect. 13 the trustees may make bye-laws, &c. for their own government and that of their officers and servants, with fines and penalties for breach thereof, not exceeding 5l.; by sect. 14 they may appoint treasurers, bankers, clerks, receivers, collectors, surveyors, supervisors, inspectors, and such other servants for the purposes of the act as they may think necessary, and remove them at pleasure, and give them such salaries as they think reasonable; by sect. 15 the treasurers, &c. are to account to the trustees, and, in default thereof, a justice of peace may order the arrears unaccounted for to be levied by distress; by sect. 26 they may bring actions in the name of their clerk, treasurer, or collector, or of one of themselves; by sect. 33 the vestry are to impose a poor-rate, a road-rate, a watching, lighting, and cleansing rate, a rate for building, &c. a chapel of ease, and a church rate, the assessors to be appointed by the vestry (sect. 32); and, by sect. 33, if the assessors neglect to make the assessment, the trustees may do so, and make rates thereon; by sect. 39 the trustees may rectify omissions in the rates, and may relieve persons aggrieved by the rates, or incompetent to pay them; by sect. 41 they may compound for the rates in certain cases; by sect. 49 they may appoint a special officer, at a salary, to relieve the casual and other poor till the next meeting of trustees; by sect. 50 they may contract for provisions and other articles for the relief of the poor; by sects. 53 and 68, the property in certain lands and materials is vested in the trustees; by sect. 64 they may contract for building, &c. any chapel or other building vested in them; by sect. 89 they may let pews in churches or chapels thereafter built or purchased; by sect. 92 they are to keep in repair, light, &c., roads, highways, streets, &c., and to cause them to

the information would not lie; my brother Parke thought that it would lie; no
 *465] judgment however was given upon *the point. In the present case, my
 brother Littledale and my brother Patteson, before whom and myself it
 was argued, are of opinion that the information does not lie; I myself enter-
 *466] tain much doubt: but, as it is *highly important to the parties that the
 judgment should not be delayed, the Court will now decide that the rule
 should be discharged. Rule discharged. (a)

be kept of the same width as before; by sects. 96 and 97 and 98, they may contract for making roads and drains, and may regulate the painting of the names of streets and numbers of houses, also (by sect. 99), the watering of streets and sinking wells; by sect. 100, on complaint by oath, which the trustees may administer, they may direct dangerous buildings to be removed, and, in default of compliance, may remove them; by sects. 103, 104, they may remove obstructions and nuisances in the highways, &c.; by sect. 105, any officer appointed by the act, or any trustee, may apprehend without warrant persons committing nuisances therein specified, and convey them before a justice; by sect. 128, the trustees may erect watch-houses and appoint watchmen at a salary; by sect. 133 they may direct what lamps are to be set up.

Two questions were raised, first, whether, from the nature of the office, an information in the nature of a quo warranto would lie; secondly, whether, under the particular provisions of the act, the election of the trustees should be by ballot. The arguments on the second question are omitted.

Campbell and Holt shewed cause (Tuesday, November 15th, 1830, before Lord TENTERDEN, C. J., PARKE, TAUNTON, and PATTESON, Js.) The office is not public. The act creating the office must be considered, for this purpose, a private act, though the last section (152) contains the usual provision that it shall be deemed to be public, and be judicially noticed; this follows from the ruling in *Brett v. Beales*, (Moo. & M. 421). In *Rex v. Nicholson* (1 Str. 299), the trustees of the port of Whitehaven had power to continue their own body, and they had jurisdiction over a haven, which jurisdiction must have originally belonged to the crown; and therefore a quo warranto was granted: but neither of these grounds exist here. In *Rex v. Badcock* (cited in *Rex v. The Corporation of Bedford Level*, 6 East, 359), the commissioners, in respect of whose office the information was granted, had jurisdiction as to paving by statute (9 G. 3, c. 44). Now, a road act or paving act is of itself public. It is true that here the trustees have power to make rates; but so may commissioners under inclosure acts, or overseers, for whose offices no information lies; and this is, besides, a very limited power, contingent only on the assessors failing to exercise their authority, and not extending to strangers. The information does not lie for the office of churchwardens, *Rex v. Dawbeny* (2 Str. 1196), *Rex v. Shepherd* (4 T. R. 381.) The office must be one of public trust, as in *Rex v. Hall* (1 B. & C. 123,) and *Rex v. M'Kay* (4 B. & C. 351.)

Sir *James Scarlett*, Attorney-General, and contra. *Evans* The office is of much higher trust and power than that of an overseer. The statute is in the nature of a charter. In *Rex v. Nicholson* (1 Str. 300,) the Court said, "Informations have been constantly granted where any new jurisdiction or a public trust is exercised without authority." They lie for the office of register and clerk of a court of requests created by statute, *Rex v. Hall* (1 B. & C. 123,) and for that of bailiff of a court leet, *Rex v. Bingham* (2 East, 308,) though mandamus does not lie to admit a vestry clerk, *Rex v. Churchwardens of Croydon* (5 T. R. 713,) nor an information for the office of churchwarden. But churchwardens are removable by the parishioners, *Watson's Clergyman's Law*, ch. 39. p. 400; Year B. Tr. 26 H. 8, p. 5, pl. 25. This office is not the less granted by the crown, because the two other branches of the legislature concur. If the information does not lie, there is no other remedy. [Lord TENTERDEN, C. J. Would not a rate be void, if the election be invalid?] *Cur. adv. vult.*

In the following Hilary term (January 27th, 1831), the Court said that they were of opinion that the election should be by ballot, but that there was a difference of opinion (see the judgment in the principal case, p. 464. ante) whether the information would lie; and they recommended the parish to acquiesce, and elect anew by ballot.

(a) See the next case, p. 467.

[*The following case was decided in Easter term 1834; *Wednesday, May 7.*]

The KING *against* BEEDLE and Others. *Wednesday, May 7, 1834.*

A local act created a corporation, consisting of sworn commissioners, with summary powers of seizure of goods and imprisonment of the person, and of preventing and removing obstructions and nuisances in the streets; powers for paving, cleansing and lighting; powers of appointing and paying officers, of determining the number of watchmen; of regulating them; and of dismissing, paying, or pensioning them; of possessing property in materials required under the act; of instituting prosecutions; of imposing rates; of appointing and removing treasurers, to whom penalties, imposed by the act, were to be paid for the purposes of the act; and of hearing appeals in certain cases brought by parties complaining of things done under the act: Held, that an information in the nature of a quo warranto would lie against persons claiming to be commissioners.

A part of the commissioners were elected by rated inhabitants, M. and T. having been candidates; and M. having been declared elected, and sworn in, and a rule nisi having been obtained, upon affidavits that T. had the legal majority, for a mandamus to certify T.'s election, and swear him in, the Court discharged it with costs, and at the same time granted a rule to shew cause why there should not be an information in the nature of a quo warranto against M.

KELLY had obtained a rule in Easter term, 1833, calling on Thomas George Beedle, the chairman of a meeting held on the 22d of January then last, for the purpose of electing a commissioner for the parish of St. Martin, in Exeter, to carry into execution the statute 2 & 3 W. 4, c. cvi. (local and personal, public) "for better paving, lighting, watching, cleansing, and otherwise improving the City of Exeter and County of the same City," and also upon the commissioners for carrying into execution the said Act, to shew cause why a writ of mandamus should not issue, commanding Beedle to enter or cause to be entered the name of Charles Henry Turner, in a book kept for the purpose of entering the names of the several persons elected in that parish pursuant to the said act, and to certify the election of the said Turner, as such commissioner so elected, to the clerk of the said commissioners, or to five or more of the said commissioners, in pursuance of the said act; and commanding the commissioners to hold a meeting *for the purpose of swearing in, and then and there to swear in [*468 the said Turner as such commissioner.

The act directs the appointment of certain commissioners for putting the act and the powers thereof into execution, some of whom are to be commissioners ex officio, and some to be elected; of the commissioners to be elected, a certain number is to be elected by the parishioners and inhabitants of the several parishes and precincts within the city of Exeter and county of the same (sect. 4); no inhabitant or parishioner is to vote at the election of a commissioner, unless he be rated or assessed to the rates, and at the amount mentioned in the act (sect. 8); the chairman of the meeting at which such commissioner is elected is to certify the name of the person elected to the clerk to the commissioners, or to any five or more of the commissioners, and the name is to be entered in a book kept by the parish or precinct (sect. 9); each commissioner is to take an oath of office (sect. 16); the commissioners are to be a body corporate and politic, by the name of "The Exeter Improvement Commissioners" (sect. 17). Various powers of contracting for paving, cleansing, lighting, &c., are given to the commissioners (sect. 29, &c.) They are to appoint treasurers and other officers under their common seal, may remove or suspend them, and may give them salaries out of the money to be raised under the act (sect. 33); the officers are to account to them (sect. 34, &c.); the treasurer is to pay money under order of five or more commissioners (sect. 35); the pavements and their materials, all dust, ashes, &c., gathered in the public streets or places, all lamps, lamp-irons, and posts, watch-boxes, watch-houses, and other buildings erected

*469] by virtue of the act, and all materials *purchased by the commissioners for the purposes of the act, are to be the property of the commissioners (sect. 40); the commissioners have various powers for paving and draining, and for removing posts, &c., (sect. 44, &c.); to set up lamps (sect. 51); penalties imposed by the act for the commission of certain nuisances are to be paid to the treasurer (sect. 56); the commissioners are to determine the number of watchmen (who are to be appointed by the justices,) are to provide proper watch houses for them, and places for the custody of offenders, and are to make regulations and orders for the watchmen (sect. 61); the watchmen are to apprehend and arrest felons, vagrants, and disorderly persons, till they can be carried before a justice of peace (sect. 62); they are subject to be dismissed by the commissioners for neglect of duty (sect. 63); recompence may be awarded to disabled watchmen by the commissioners, out of the money to be raised by the act (sect. 66); the commissioners may make common sewers, wells, and pumps (sect. 88); they may remove obstructions (sect. 97, 98, 99, &c.); drivers of carriages or horses, or riders, who are guilty of certain misbehaviour specified, are to pay certain penalties, and may be apprehended by any commissioner or officer, or other person appointed by the commissioners, who may see the offences committed, and taken before a justice (sect. 101); the commissioners may seize carriages, timber, and other specified articles, creating obstruction or nuisance, and detain them until certain penalties be paid (sects. 102, 103, 105); they may take down houses, &c., pronounced by a justice to be in a dangerous state (sect. 107); they may order prosecutions for public nuisances, and pay the expenses *470] from the moneys to be raised *under the act (sect. 109); they may raise money by one rate upon landlords, owners, tenants, and occupiers in every year, for the purposes of the act (sect. 136); and a lamp rate (sect. 139); divers penalties imposed by the act are to be paid to the treasurer (sect. 180); persons giving false evidence on oath before the commissioners are declared guilty of perjury (sect. 183); persons aggrieved may appeal to the commissioners in the first instance (sect. 188); the commissioners may reward informers (sect. 194).

The affidavits set forth that, on a vacancy among the commissioners to be elected by the inhabitants of one of the parishes, Samuel Maunder and Charles Henry Turner were candidates, and that Beedle was chairman of the meeting at which the election took place, and declared Maunder duly elected. Statements were then made for the purpose of shewing that bad votes had been admitted for Maunder, and that good votes, tendered for Turner, had been rejected, which gave the former an apparent majority, whereas Turner would have had the majority, save for such improper admission and rejection. Beedle certified the election of Maunder, who was sworn in accordingly.

John Greenwood now shewed cause. The object of the present application is to impugn the propriety of Maunder's election. That should be done by a quo warranto information. Such a proceeding is applicable to the officer in question. From Comyns's Digest, Quo Warranto (A), it appears that an information in the nature of quo warranto lies against persons claiming powers of the nature which this act gives to the commissioners; as for claiming fines, *471] amerciaments, estrays; *for claiming to be a corporation; for a claim of the correction of others; for a claim to have a prison, power of arresting, &c. In *Rex v. Nicholson*, 1 Str. 299, it was held that an information would lie against persons taking upon themselves to act as trustees, under a private act of parliament, for the port of Whitehaven, even if there were no usurpation upon a franchise of the crown; the Court saying, that information had been constantly granted, where any new jurisdiction or a public trust was exercised without authority. In *Rex v. Boyles*, 2 Str. 836, an information had been granted, calling upon a party to shew by what authority he claimed to be bailiff of a ville, which did not appear to be a corporation, but the office was said to be "tangens regimen et gubernationem villæ prædictæ;" and, on demurrer, the

Court gave judgment for the crown. In *Rex v. M'Kay*, 4 B. & C. 351, the defendant to an information not having traversed that the office was "of great trust and pre-eminence within the said borough, touching the rule and government of the borough, and the election and return of burgesses to serve for the Commons in parliament for the said borough," it was held that the information lay. In *Rex v. Ogden*, 10 B. & C. 280, an information was refused on two grounds; one of which was, that there was no claim to exercise any corporate or other powers, authorities, privileges, and jurisdictions over the rest of the inhabitants, although there was a claim to act as a corporation. The criterion recognised in these two cases, namely, the connexion of the office with the government of the place, shews that an information will lie in the present case. In *Rex v. Badcock* (cited in *Rex v. The Corporation* of the Bedford Level*, 6 East, 359, an information was granted against persons exercising the office of commissioners for paving the town of Taunton, under an act of parliament, and not being a corporate body; and Lawrence, J., distinguished the case, without disputing its authority, from the case in which it was cited, on the ground that a power was given to commissioners to impose rates and taxes on the inhabitants, which was a power even greater than the crown of itself could confer. Such a power is given to the commissioners in the present case. If a quo warranto lies against Maunder, the Court will not grant a mandamus; *Rex v. Attwood*, 4 B. & Ad. 481. It may be objected, that the titles of the persons claiming to vote are not to be impeached by impeaching the title of the party elected; and that doctrine may be true, where the right to vote itself depends upon the tenure of an office; but here the right to vote arises from inhabitancy and payment of rates, qualifications which could not be directly challenged by a legal proceeding. This distinction is expressly drawn by Lord Kenyon in *Rex v. Mein*, 3 T. R. 598, and is also recognised by Bayley, J., in *Rex v. Hughes*, 4 B. & C. 378; and in *Rex v. Hall*, 1 B. & C. 123, the right of persons to vote as householders was impeached in an information in the nature of a quo warranto against the party elected, and no objection was made on that ground.

Kelly, contra. The application is, that the commissioners may be commanded to certify that Turner is elected; if they dispute the fact, they may deny it in a *return to the mandamus. This is not an office for which a quo warranto information will lie. In *Rex v. Nicholson*, 1 Str. 299, the Court [*473] rested their decision on the ground that all havens belong originally to the crown; and what was said besides was unnecessary. The decision in fact shews only this:—that, in cases where the franchise is such that it might have been granted by the crown, so that a quo warranto would have lain at common law, the information will lie. If an office be of the nature of those offices which are grantable by the crown, an information will lie, whether in point of fact the office in question be so granted or not: if it be not grantable by the crown, it is immaterial how it is actually granted, for the information will not lie in any case. *Rex v. Badcock*, (cited in *Rex v. The Corporation of the Bedford Level*, 6 East, 359,) was, indeed, an instance of an office not grantable by the crown; but there is no detailed report of the case: and it is observable that, in *Rex v. The Corporation of the Bedford Level*, 6 East, 359, in which *Rex v. Badcock* was cited, Lawrence, J. says, "It has always been considered that a quo warranto only lay for encroachments on franchises created by the crown." In *Rex v. Hanley*, ante, p. 463, note (b), a rule nisi had been obtained for an information against persons claiming to be trustees of the poor of the parish of St. Mary Islington; and, though no decision was given upon this point, it was understood that the Court thought it not grantable. Yet there the commissioners had power to lay a rate. And, with respect to the power of imprisonment, the commissioners in the present case have not, properly speaking, that power, but only a power to *arrest, like that of gamekeepers who may arrest in the night: and, indeed, the same power, with many others, is given, by the present act, [*474]

(sect. 101,) to any of the persons there mentioned, who may see the offence committed. Lord Coke, in his commentary on the *statutum de quo warranto* (stat. 2, 18 Ed. 1,) says (2 Inst. 496, (3)), "The quo warranto was framed for franchises which belong to the crown, and such as the subject hath, are derived from the crown, *Libertates regales ad coronam spectantes ex concessione regum a corona exierunt.*" In *Rex v. Shepherd*, 4 T. R. 381, the Court refused an information to try the validity of an election to the office of churchwarden, on the ground that the old writ of quo warranto lay only for an usurpation on the rights or prerogatives of the crown; and that an information in the nature of a quo warranto could be granted only in such cases. In *Rex v. Thatcher*, 1 D. & R. 426, an information was applied for against the person filling the office of clerk to the commissioners of the land tax, and refused: but the Court granted a mandamus to admit the relator, on affidavit that he had the majority of legal votes in his favour. If the remedy by information be extended to all offices of public trust, the consequence will be that there will be one rule as to proceedings by quo warranto at common law, and another as to those under stat. 9 Ann. c. 20. For the fourth section of that statute applies to such offices only as are before named in sect. 1, those, namely, of "mayors, bailiffs, portreeves, and other offices, within cities, towns corporate, boroughs, and places" within, &c.; and the provision as to costs, in the fifth section, applies to no other. Even admitting that the information does lie here, it does not follow that the Court will not *475] grant a mandamus. In *Rex v. The Mayor of York*, 4 T. R., 699, a rule for a mandamus was made absolute, commanding the defendants to put the corporate seal to the certificate of the election of a party claiming to have been elected recorder, though the corporation had certified to the crown the election of another candidate, the dispute in fact relating to the validity of a vote. There *Rex v. The Mayor of Colchester*, 2 T. R. 259, was cited: but the Court said that the granting of the writ would not be conclusive against the candidate whose election had been certified by the corporation, inasmuch as it only required them to do the act, or to shew cause why they did it not: that is all which is sought by the present application. If the Court shall, however, decide, on this ground, against a mandamus, they may now grant a rule nisi for an information in the nature of a quo warranto, as was done in *Rex v. The Mayor of Colchester*, 2 T. R. 259.

John Greenwood, in reply. In *Rex v. Thatcher*, 1 D. & R., 426, the mandamus was not granted till after the application for an information had been refused. The same course was pursued in the *Patten Makers' case*, cited in *Rex v. Attwood*, 4 B. & Ad. 483. In *Rex v. Bankes*, 3 Burr. 1454, Lord Mansfield said that, where an election de facto was doubtful, it was fit to be tried by an information in the nature of a quo warranto: but that where it was colourable and clearly void, a mandamus was a proper remedy; which was assented to. *476] Lord DENMAN, C. J. Mr. Dealtry informs us that an information in the nature of a quo warranto was granted (a) against a party claiming to act as guardian of the poor in Exeter, under stat. 28 G. 3, c. 76. That is the proper course here.

LITTLEDALE and WILLIAMS, Js. concurred. (b)

Rule for mandamus discharged with costs.

Rule nisi for an information in the nature of a quo warranto granted. (c)

The KING against YARBURGH GREAME, Esquire. *Friday May 29th.*

THIS case is already reported, 2 A. & E., 615.

(a) In Hilary term 1816.

(b) Patteson, J. was absent.

(c) No cause was ever shewn, the parties having settled the question by agreement.

***The KING against the Proprietors of the WILTS and BERKS Canal Navigation. Friday, May 29.**

By statute, incorporating a canal company, the affairs of the company were to be managed by a committee, who were authorised to appoint a clerk for better carrying into execution the purposes of the act. The committee were required to enter in books an account of their disbursements, receipts and transactions, and the books were to be open at all seasonable times to the inspection of the proprietors. A proprietor applied to the clerk for an inspection of the books which were under his charge. The clerk said he would refer the demand to the committee. The proprietor attended the committee, and their repeated his request; and the chairman said they would take time to consider it. Ten days afterwards the proprietor applied again to the clerk, who refused the inspection. On motion for a mandamus to the company to allow inspection of the books: Held, that there had been no sufficient refusal by the committee to warrant the application.

Semble that a party applying for a mandamus to give inspection of such documents, ought to shew that, when he demanded the inspection, he stated the object for which he wanted it.

A RULE nisi was obtained in Michaelmas term, 1834, (November 24th), for a mandamus to the company of proprietors of the above navigation, to allow Thomas Vincent, one of the said proprietors, to inspect all books, papers, and writings belonging to the company, and kept in pursuance of the statute after mentioned, and to take copies or extracts. The company was incorporated by stat. 1 & 2 G. 4, c. xevii. (local and personal, public), by which act, sect. 86, a committee of management was appointed to transact and manage all the affairs and business of the company, except matters expressly directed by the act to be done at a meeting of the proprietors at large. And, by sect. 95, the committee were authorized and required to appoint one or more clerk or clerks, and such superintendents, collectors of the tolls, and other officers as they should think proper for the better carrying the purposes of the act into execution. Sect. 101 enacted, that the committee shall enter into books, to be provided at the expense of the proprietors, a full and true account of all disbursements and payments made by such committee, and by all persons employed under *them, and [478] of all moneys paid to or received by them respectively on account of the company; "and also a full and true account, or proper notes and minutes of every contract, bargain, and agreement which shall be entered into by them respectively, for and on behalf of the said company of proprietors, and of all and singular their respective orders, transactions, and proceedings whatsoever, in and about the affairs and business of the said company:"—and every such book, and all other books, papers, and writings belonging to the said company of proprietors shall, at all seasonable times, be open to the inspection of all the said proprietors, who may take copies thereof, or extracts therefrom, without fee or reward." Sect. 107 required the committee to keep an account of the rates, tolls, &c., to be collected under the act, and of the charges of the navigation and works, such account to be open, at all seasonable times, to the inspection of every proprietor.

Thomas Vincent, who made the present application, and was a proprietor of some shares in the navigation, stated, in his affidavit, that he had been informed by the clerk of the company, on inquiry, that the company's minute book and list of proprietors were kept by him, and all other books and papers belonging to the company by Dunsford, their superintendent, at the canal office at Swindon. Vincent further stated that, on the 18th of August, 1834, he applied at the canal office, during the office hours, for "an inspection of the books, papers, and writings which were there belonging to the company;" that Dunsford's clerk, Dunsford himself being absent, refused to shew him any paper or book, except the account *of annual expenditure; and that he thereupon wrote [479] to Crowby, the clerk of the company, informing him of the refusal, and

desiring to see the documents at the canal office, and also the list of proprietors, and minute-book of the committee, which, as he now stated in his affidavit, he believed to contain an account of the orders, transactions, and proceedings of the company. That Crowdy said he would submit the demand to the committee on the following 12th of September; and that Vincent himself on that day attended the committee "to request a sight of the books, papers, and writings belonging to the company; and read to them the clause of the act under which he made the application;" whereupon the chairman said, "it was such an application as they had never had made before, and it would therefore require time to consider of it." Vincent also stated that, receiving no further answer from the committee, he wrote to Crowdy and Dunsford on the 18th and 20th of September, pressing to see the documents; and that, on the 22d, he went to Crowdy's office, "and requested inspection of the books, papers, and writings belonging to the said company of proprietors in the possession of the said William Crowdy," but was told by a clerk that Crowdy denied his right to inspect them, and was from home. He called again in the same day, and received a similar answer, Crowdy having in the meantime returned home, and gone out again, declining to see Vincent. On the same day Vincent went to Dunsford's office, and, as a proprietor, demanded of him "an inspection of the books, papers, and writings in his possession, belonging to the company." Dunsford refused to give him *480] an inspection of any of the documents, *stating that he had no personal objection, but declined to do it until a judicial decision had been obtained on the subject. There were affidavits on the other side, contradicting the above statements in some particulars (which it is not material to state), ascribing Vincent's applications for a sight of the documents in question to malicious motives, particularly towards Dunsford; and stating that Vincent had, on the 18th of August, inspected the general accounts and book of disbursements at Dunsford's office; but that he subsequently applied again, and demanded to see every book and paper belonging to the company, and particularly the disbursement book shewn to him before, saying that he was entitled to see it as often as he pleased; a right which, as it was now sworn, would produce great inconvenience if exercised by every proprietor, the number amounting to nearly 500. It was also deposed by Dunsford that, during a meeting of proprietors on the 11th of November, 1834, (before the making of this application), a member of the committee told Vincent that he might and should see any of the books and papers kept at the canal office on giving Dunsford proper notice; to which Vincent replied, that that would not answer his purpose. It did not appear that Vincent had ever stated his object in requiring an inspection of any of the books or papers.

Sir John Campbell, Attorney-General, and R. V. Richards now shewed cause. The application is not made bona fide or for a legitimate purpose. At least the party applying ought to state some ground on which he desires to see *481] the books and papers; *Rex v. Clear*, 4 B. & C. 899; especially in the case of a mere private company, which this is. It may indeed be questioned whether the Court would interfere at all in the disputes of such an association; *Rex v. The London Assurance Company*, 5 B. & Ald. 899. The documents here are, virtually, in the possession of the company, not of the clerk, who is a mere inferior officer, and to whom no mandamus would lie; and it does not appear that there has been any refusal of inspection by the company. The intimation by the committee, that they would take time for consideration, was not a refusal.

Bere, contra. Sufficient reason appears for the wish of Vincent, as a proprietor, to inspect these documents, independently of the motive alleged. After the statement of Crowdy that he would lay Vincent's request before the committee, and the answer given to him by the committee themselves, their neglect to give the inspection, and the other circumstances of the case, amount to a refusal. [Lord DENMAN, C. J. Vincent does not state that he made any

further application to the committee after they had said that they would take time.] It does not appear that they called any other meeting until November. Even now they do not state that they will grant the inspection. If any difficulty arises upon the form of the present rule, a mandamus may be directed to the committee, or to the clerk in whose possession the documents are. [LITLEDALE, J. It could not go to him; he is a mere officer.(a)] *A company, though in the nature of a private body of undertakers, is compellable by [*482 mandamus to do what its duty and the general interest require; and that has been held even in a case where the prosecutor might have proceeded by indictment, the Court saying that the remedy by mandamus was more beneficial, as enforcing performance of the duty; *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646. And, where parties hold books and paper as trustees, the Court will grant an inspection to persons interested, without any specific reason assigned. In *Rex v. The Governor and Company of the Bank of England*, 2 B. & Ald. 620, where a mandamus was refused, there appeared no parliamentary direction that the accounts should be produced. *Rex v. Clear* is distinguishable from this case: *Bayley and Littledale Js.*, there, (7 Dowl. & R. 395, 396,) relied upon the words of the enactment, 17 G. 2, c. 38, s. 1, as not being general enough to entitle a party to inspection without his having some public ground for desiring it; and Littledale, J. said, "It cannot be for the purpose of appeal, because the time for appeal has expired, and it is difficult to imagine any other reasonable purpose that the party could have."

LORD DENMAN, C. J. There is no doubt that every proprietor has a right to inspect these documents. There is no particular officer to whom the care of them belongs: the committee have the power over them, and appoint officers, in whose hands they remain. Where the applications to inspect these documents may occasion *inconvenience, it is reasonable that the parties upon whom such demands are made, should be informed, *bonâ fide*, of the object of [*483 the request. Here the party applying goes to the officers, and afterwards to the committee, who say that they have never had such an application made, and must take time to consider it. That, I think, is reasonable, and no refusal. The party should have applied to them again, so as to obtain an answer which might shew that they had exercised their judgment on his demand. Instead of doing so, he goes again to gentlemen with whom he seems to be upon ill terms, and who do not appear to have been authorised by the committee to return him an answer, but who make a reply which one is not surprised at. It seems to me that this is no refusal by the committee. They were the persons to whom the second application should have been made: and until they had refused, upon such application, there could be no ground for a mandamus.

LITLEDALE, J. There is no question as to the right which every proprietor has under the act to inspect the books and papers at seasonable times. But the application, to ground a motion of this kind, should be to the committee themselves, not to their officer; and the party should tell them his object in applying. When the committee had said that they would take time, the first application should have been followed up by a further demand upon them. The answer given by the officers was no refusal by the committee.

PATTESON, J. I am also of opinion that there was no sufficient refusal to ground this application. Every *proprietor has a right to the inspection here claimed: but, as at present advised, I think that, before we are called [*484 upon to grant a mandamus, we should be informed that when the party applied for the inspection, he stated what his object was in requiring it. The rule must be discharged.

WILLIAMS, J. concurred.

Rule discharged with costs.(b)

(a) See the judgment of the Court in *Rex v. Jeyes*, ante, pp. 421—425.

(b) See *Rex v. The Brecknock and Abergavenny Canal Company*, ante, p. 217.

**In the Matter of PILGRIM. Friday, May 29.*

This Court granted a rule nisi for a habeas corpus to bring up a prisoner, in custody upon a charge of felonious embezzlement, to give evidence before an election committee of the House of Commons, the rule directing notice to be first given to the Attorney-General, to the committing magistrates, to the constable who apprehended the prisoner, and to all persons at whose suit he might be detained on civil process.

HILL moved for a habeas corpus, to bring up John Pilgrim to give evidence before an election committee of the House of Commons now sitting, on a petition against the return of the two sitting members for the borough of Ipswich on the ground of alleged bribery. The committee had reported that John Pilgrim had absconded for the purpose of avoiding the service of the Speaker's warrant, and that he had been guilty of bribery at the election. Since that report, a warrant from the chairman of the committee had been served upon Pilgrim; and, after Pilgrim had made preparations to depart in obedience to the warrant, he was arrested on a warrant of a justice of the city of Norwich on a charge of felonious embezzlement, and subsequently committed to the custody of the chief constable of the city of Norwich on this charge, for further examination. It was suggested in affidavit that Pilgrim himself was willing to obey the chairman's warrant, but had been arrested to prevent his doing so; and it was sworn that he was a necessary witness. Hill stated that it had been considered proper to make the application to this Court, without reference to the effect of the chairman's warrant in such a case, on the ground of the authority of the Court over all officers acting in criminal proceedings. A similar course was pursued in the matter of Sir Edward Price, 5 East, 587, where the court afterwards made the rule absolute, no cause *486] being shewn. *LITLEDALE, J. The stat. 43 G. 3, c. 140, enacts that it shall be lawful for a judge of any of the superior courts to grant a habeas corpus to bring a prisoner before courts martial, or any of the commissioners therein mentioned, for examination touching any matter depending before them; and by stat. 44 G. 3, c. 102, it may issue in like manner to bring such prisoner, before any court of record there mentioned, to be examined as a witness; but have we such a general authority as enables us to do what your application requires? I do not see how it can be done without the consent of the Attorney-General.] The case cited shews the precautions which the Court will take in granting the rule.

LITLEDALE, J. (a) Take a rule to shew cause: and let there be service on the Attorney-General, on the committing magistrate, on the constables who apprehended the prisoner, and on all persons at whose suit he may be detained for civil process: for there may be such detainers. I am not sure that we shall then make the rule absolute; for the case is not quite similar to that cited.

PATTESON, J. I do not know that there is any authority of this kind in the case of a prisoner detained on a charge of felony. But there may be a rule nisi.

WILLIAMS, J. concurred.

*487] "Ordered that Wednesday next be given to Samuel Bignold and Edward Temple Booth, Esqrs.," [the committing *magistrates] "two of the justices of the peace for the city of Norwich, to the keeper of his Majesty's gaol at Norwich, and Philip Barnes, chief constable of the said city and county, or other person having the custody of John Pilgrim, to shew cause why a writ of habeas corpus should not issue, directed to them, commanding them to have the body of the said John Pilgrim before the select committee of the House of Commons for determining the merits of a certain petition now depending before them, touching the election of members to serve in parliament for the bo-

(a) Lord Denman, C. J. was absent.

rough of Ipswich in the county of Suffolk, then and there to testify before the committee in the manner of the said petition : Upon notice of this rule to be given to the solicitor for the affairs of his Majesty's treasury, and to the said keeper and chief constable, or other person having the custody of the said John Pilgrim and to all persons at whose suit the said John Pilgrim may be detained by civil process, and to the said Samuel Bignold and Edward Temple Booth, Esqrs., in the meantime."(a)

*The KING *against* Sir OSWALD MOSELEY, Bart., Lord of the Manor of MANCHESTER. *Saturday, May 30.* [*488]

H. occupied a warehouse in Manchester, within the jurisdiction of the court leet, where he carried on his business, but did not reside ; and he usually lodged and boarded in Manchester from Monday till Saturday. He had also premises in Haslingden, in which township he slept when not at Manchester ; and he did suit and service to the court leet of Haslingden : Held, by Lord Denman, C. J. and Littledale, J., and, *semble*, per Patteson, and Williams, Js., that H. was liable to be appointed a constable of the Manchester leet.

In 1808 fines of 100*l.* had been imposed (and submitted to) for refusing the office of constable in Manchester, the parties fined not claiming exemption ; since that time the duties of the office had greatly increased, and the number of residents qualified to serve had diminished ; and it was sworn that difficulty was expected in procuring persons to serve, unless considerable fines were imposed for refusing : Held that, under these circumstances, a fine of 300*l.* on a person merely refusing to serve by reason of an alleged exemption, was excessive.

A RULE nisi was obtained last Michalmas term for a certiorari to Sir O. Mosley, lord of the manor of Manchester, to remove into this court the record of the proceedings in the court leet of the said manor, relative to the appointment of Ralph Turner as one of the constables of the said manor,(b) and to the fine imposed upon him for refusing to serve the said office. It appeared that Mr. Turner, having been elected a constable by the leet jury, was summoned to a court leet in October 1834, and there required by the steward to take the oaths of office, but refused to do so, and was thereupon fined 300*l.* The ground of his refusal, and one ground of this application, was that he was not liable, under the circumstances after stated, to serve the office ; and in applying for this rule, he made affidavit as follows :—That he resided with his mother (keeping, however, a servant, horses and carriages of his own, and being assessed for them) in the township of Haslingden. That he and his brother kept a large manufactory in Haslingden, and farmed lands there, for which they paid 700*l.* a year, besides rates and taxes, having also other lands in the same township, of which they were joint *proprietors. That they were subject in respect of the said property to suit and service at the court leet held at Haslingden, which suit and service they actually performed, or were fined when they omitted it. That they also jointly occupied a warehouse in Manchester as yearly tenants, and there sold the goods manufactured by them at Haslingden. That the deponent usually came to Manchester every Monday or Tuesday, and remained there for the purpose of his said business, till the Saturday following, when he returned home ; that while at Manchester he slept at a lodging-house ; that no person slept at the warehouse ; that he had no servant or establishment in Manchester, except at the warehouse ; nor was he assessed to any rates or taxes in Manchester, except in respect of the said warehouse. It appeared by

(a) No motion was ever made to make the rule absolute, Pilgrim having been sent up in obedience to the chairman's warrant.

(b) It appeared by the affidavit of the deputy steward of the leet, that the manor and township of Manchester are co-extensive.

affidavits on the other side, that Mr. Turner (who was the chief manager of the business in Manchester,) had for six years past, occupied exclusively, a sitting-room, and bed-room at a house in Manchester, where he also boarded, being absent only at the intervals of time mentioned in his own affidavit.

Mr. Turner contended, further, that the fine, if any could be imposed, was excessive; and on this subject it appeared, that at the Manchester court leet, in 1808, fines of 20*l.* and 100*l.* had been imposed on two persons respectively, for refusing to take the office of constable; that neither of those parties claimed any exemption; that both fines were paid but the latter was in part remitted; and that at that court another person was fined 100*l.* which he paid, for refusing the same office. It was also stated by the deputy steward of this court leet, that persons elected to the office of constable had shown great reluctance in *490] accepting it; that the population of Manchester *and the duties of constable had much increased since 1808; that many merchants who formerly had dwelling-houses in Manchester, had ceased to reside there, and to be liable to serve the office of constable, and their dwelling-houses had been converted into ware-houses; and that, unless a considerable fine were imposed upon persons elected by the leet and refusing to be sworn, it would be difficult to procure persons to execute the office.

Sir F. Pollock and Wightman now showed cause. The question of resiancy was very fully considered, with reference to the duty of serving the office of constable, in *Rex v. Adlard*, 4 B. & C. 772, where it was held that a party was not an inhabitant liable to such service in a parish where he did not sleep; and Abbott, C. J. cited 2 Inst. 122, where it is said that "if a man hath a house within two leets, he shall be taken to be conversant where his bed is." Here the party sleeps in Manchester every night in the week but two. His occasionally sleeping in Haslingden cannot excuse him from serving in Manchester; if that were so, his sleeping in Manchester would in like manner exempt him from serving in Haslingden, and he would be subject to neither leet. But a man may be liable to two leets, in different places. In *Rex v. Poynder*, 1 B. & C. 178, persons holding premises in London parish, frequenting them for the purpose of business, but not otherwise, and residing in the country, were held liable to serve the office of overseer for the parish; but the question there turned upon the word "householder," in stat. 43 Eliz. c. 2. As to the fine, *491] the affidavits show sufficient reason for fixing it at the amount here imposed.

Sir John Campbell, Attorney-General, and Colquhoun, contrâ. Mr. Turner is clearly a resiant in Haslingden, and actually serving on the leet there, or fined in case of default. He cannot be resiant, and compellable to take the office of constable, in two places, several miles apart.(a) And, if so, *Rex v. Adlard*, 4 B. & C. 772, must be considered as showing that he ought to serve in Haslingden, and not in Manchester, where he is a mere lodger and has no house in respect of which he is rated. [LITTLEDALE, J. In *Cook v. Stubbs*, Cro. Jac. 584, (see Hawk. P. C. Book 2, c. 10, s. 12; c. 11, s. 3. Vol. iii. pp. 126, 153, 7th ed. 1795,) it is said that "none can be of two leets;" but the question there did not relate to two different residences; it was whether the lord of a larger leet could compel the attendance of the resiants in a smaller, which was locally within it.] If the party here had been a rated householder in Manchester as well as in Haslingden, the case might have presented more difficulty. [LITTLEDALE, J. Suppose he had had no establishment at all at Haslingden, would he then have been liable to serve this office in Manchester?] It is doubtful at least. A resident, not being a householder, may be liable to attend the leet; but more is requisite to qualify a man for the office of constable, which carries with it a great deal of power and trust, and to which a man who is not a householder may not be considered "idoneous." Then, as to the

(a) Haslingden is about seventeen miles from Manchester.

second point; for the fine of 300*l.* is at all events excessive. The steward, who is the servant *of the lord, acting for his benefit, cannot fine to an indefinite amount. In Com. Dig. Leet. (N. 5.) it is said that fines imposed by the leet ought to be reasonable: the highest there mentioned is 40*l.*; and it appears to have been considered a question whether 5*l.* "for refusing to be constable" was excessive. In this case there was no contempt, but a bona fide question as to the liability. If the party had been indicted, and the case argued upon a special finding of the facts, the fine would have been only nominal, if the Court had held the defendant liable. On the former occasions referred to in the affidavits, fines of 20*l.* and 100*l.* have proved sufficient.

LORD DENMAN, C. J. This rule must be absolute. I have not, indeed, any doubt of the party being resiant in Manchester, but he himself appears to have had a strong doubt of it, and such questions often are difficult. The fine imposed was unreasonable. It appears by the affidavits that a much smaller one was found effectual twenty-seven years ago; and it is impossible not to look with jealousy at fines which are imposed by the steward for the benefit of the lord.

LITLEDALE, J. I think this party was a resiant within Manchester, and that he was a proper person to be appointed constable. A man is not to be exempt from such an office because he chooses for his convenience to live occasionally at a distant place. But I think that the fine was too great. I do not wonder that persons show an unwillingness to serve this office; but the largest sum which appears to have been hitherto imposed is 100*l.*; and I think 300*l.* is too much at present, although *in the end a fine to that amount may [*493 become necessary. As to the sum of 5*l.* mentioned in Com. Dig. from a case in 8 Rep. (Griesley's Case, 8 Rep. 38. a.,) allowance must be made for the difference in the value of money at that time; and, if the appointment was in a small place, a low fine might be sufficient.

PATTESON, J. I am of the same opinion, on the ground that the fine is too large; but I do not mean to say that the rule would have been absolute on the other ground. It is not necessary to decide the point now; but I do not see why a man may not be liable to half a dozen leets. (a)

WILLIAMS, J. I also think the rule must be absolute. As to the liability to serve, if Mr. Turner had been serving the office of constable at Haslingden at the time of the appointment in question, I think he would have had a perfect exemption; but that this is not the case here. Rule absolute.

*The KING *against* HALLS and MINSHULL, Esquires, Justices of the Peace for the County of MIDDLESEX. *Saturday, May 30.* [*494

By an act for paving and lighting a parish, a certain committee was empowered to distrain for rates, and to sue for the amount if there was no sufficient distress. The Metropolis Paving act, 57 G. 3, c. xxix., subsequently passed, by sect. 38, enables any person having the control of the pavements of any parochial or other district within the jurisdiction of the act (of which districts the above parish was one), to sue for the recovery of the paving rates, and it imposes no condition as to previous distress. It further provides, that former paving acts shall not be repealed, but that commissioners under such acts shall retain and may exercise all the powers and authorities thereby conferred, and may act upon all and every the provisions, clauses, powers, and authorities of such acts, or of this act, as they shall find expedient.

Held, that the general power of suing given by the Metropolis Paving Act was extended to the committee established under the local act, and consequently that, in bringing

(a) Littledale J. here referred to Price's case, Sir T. Jo. 46, (cited 5 Vin. Abr. Constable (C), pl. 8,) where a party *actually serving* as constable in B., was exempted from discharging another office to which he was appointed in C. until the office of constable in B. should expire. S. C. 3 Keb. 627, as Rex. v. Rice. See Abdy's Case, Cro. Car. 585.

: actions, they were no longer restricted to the case in which no sufficient distress could be found.

By stat. 23 G. 3, c. 90, "for better paving, cleansing, and lighting, the parish of St. Martin in the Fields," &c., the sole power of carrying the several purposes of the act into execution is given to the vestrymen and a committee to be appointed by them; and, by sect. 23, the committee are to rate the inhabitants for the purposes of the act.

Sect. 32 enacts that, in case of refusal or neglect, on demand, to pay the money assessed, "it shall be lawful for the collector or collectors of the said rates or assessments to collect and levy the money which shall be so unpaid, by warrant under the hands and seals of any two of his Majesty's justices of the peace for the said county of Middlesex, or city and liberty of Westminster," (such justices having first summoned the party,) "by distress of the goods and chattels of the party so refusing," &c.

Sect. 33 enacts, "That it shall be lawful for the said committee, or any seven or more of them, if they shall think fit, where no sufficient distress can be made, to direct and cause an action or actions to be brought and prosecuted in any of *495] his Majesty's courts of record at Westminster, for the recovery of any of the said rates or assessments;" and, upon proof of demand and refusal or neglect of payment, the committee shall be entitled to a verdict.

A dispute having arisen respecting the election of the committee in 1834, several of the inhabitants refused to pay a rate made and signed by nine of the committee. Summonses to attend before the magistrates were served on five of the persons refusing; and finally the defendants, being two such magistrates, declined to issue distress warrants, assigning for reason their doubts as to the validity of the election. In Michaelmas term last, Sir James Scarlett obtained a rule to show cause why a mandamus should not issue, directing the two magistrates to issue warrants of distress for enforcing payment of the sums rated upon the five persons.

Sir John Campbell, Attorney-General, and Platt, now showed cause. The rate is not legal, the committee not being duly elected. (The arguments on this point are omitted.) Supposing it legal, the Court will not compel the magistrates to do that which may subject them to the risk of an action. It appears that they entertained a doubt as to the legality of the rate, which is enough. The proper remedy for recovery of the rate is an action at law. [Lord DENMAN, C. J. That is given only where there is no sufficient distress.] The stat. 57 G. 3, c. *496] xxix. (local and personal, public) s. 38, (a) gives a "right of action in any court of law or court of requests, without any restriction as to previous distress.

(a) Stat. 57 G. 3, c. xxix., entitled "An Act for better paving, improving and regulating the Streets of the Metropolis," &c. Sect. 1, enacts, "That this act and the provisions herein contained shall extend to all streets and public places which are now paved, or which may be hereafter paved, within the cities of London and Westminster and Borough of Southwark, and any other parts of the metropolis which are included within the weekly bills of mortality," &c.

Sect. 38 enacts, "That it shall be lawful at any time or times hereafter for the commissioners or trustees, or other persons having the control of the pavements of any parochial or other district within the jurisdiction of this act (if they shall think it expedient), in the name or names of their treasurer or treasurers, clerk or clerks for the time being, or of any person or persons appointed by them to collect or receive any rate or rates, assessment or assessments, made or to be made for or towards the charges of paving or repairing the pavement of the streets or public places in any such parochial or other district, either exclusively or jointly with or for any other objects or purposes, to bring or cause to be brought any action or actions of debt, or special action on the case, or other action or actions, in any of his Majesty's courts of record at Westminster, or to proceed in any court of requests, or other court whatever (for the recovery of debts above or under 5*l*.) within the jurisdiction of which the said messuages or hereditaments in respect whereof such rates or assessments shall be made," [*sic*] "or wherein the person or persons or

*Sir *W. W. Follett* and *Channell*, contra. The action does not lie, under 23 G. 4, c. 90, s. 33, unless there be no sufficient distress; and [*497 here that does not appear. Stat. 57 G. 3, c. xxix. does not repeal the previous act; it expressly reserves the powers of previous local acts, by sect. 138. Now the commissioners had, under stat. 23 G. 3, c. 90, s. 33, a limited power, in case only of want of distress: the subsequent act cannot be understood to substitute an unqualified power. Even supposing that the action were maintainable, there is no general rule that this Court will not grant a mandamus, in any case where an action would lie. (They then proceeded to argue, that the mandamus would be the more convenient remedy; and, further, that the election of the committee was valid.)

Lord DENMAN, C. J. This rule must be discharged, on the simple ground that stat. 57 G. 3, c. xxix. s. 38, gives a better remedy. That section seems almost *framed for the purpose of preventing the circuitous mode of [*498 proceeding by application to this Court for a mandamus. It is much better that the case should be tried, and the opinion of the Court be obtained, by that means, than that the Court should be put in motion to compel magistrates to do that which may subject them to actions of trespass, in which the same question must be ultimately discussed.

LITTLEDALE, J. It is suggested that, even if the action does lie, it would be more convenient to issue the mandamus; and it is true that by that proceeding all the money might be raised under a number of distress warrants; it is possible that on such distresses being levied, one action only might be brought, and the rest might abide the result; but it is also possible that every person might hold out, and as many actions be brought as there were warrants. It is not to be expected that the Court will direct distress warrants to be issued, when actions may be brought for the money, which will raise the question as effectually as actions of trespass against the justices. Then it is urged that the

either of them against whom such action or actions or other proceedings may be brought shall reside, and against" . . . "any other person or persons liable to pay the sum or sums of money for or in respect of or by virtue of any rates or assessments made for or towards the expenses of paving," &c. (as above) "by virtue of any local act or acts of parliament relating to such parochial or other district, or by virtue of this act, for the recovery of the sum or sums of money due" from any "person or persons liable to pay the same by virtue or in respect of any such rates or assessments; and that in any such action," (a general form of declaration is then given); "and that it shall only be necessary for such plaintiff or complainant to produce any such rate or rates, assessment or assessments, and to prove that the person or persons against whom such action or actions or other proceedings shall be brought," &c. "was or were the person or persons mentioned in such rate or assessment, or liable to the payment thereof by virtue of any local act or acts of parliament, or of this act, to entitle such plaintiff or complainant to recover" the whole sum proceeded for. And full costs are given to the plaintiff, if he shall recover the sum proceeded for or any part thereof.

Sect. 138, provides, "That neither any act or acts of parliament relating either exclusively to the paving or repairing the pavements of the streets or public places in any parochial or other district within the jurisdiction of this act, or relating thereto jointly with any other object or purpose, nor any clause, matter or provision therein contained, shall be hereby repealed; but that the commissioners, trustees or other persons by any such local act or acts of parliament vested with the control or superintendence of the pavement of the streets and public places in every such parochial or other district, shall retain and may exercise all and every the powers and authorities by all and every such local act and acts of parliament conferred upon them or any of them; and that they may from time to time and at all times either act under and upon all or any of the provisions, clauses, powers, and authorities of such act or acts of parliament or under any of the provisions, clauses, powers and authorities of this act, as they from time to time, upon each emergency or each particular occasion, may think proper and deem most expedient; but subject nevertheless to all the provisions contained in this act as to" the appointment of surveyors of the pavement, the means provided for compelling the speedy and effectual reparation of imperfect pavement in streets, &c. within the jurisdiction of the act, the regulation and improvement of such streets, and the removal and prevention of nuisances and obstructions.

power under stat. 23 G. 3, c. 30, s. 33, is restricted to cases where there is no distress; but stat. 57 G. 3, c. xxix. s. 38, gives an unrestricted power, and is a later act: it therefore removes the previous restriction.

PATTERSON, J. I am entirely of the same opinion, upon the thirty-eighth section of stat. 57 G. 3, c. xxix. This is a paving committee, consisting, if it be legally elected, of "persons having the control of the pavements" of a parochial district within the jurisdiction of the act. That gives power to them to *499] bring the action, *if they shall think it expedient; and it is subsequent to the act which gives only the restricted power. It is urged that the later act is not applicable where an earlier local act gives a power to sue: but I think that this argument is not correct, and that the later act has the effect of enlarging the power where the earlier act gives only a restricted power. There is therefore a remedy by action.

WILLIAMS, J. I am of the same opinion. It has long been a rule that the Court is not, upon slight grounds, to issue a mandamus to magistrates, especially if it will probably have the effect of subjecting them to an action. Now the whole question is open to discussion upon the proceeding given by stat. 57 G. 3, c. xxix. s. 38. I agree in the construction put upon that statute; and, as there is a reasonable doubt with respect to the right, we will not force the magistrates to become defendants in actions of trespass. Rule discharged.

*500] *The KING against The Justices of the Town and County of the Town of NOTTINGHAM. Monday, June 1.*

The stat. 4 & 5 W. 4, c. 48, s. 1, does not entitle rate-payers to take part in the allowance at sessions of accounts charged upon the county rate, nor to inspect the items at the time of such allowance; the statute not altering the nature of the authority by which the allowance is to be made, but merely directing that the business shall be transacted in public.

And the Court will not grant a mandamus for such inspection, on affidavit by a rate-payer, suggesting that the accounts had been examined by the justices at a private meeting, previously to the examination in open court, and alleging that the applicant demanded an inspection of the accounts at the sessions, and offered evidence to shew the impropriety of some of the charges, but was not allowed to interfere; and adding that he could now impugn the charges, if allowed the inspection.

At the quarter sessions for the town and county of the town of Nottingham, held on the 30th of April, 1835, the justices in open court, pursuant to notice duly given, proceeded to the consideration of the bills and accounts of charges and disbursements to be defrayed out of the county rate for the said town and county; the clerk of the peace stating that they had been previously examined by some of the justices at a private meeting. Shilton, a rate-payer, being present at the sessions, required to be permitted to inspect the items, and offered to give information to shew the impropriety of the allowance of some of them; but the justices refused to permit him to inspect, or to give the information, or to interfere with the allowance of the accounts in any way. On affidavit of the above facts by Shilton, who deposed further that, if he were allowed the inspection, he could establish the impropriety of several of the charges, *G. T. White*, in Easter term last, obtained a rule nisi for a mandamus to the justices to permit Shilton to inspect and examine and to have copies or extracts of the several bills and accounts, vouchers and papers, exhibited to, and allowed and passed by them.

Sir John Campbell, Attorney-General, and Amos, now shewed cause. The *501] stat. 4 & 5 W. 4, c. 48, s. 1, (a) *does not vary the jurisdiction by which the accounts are to be allowed, but merely directs that the business shall

(a) Which after reciting that doubts have arisen, whether it is requisite that the busi-

be transacted publicly. The persons who are to transact it are the same as before the statute. There is nothing, in the statute, to give to the allowance the nature of a contentious proceeding, or to authorise rate payers, or other spectators, to interfere by evidence or otherwise. The intention was merely to impose upon the justices such a check as might be the consequence of the public nature of the proceedings. The bills which are allowed become part of the order of allowance, and are matters merely for the cognisance of those who make the order. Even admitting the applicant to have the right of objecting to the allowance, this is not the proper application: he should have asked for a mandamus commanding the justices to hear his objections; or that he might be allowed now to inspect the bills for the purpose *of making such objections; but, if that were the application, it would have been necessary for [*502 the applicant to shew that he had made a demand that he might inspect, or be heard, at some other time than that at which the justices were assembled at quarter sessions; for he had no right to take a part in their proceedings then; and that is all which he has hitherto demanded.

G. T. White, *contra*. This is an attempt to evade the provisions of the statute. Such an audit of the accounts is public in form only. Independently of the late act, the rate payers have a right to demand the inspection of the rates: *Rex v. The Justices of Leicester*, 4 B. & C., 891; S. C. 7 D. & R. 370. And that case shews that, if as suggested on the other side, this rule be too large in its terms, the Court will mould it so as to meet the justice of the case. There it was ruled that a mandamus should not issue, till inspection had been demanded of the justices at quarter sessions; but here that condition has been performed.

Lord DENMAN, C. J. This rule must be discharged. The applicant requires to be permitted to inspect the accounts allowed by the order of the justices; but it does not appear that he will not have that inspection upon demand: he could not have it with propriety at the time when he demanded it. If *Rex v. The Justices of Leicester*, 4 B. & C. 891, (S. C. 7 D. & R. 370,) be good law, the present case is not brought within it, for no demand has been made which could be complied with.

*LITTLEDALE, J. I am of the same opinion. The course of the Court has always been not to issue a mandamus till a proper demand [*503 has been made.

PATTESON, J. According to the principle contended for by the applicants, all the rate payers would become the auditors instead of the justices. The statute prescribes merely that the justices are to perform their functions in this respect in open court.

COLERIDGE, J. The practice contended for would strip the justices of their jurisdiction. The statute simply changes the place where the discussion is to be:

ness relating to the assessment, application, or management of the county stock or rate, and of the funds in aid thereof, should be carried on and transacted by the justices assembled publicly and in open court at general or quarter sessions, or any adjournment thereof, and that a practice hath in some counties prevailed of transacting such business in private, which hath been found inexpedient: for the removal of such doubts, and preventing of such practice for the future, declares and enacts, "that from and after the passing of this act" [August 13th, 1834] "all business appertaining to the assessment, application, or management of the county stock or rate, or of any fund or funds used or applied in aid thereof or contributing thereto, or to any matter or things whereby or in respect whereof the said county stock or rate is or may be chargeable by law, which by any statute or statutes now in force the justices of the peace for that part of Great Britain called England are authorised and directed to do and transact at the general or quarter sessions or at any adjournment thereof, shall be done and transacted publicly and in open court at such general or quarter sessions, or adjournment thereof, and not otherwise; and that no order of such justices relating to the matters aforesaid shall be binding or effectual unless the said order shall have been made and the business relating thereto shall have been done and transacted publicly and in open court as aforesaid."

it must now be in public, and not in private. This application goes too far: even supposing it to be right in principle, the proper course has not been adopted.

Rule discharged with costs.

The KING against STRETCH and Others. Tuesday, June 2.

A witness subpoenaed to give evidence, on the indictment tried December 11th, made default: Held, that it was too late to move for an attachment in Easter term following. If a cause be called on, quære, whether a witness can be attached for contempt in not attending, who has not been regularly called on his subpoena.

THIS was an indictment for a nuisance. A person of the name of Auriol was served with a subpoena, on the part of the prosecution, on the 5th of December, 1834, to give evidence at the Middlesex Quarter Sessions, to be held on the 11th. The witness did not appear, and the defendants were acquitted on the last-mentioned day. *G. T. White*, in Easter Term last, obtained a rule, calling upon Auriol to show cause why an attachment should not issue against him for contempt. *In the affidavits in support of the rule (sworn April 23d and *504] April 28th, 1835), it was alleged that Auriol was a material witness, that the defendants were acquitted in consequence of his absence and that of others, and that he was called upon his subpoena. The affidavits also stated what facts Auriol was called to prove. The affidavits in answer stated that Auriol was not regularly called on his subpoena.

W. Clarkson now shewed cause. First, the evidence was not material. (The argument as to this is omitted.) Secondly, the witness was not called on his subpoena, and, therefore, cannot be attached for contempt; *Malcolm v. Ray*, 3 B. Moore, 222. *Patteson, J.* held this a fatal objection, upon an application for an attachment against another witness on the same indictment, in Hilary term last, *Rex v. Stretch*, 3 Dowl. P. C. 368; S. C. as in *re Joseph Jacobs*, 1 Woll. 123, though *Barrow v. Humphreys*, 3 B. & Ald. 598, was there cited. *Dixon v. Lee*, 1 Cro. M. & R. 645; 5 Tyr. 180; 3 Dowl. P. C. 259, in the Exchequer, is against the objection; but that was an earlier case. But, thirdly, the application is at any rate too late; 1 *Tidd's Pr.* 807, 808, (9th edit.) The prosecutor should have applied in Hilary term, as he did in the case of the other witness.

G. T. White, contra, as to the objection from the witness not being called, relied on *Barrow v. Humphreys*, 3 B. & Ald. 598, and *Dixon v. Lee*, 1 Cro. M. & R. 645; 5 Tyr. 180; 3 Dowl. P. C. 259; and argued that, in the former case of *Rex v. Stretch*, 3 Dowl. P. C. 368; S. C. as in *re Joseph Jacobs*, 1 Woll. 123, there was an answer on the merits. And he contended that the application was early enough.

*505] *Lord DENMAN, C. J. It is not necessary to notice the disputed question of law. Perhaps the Court of Exchequer was right in saying that a contempt is committed simply by the neglect of a witness to attend. But, however that may be, in the present case the proper time for making this application had elapsed: in the case of the other witness the application was properly made in Hilary term. The party complaining in such a case should come at the earliest opportunity.

LITTLEDALE, J., concurred.

PATTESON, J. I am quite of the same opinion. With respect to the former case decided by me, and which is the latest in order of time, the previous decision of the Court of Exchequer was not then brought to my attention. If it had been, I should, perhaps, have felt less confidence. *Barrow v. Humphreys*, 3 B. & Ald. 598, is distinguishable. There it was ascertained that the witness was not in Court; and the plaintiff did not choose to go to the expense of swearing the jury and being nonsuited. If you fix a witness with the fact of absence, I cannot say that it is necessary that the cause should be called on. If

it be called on, the most convenient course is that the witness should be called on his subpoena.

WILLIAMS, J. I will not decide on the question of law; though I am inclined to distinguish as my brother Patteson has done. But here the prosecutor has, at any rate, not been pressed enough. Rule discharged.

*The Mayor and Burgesses of DEVIZES against CLARK.

Thursday, June 4.

[*506]

It is the privilege of a jury to decline finding any other than a general verdict; and, therefore, if the judge explains to them, and they clearly understand, that, in the absence of a particular fact, the plaintiff's right to recover will depend on a doubtful legal question, and the judge requests them to find that fact, if satisfied of its existence, but they, nevertheless, give a verdict for the plaintiff generally, and, on being pressed, refuse to find the particular fact, the court will not set aside the verdict.

ACTION on the case. The plaintiffs declared that they were possessed of a market, on Thursdays, at Devizes, and that it was the duty of persons who sold butcher's meat at Devizes on market days to expose it for sale on certain stalls appropriated by the plaintiffs for that purpose, paying the plaintiffs a reasonable sum, to wit 1s. 6d. for the use of each stall, and not to expose meat for sale on such market days in any place in Devizes other than the plaintiffs' stalls; and that the defendant, not regarding his duty, on divers market days sold butcher's meat in his own house in Devizes, and refused to pay the plaintiffs for the use of their stalls. Plea, not guilty.

On the trial before Williams, B., at the Salisbury Lent assizes, 1834, the plaintiffs proved that they were possessed of an ancient market: that, with very few exceptions, all persons selling butcher's meat on Thursday in the town had always sold it at the plaintiffs' stalls, paying stallage for the same; and that, in 1803 and 1816, actions having been brought against certain persons for selling butcher's meat on market days at their own houses in Devizes, instead of the plaintiffs' stalls, the defendants in those actions had allowed judgment to go by default and had paid the costs. For the present defendant it was contended that the possession of an ancient market (which it was admitted the plaintiffs had *proved) did not necessarily carry with it the right to prevent per- [507] sons, who lived within the town, from selling at their own houses on market days; *Mosely v. Walker*, 7 B. & C. 40; that a right to prevent such dealings within the town could only be established by proof of a custom to that extent; and that the evidence in the present case was insufficient to establish the custom, there appearing an instance or two in which a butcher had dealt at his own house on market days. The learned judge told the jury that, as it was still a matter of legal doubt, whether or not the right to an ancient market carried with it the right to prevent parties from selling in their own houses within the town on market days, and as the plaintiffs' right to an ancient market was admitted, he wished the jury, with a view to prevent further discussion between the parties, to find expressly, if they thought the evidence warranted such a finding, whether there was any custom in Devizes to preclude the sale of butcher's meat on market days in any part of the town except on the plaintiffs' stalls. Upon this some of the jurymen entered into a conversation with the learned Judge, from which it appeared that they understood the effect of his observations as to the point left to them. After retiring for a short time they found a verdict for the plaintiffs generally. The following conversation then took place between the learned Judge and the foreman:—Williams, B. "Then, gentlemen, you find that in your judgment there has been an immemorial usage for the corporation to demand and receive this stallage for meat in the market, and that there was no right on the part of individuals to sell in a house

*508] or shop out of the *market." The Foreman. "That is not our verdict; our verdict is for the plaintiffs; the right to the market is acknowledged on all hands; of course our verdict is to say, that the defendant had not a right to do what he is charged with doing." Williams, B. Then you further find, that the defendant had no right?" The Foreman. "I would rather not add any words." In the course of the conversation, the learned Judge said that an express finding might prevent further litigation, and the foreman said that the jury had been guided by the remarks of his lordship; but that they desired to add nothing to their verdict. A general verdict was then taken for the plaintiffs. In Easter term, 1834, Merewether, Serjt., obtained a rule to show cause why the verdict should not be set aside, and a new trial had, on the ground, chiefly, of uncertainty in the finding of the jury.

Sir W. W. Follett and Bingham, who showed cause, proposed to establish that the right to an ancient market necessarily carries with it the right to prevent persons from selling on market days in any place other than that appointed for the market; but the Court confined them to the question arising on the conduct of the jury in giving the present verdict.

As to this, they contended, first, that it is the privilege of a jury to give, if they please, a general verdict only; and that, unless they deal contumeliously (a) with the *directions of the judge, such a verdict will be upheld by the Court. *509] In *Davies v. Lowndes*, 1 New Ca. 619, upon the trial at bar of a writ of right, the tenant claimed to hold the property in dispute under a will; but the Court, with a view to render superfluous any question as to the effect of the will, requested the members of the grand assize, before considering the general verdict, to find whether or not the demandant, who claimed as heir of the blood of the person last seised, had established her pedigree to their satisfaction. The members of the grand assize found a general verdict for the tenant, and refused to express any opinion upon the demandant's pedigree; and, though a bill of exceptions was tendered on other grounds, neither the counsel nor the Court excepted to the general verdict. But, secondly, the jury in this case have in effect found the custom put to them. When they understood from the learned judge that it was doubtful whether the right to the ancient market would of itself entitle the plaintiffs to prohibit the sale of butcher's meat on market days in any place other than the market, but that the existence of a custom to that effect would prevent further discussion, their finding that "the defendant had not a right to do what he was charged with doing," necessarily implied that they considered the custom established in proof; for unless they considered the custom so established, the defendant might, according to the direction of the learned judge, have had a right to do what he was charged with doing.

*510] **Erle*, contra. It does not appear but that the jury gave their verdict on the ground of the plaintiff's having been shewn to be in possession of the market, and on the supposition that this, of itself, established the right claimed by them against the defendant. To shew that the jury founded their verdict on the fact of the custom having been proved, it should appear that they were directed to find for the plaintiffs or the defendant according as such fact was or was not proved. But this does not appear.

Lord DENMAN, C. J. The plaintiff is entitled to maintain this verdict, if it was rightly given, and there is nothing to shew that it was not. It appears that the learned Judge explained to the jury that the question of law, whether the mere possession of the ancient market was of itself enough to entitle the plain-

(a) "Also if a judge, for the better direction and information of a jury, shall ask them their opinions concerning such a particular fact, and they shall refuse to answer him, and obstinately insist to deliver in their verdict as they think fit, contrary to his direction, it seems questionable whether they may not be fined in such a case also, unless an *attaint* lie against them, for that it is the duty of jurors to take the advice and information of the court, in order to be governed by it as far as shall be consistent with their consciences." Hawk. P. C. b. ii. ch. 22, s. 22, (vol. iii. p. 284, 7th ed. 1795).

tiffs to a verdict, was a question attended with some doubt; but told them that they needed not enter into that question now, inasmuch as there was direct evidence of the custom; and directed them to give their verdict on that evidence, if they deemed it sufficient to establish the custom. From what the jury said before they retired, it is clear that they understood him. Then they retire, and afterwards bring in a verdict for the plaintiffs. The only issue which they could so find, consistently with abstaining from any decision on the legal question, was the issue as to the fact of the custom. Then the Judge, with the purpose of making further discussion unnecessary, told them that, if they found the fact more distinctly, it might prevent further litigation. A conversation takes place, in the course of which the jury say, "of course our verdict is to say *that the defendant had not a right to do what he is charged with doing." [*511 Now, whether the defendant had the right, depended, at that stage of the proceedings, on the question as to the fact of the custom: finding the one was finding the other. It is true that the jury were called on to speak expressly as to the fact; but they had a right to refuse. It seems to me that they have merely exercised a right belonging to them, and that we should not be justified in disturbing their verdict.

LITTLEDALE, J. The direction to the jury was correct in all points. It was left as a question, whether the immemorial custom existed in fact. Then the jury find for the plaintiff. That must mean, that the custom was established in proof. They are then specially asked, whether they find the existence of the custom, to which they answer, that they had rather not add any thing to their verdict. They have a right to refuse to do so. I am satisfied that they understood how the question was left by the Judge. The verdict, therefore, must not be disturbed.

PATTESON, J. I am entirely of the same opinion. The jury had a right to find a general verdict: they were not bound to find any thing except in the terms of the issue. It is certainly convenient sometimes to act otherwise. I thought, when the motion was made, that they might not have understood the judge's direction; but, from the discussion, it is clear that they did understand it. No other question could be before them: the fact of the possession of the ancient market was conceded; whether that drew with it the right claimed, they were told was a question of law attended with *some doubt; and all this they understood. Nothing could possibly remain but the question [*512 of fact. Then they find for the plaintiffs. What could that mean, but that they found the existence of the custom? But then we are told that, on the Judge saying, "then you find that there is an immemorial usage," they answer, "that is not our verdict." They go on to say, "our verdict is for the plaintiff; the right to the market is acknowledged: our verdict is to say, that the defendant had no right to do what he is charged with doing." This is apparently inconsistent; for, if there were no usage entitling the plaintiffs to exclude the defendant from selling as he did, the defendant might have the right. But what is the real effect of the whole? Why, that when they say "that is not our verdict," they mean, that it is not their verdict totidem verbis. But the effect of the verdict is a different matter from the expression of it. In effect, the meaning is that they find the custom in fact. The verdict, therefore, is not to be disturbed.

WILLIAMS, J. When I left the case to the jury all the cases were under my notice. The doubts of Mr. Justice Bayley and Mr. Justice Holroyd in *Mosley v. Walker*, 7 B. & C. 53, 56, and the question stated by my brother Littledale in the Mayor of *Macclesfield v. Pedley*, 4 B. & Ad. 403, were all before me. The jury understood the question of fact as distinguished from the question of law, and that it was not quite settled whether an immemorial market necessarily drew with it the right claimed. I entertain no doubt whatever, that their only object was to rely on their *general right to give a general verdict, and to abstain from expressly finding the special point. Although they said [*513

"that is not our verdict," they went on to find a verdict which they could not give unless they found the fact left to them; for what else could be their meaning, when they said, "the defendant had no right to do what he is charged with doing?" I thought then that they had a right to find a general verdict, and I think so now.

Rule discharged.

DOE on the Demise of ROGERS *against* BROOKS. *Friday, June 5.*

An indenture of mortgage, of 1817, recited that, by a former indenture, of 1815, A., in consideration of 200*l.* conveyed the premises, of which he was tenant in fee, to C. and H. for 1000 years, subject to a proviso of redemption; that P., at the request of A., had paid C. and H. the 200*l.* and advanced a further sum to A., and that, in consideration thereof, C. and H., at A.'s request, did assign, and A. did grant, &c. to P. the premises comprised in the original mortgage, from thenceforth for all the residue of the said term of 1000 years, subject to a new proviso of redemption. In ejectment brought by the representatives of P. against those of A.:

Held, that the deed of 1817 (with proof of A.'s seisin in fee) was sufficient evidence of title in P., without production of the deed of 1815: that, if the recital of the former deed were admissible, it might be taken all together, and shewed a right in C. and H. to assign the term; and, if it were rejected, nothing appeared to prevent A., as tenant in fee, from granting a term to P.:

That, if the recital in the deed of 1817 were rejected as proof of a right in C. and H. to assign, it might still be looked to for the purpose of ascertaining what term was intended to pass by the deed. And that from the whole of this deed it might be collected that the residue of a term of 1000 years, commencing in 1815, was granted to P. from 1817.

On the trial of this ejectment before Littledale, J. at the summer assizes for Sussex, 1834, the following facts appeared. In 1805 a feoffment in fee of the land was made to one Robert Allen. By indentures of December 26, 1817, between Thomas Clayton and Edward Hide of the first part, the said Robert Allen of the second part, and John Parsons of the third part; after reciting an indenture of March 22d, 1815, between the said Allen of the first part, and the
 *514] said Clayton *and Hide of the other part whereby, in consideration of 200*l.* paid to Allen by Clayton and Hide, the said Allen did grant, demise, bargain, and sell to Clayton and Hide, their executors, &c. all that the said piece or parcel of ground, together with the messuage or dwelling-house, &c. then standing thereon, and which said piece or parcel of ground was, by a certain indenture of feoffment, bearing date December 23d, 1805, conveyed to the use of the said Allen and his heirs, with the appurtenances, to hold unto the said Clayton and Hide, and their executors, &c., from thenceforth for 1000 years, sans waste, subject to a proviso of redemption on payment to Clayton and Hide of 200*l.* and interest, on the 22d of September then next: And after further reciting that the said 200*l.* was then due to Clayton and Hide, who had applied for it to Allen, and that Allen had requested Parsons to lend him 200*l.*, and a further sum of 100*l.*, which he had agree to do: It was witnessed that in consideration of 200*l.* paid by Parsons to Clayton and Hide at Allen's request, and 100*l.* paid to Allen by Parsons, the said Clayton and Hide, at the request and direction of Allen, did each of them bargain, sell, assign, &c., and Allen did grant, demise, bargain, sell, ratify, and confirm to Parsons, his executors, &c., all that the said piece or parcel of ground, messuage, and all other the premises comprised in and demised, or expressed to be demised, by the before in part recited indenture of mortgage of March 1815, with the appurtenances, and all the estate, &c. habendum to Parsons, his executors, &c., from thenceforth for all the residue and remainder then to come and unexpired of the said term of 1000 years, freed and discharge from the proviso for redemption contained in the
 *515] *said recited indenture, but subject to another proviso for redemption, viz. a proviso for re-assignment, on payment by Allen, his heirs, executors,

&c., to Parsons, his executors, &c., of 200*l.* and interest, on the 26th of June then next. Parsons bequeathed all his personalty (with some exceptions not material,) and the lands to which he was entitled for any term in mortgage, to Rogers, the lessor of the plaintiff. The defendant claimed under the will of Allen, the mortgagor.

The plaintiff put in the indentures of 1805 and 1817, but not the mortgage of 1815, insisting that formal proof of this was rendered unnecessary by the recital in the deed of 1817. The defendant urged that he, being a stranger to that deed, could not be bound by its recitals. The learned Judge directed a nonsuit, giving leave to move to enter a verdict for the plaintiff, if the court should think his proof of title sufficient. A rule nisi was obtained accordingly, and, in Easter term last, (a)

Comyn shewed cause, and *Hollist* supported the rule. The points discussed in argument will sufficiently appear from the judgment of the Court, which was now delivered by

Lord DENMAN, C. J. His lordship, after stating the circumstances under which the motion was made, proceeded as follows. Upon consideration, the proof of title appears to us to be sufficient. In order to make the deed of 1817 per se sufficient, it is necessary that *by it a term of years in possession should have passed to Parsons. Allen was proved aliunde to be seised [*516 in fee; but it was objected that by that deed he stated himself to have made an effective grant of the premises for 1000 years, and therefore could grant nothing but an interest subject to that term; and that, although the grantees joined in the deed of 1817, and assigned their interest to Parsons, yet their act could avail nothing, because there was no proof, by the production of the deed, of any interest in them. This is not a tenable objection; the recital must be taken altogether; it either proves an interest in Clayton and Hyde, or it does not: if the former, then Clayton and Hyde effectually assign it to Parsons; if the latter, the difficulty raised by the supposed intervention of their estate vanishes, and Allen remains tenant in fee capable of creating a term in immediate possession.

But it is further objected that if the recitals be struck out of the deed of 1817, there is no sufficient certainty of description of the interest conveyed by it. Allen will then be the grantor, it is said, and he professes only to grant the residue of a term created by a former deed, which it is necessary to look into, in order to see what that term was, and when commencing. But the answer to this objection is, that it is sufficient if it can be collected from the whole deed what the interest was which it was intended to convey by it; and that, for this purpose, the recitals may properly be looked to as the language of the granting party; that, when those recitals are looked to, it appears with sufficient clearness that Allen, by the hypothesis supposed to be a tenant in fee in possession, conveys a term for so much of 1000 years commencing on the twenty-second of March 1815, *as was unexpired on the twenty-sixth of December [*517 1817.

Either way, therefore, the title is complete. If the recitals are of force to raise an objection, the execution of the deed by Clayton and Hyde is of force to remove it: if they are not allowed to operate as raising an objection, still they may be legitimately looked to as completing the description of the premises.

Rule refused.

(a) May 6. Before Lord Denman, C. J., Littledale, Patterson, and Coleridge, Js.

COPLAND *against* LAPORTE and REYNOLDS. *Friday, June 5.*

By indenture of lease, reciting that L. had agreed to take premises of C., and that it had also been agreed that R. should enter into the covenant after-mentioned for securing payment of the rent, it was witnessed that in consideration of the covenants after-mentioned on the part of L. to be performed, and particularly of the covenant thereafter entered into by R., the said C., at the request of R., demised to L., &c. And L. and R. covenanted to C. that they would pay him the rent on the appointed days: and further, that L., his executors, &c. should and would keep the premises in repair. There were other covenants similarly framed to this last, for matters to be performed by L., and a proviso for re-entry if the rent should be in arrear, or if L., his executors, &c. should not perform the covenants in the indenture contained, on his and their part to be performed: and there was a covenant by C. to L. for quiet enjoyment, L., his executors, &c., paying the rent and performing the covenants in the indenture before contained:

Held, that R. was jointly bound with L. by the covenant to repair, as well as the covenant to pay rent.

COVENANT. The alleged breaches were of covenants in a lease, to pay rent and to keep in repair. Plea, non est factum. At the trial, before Coleridge, J., at the sittings in Middlesex, in this term, it appeared that the instrument declared upon was an indenture between John Copland of the first part, Pierre François Laporte of the second part, and John Hamilton Reynolds of the third part, beginning as follows:—Whereas the said P. F. Laporte hath agreed with the said John Copland to take a lease of the messuage or tenement and premises hereinafter particularly described; and whereas it has also been agreed *518] that the said J. H. Reynolds should enter into the covenant hereinafter contained for securing to the said J. Copland, his heirs and assigns, the due payment of the rent hereby reserved: now this indenture witnesseth that, in pursuance of the said agreement, and for and in consideration of the rent, covenants, provisoes, and agreements hereinafter reserved and contained on the part of the said P. F. Laporte, his executors, administrators and assigns, to be paid, observed, and performed, and particularly in consideration of the covenant hereinafter also entered into by the said J. H. Reynolds, he the said J. Copland, at the request of the said J. H. Reynolds, doth demise," &c., "unto the said P. F. Laporte, his executors," &c., all that, &c. (house, outhouses, garden, fields, &c., reserving trees), habendum to Laporte, his executors, &c., from, &c., for fourteen years, determinable nevertheless in manner hereinafter mentioned: yielding and paying therefore yearly and every year unto the said John Copland, his heirs and assigns, the rent or sum of 139*l.* 4*s.*, of lawful," &c., by specified quarterly payments. "And the said P. F. Laporte and J. H. Reynolds, for themselves and for their several and respective heirs, executors," &c., "do hereby covenant, promise, and agree to and with the said J. Copland, his heirs and assigns, in manner following, that they the said P. F. Laporte and J. H. Reynolds, their heirs, executors," &c. "shall and will well and truly pay, or cause to be paid, unto the said J. Copland, his heirs and assigns, the said yearly rent or sum of," &c., "on the days and times and in manner hereinafter mentioned for the payment thereof. And also that the said P. F. Laporte shall and will well and truly pay and satisfy all taxes, rates," &c. *519] "And farther, that he, the said P. F. Laporte, his executors, &c., shall and will, at their own costs and charges, cause and procure to be well and sufficiently painted," &c., all the outside wood and iron work, &c. within every three years of the term, and shall also paint the inside of the said premises within, &c., "and at his and their like costs and charges, shall and will at all times during the continuance of this demise, maintain and keep the said messuage," &c., in good repair; and shall and will at the end, or other sooner determination of the said term, peaceably yield up the same premises, &c. "And also that it shall and may be lawful" for Cop-

land to enter and view the condition of the premises, and in case of any defect found, the said P. F. Laporte, his executors, &c., shall, upon notice, repair, &c. "And also that the said P. F. Laporte, his executors," &c., shall manage the land in a husbandlike manner, and not plough it. Proviso, that if the rent shall be in arrear twenty-one days after the appointed times, the same being lawfully demanded, "or if the said P. F. Laporte, his executors, administrators, or assigns, shall not well and truly observe and perform all and every the covenants and agreements herein contained on his and their part to be observed and performed, it shall be lawful for Copland to re-enter, &c. Covenants, by Copland to Laporte, his executors, &c., not to cut the ornamental timber during the term; and that Laporte, his executors, &c. paying the rent in the said indenture reserved, and performing the covenants thereinbefore contained, shall quietly enjoy, &c. Proviso and agreement "by and between the said parties hereto," for putting an end to the lease at the end of seven years, if Copland, his heirs, &c., or Laporte, his executors, &c., shall be so minded; the party so minded giving notice to the other party, his heirs, executors, &c. The plaintiff *obtained a verdict for 104*l.* 8*s.*, three quarters rent, and 72*l.*, [*520 dilapidations, leave being reserved to move as after-mentioned.

Hill, in this term, (a) moved for a rule to shew cause why the verdict should not be reduced by the amount given for dilapidations. Reynolds was not liable under the covenant to repair. The only joint covenant was for the payment of rent. The recitals shew that this, and nothing more, was intended, although it may be argued that in the clauses following the covenant for the payment of rent nothing is inserted to shew that a joint liability is no longer contemplated. The covenant for rent is distinguished from the others in the proviso for re-entry, where it is said that that right shall accrue if the rent reserved, or any part thereof, shall be in arrear and unpaid for the space of twenty-one days, &c., "or if the said Laporte, his executors, administrators or assigns, shall not well and truly observe and perform all and every the covenants and agreements therein contained on his and their part to be observed and performed."

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. We think that in this case the defendants jointly covenanted that both should pay the rent, and that Laporte the lessee should keep the premises in repair. The language of the recitals does not go to so great an extent, but is not inconsistent with this view of the covenants. There will, therefore, be no rule.

Rule refused. (b)

*GRAHAM against PITMAN. Friday, June 5.

[*521]

A plea to assumpsit by drawer against acceptor of a bill of exchange, "that defendant received no good or sufficient consideration from plaintiff for accepting the bill" is bad on demurrer, though the plea be not specially demurred to for that defect.

ASSUMPSIT by drawer against acceptor of a bill of exchange, stated to be made payable to the plaintiff, by certain instalments with lawful interest, for value received. Plea, "that the defendant did not receive any good or sufficient consideration whatsoever from the plaintiff for accepting the said bill of exchange in manner and form," &c. Conclusion to the country. Demurrer, assigning for cause that the plea concludes to the country, whereas it ought to have concluded with a verification. No other special cause was assigned. Joinder in demurrer.

(a) June, 4th. Before Lord Denman C. J., Littledale, Patteson, and Williams, Js.

(b) See the Duke of Northumberland v. Errington, 5 T. R. 522.

Hindmarch in support of the demurrer. The plea is bad on the special ground assigned. And a plea, that the defendant did not receive any good or sufficient consideration from the plaintiff, is no answer. It should have expressly stated how the bill came to be accepted. If, for instance, it was accepted for accommodation, or to guarantee the debt of a third person, that should have been alleged. The plea, as now framed, does not exclude those cases. A similar plea has lately been held bad in the Court of Exchequer. (a) (Here he was stopped by the Court.)

*522] *Lord DENMAN, C. J. I do not know what is meant here by "good or sufficient consideration." "Consideration" seems to be put, by a strange use of words, in the place of "value." We can assign no meaning to the language of the plea.

PER CURIAM, (b)

Judgment for the plaintiff. (c)

No counsel was present to support the plea, but *Heaton* afterwards appeared, and stated that the plea had been drawn in its present form, under a supposition that the new rules of pleading rendered it proper; and he prayed leave to amend, which was granted (June 10th) on terms.

TRINDER *against* SMEDLEY. Friday, June 5.

A plea to assumpsit by indorsee of B. against a prior indorser, that defendant had no consideration for indorsing, and that B. indorsed to plaintiff *without any consideration*, and that plaintiff had always held without any consideration, is bad in substance.

ASSUMPSIT on a promissory note indorsed by defendant to Bingham, and by Bingham to plaintiff. Plea, that defendant never had any consideration for indorsing the note; that Bingham indorsed it to plaintiff without any consideration, and that plaintiff had always held it without any consideration. Replication, that defendant had consideration for indorsing, and that Bingham indorsed to plaintiff with consideration: conclusion to the country. Demurrer, assigning *523] for causes, that the particulars of the supposed consideration for *the indorsement by defendant to Bingham are not set forth in the replication, and that the particulars of the supposed consideration for the indorsement by Bingham to plaintiff are not, although he was a party thereto, set forth: also, that the replication ought not to have concluded to the country. Joinder.

Manuel, in support of the demurrer. The replication is bad. It cannot be contended, after the case of *Bramah v. Baker*, 1 Hodges, 66, (*S. C. Bramah v. Roberts*, 1 New Cases, 469,) that the plaintiff was bound to set out all the particulars of the consideration; but here, he merely states that the defendant *had consideration* for indorsing, and that Bingham indorsed *with consideration*. It may be collected from the judgment of Tindal, C. J., in *Braham v. Baker*, that the replication ought, at least to state that there was a good and valuable consideration. It was so alleged there, and that the consideration was money due from the plaintiffs. Here nothing of the kind is averred. The plaintiff takes upon him to allege that there was a consideration, but, upon his statement, the consideration might be one which was not good or valid. [Lord DENMAN, C. J. Is not the replication as good as the plea? That merely alleges that the note was indorsed to the plaintiff "without any consideration." What do those words signify? Their natural sense is, without reflection. It is impossible to say, from the popular use of terms, what the plea means. We have already

(a) *Easton v. Pratchett* (Hil. T. 1835,) 4 Tyr. 472. S. C. 1 Cro. M. & R. 798. *Stoughton v. Earl of Kilmorey* (Easter T. 1835,) 5 Tyr. 568. S. C. 2 Cro. M. & R. 72. In these two cases the words were "any value or consideration." See also *Lucey v. Forester* (same term,) 5 Tyr. 567. S. C. 2 Cro. M. & R. 59.

(b) Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

(c) See the next case.

decided, (*Graham v. Pitman*, ante, p. 521,—see the cases there cited,) that to allege that the defendant did not receive any good or sufficient consideration for *accepting, is no plea. [PATTERSON, J. A general plea of no consideration, is no plea at all.] [*524]

PER CURIAM :(a) (*Stopping Miller*, contra.)

Judgment for the plaintiff.

WILES against R. B. COOPER, Esquire, and Two Others. Friday, June 5.

Quære, whether, under stats. 20 G. 2, c. 19, and 4 G. 4, c. 34, justices have power to order payment on an information stating that a sum is due to the complainant "for wages for labour as a carpenter."

The stat. 5. G. 4, c. 18, s. 2, does not empower justices to commit in default of distress, for nonpayment of wages.

THIS was an action of trespass and false imprisonment. Plea, the general issue. The following case was stated by consent, pursuant to stat. 3 & 4 W. 4, c. 42, s. 25.

The plaintiff is a carpenter and joiner, living at Cheltenham. The defendants were at the time of the imprisonment, and still are, justices of the peace for the county of Gloucester. On the 1st of May 1834, Aaron Willicombe laid the following information against the plaintiff before the defendant Cooper.

"Public office, Cheltenham.

"County of Gloucester, to wit.—The information and complaint of Aaron Willicombe of the parish of Cheltenham, in the county of Gloucester, upon oath before me one of his Majesty's justices of the peace in and for the said county of Gloucester, this first day of May 1834, who saith that there is due to him from *Charles Wiles, for wages for labour as a carpenter, the sum of 2*l.* [*525] 2*s.* 8*d.*, which he has neglected to pay.

"Aaron Willicombe.

"Before me, R. Bransby Cooper.

The plaintiff was summoned to appear and answer the complaint, and appeared accordingly at the next petty sessions at the public office, Cheltenham, on the 3d of May, before the three defendants, who were then the sitting magistrates. Willicombe also appeared, and made a statement, the minute of which, taken at the public office, was as follows :—

"3d May, 1834.

"Aaron Willicombe, sworn, saith, there is due to me from Charles Wiles, 2*l.* 2*s.* 8*d.* for wages as a journeyman carpenter at 14*s.* a week."

The defendants heard the plaintiff's statement in answer, which did not satisfy them that the said wages were not due as deposed by Willicombe; they therefore ordered the plaintiff to pay the 2*l.* 2*s.* 8*d.* and 4*s.* 6*d.* costs, forthwith. The plaintiff said that he could not pay, and had not sufficient goods and chattels whereupon the amount could be levied by distress. The defendants then made their warrant, addressed to the constable of Cheltenham, and the keeper of the House of Correction at Northleach, and the body of which was as follows :—

"Whereas Aaron Willicombe of Cheltenham aforesaid, on the 1st day of May instant, complained unto one of his Majesty's justices of the peace in and for the said county, that Charles Wiles of Cheltenham aforesaid, had refused or neglected to pay unto him the said A. W. the sum of 2*l.* 2*s.* 8*d.*, the wages justly due to him *from the said C. W., for work and labour as a servant in the business of a carpenter duly performed by him the said A. W. [*526] for him the said C. W. at Cheltenham aforesaid; and whereas the said C. W. hav-

(a) Lord Denman, C. J., Littledale, Williams, and Patterson, Js.

ing been duly summoned to answer the said complaint, did appear in pursuance of such summons, but did not prove to us, three of his Majesty's justices of the peace for the county of Gloucester, that the said wages had been paid to the said A. W., and did not show any just cause why the same should not be paid; therefore the said justices upon due examination and consideration had thereof this 3d day of May, by writing under their hands did adjudge, determine, and order that the said C. W. should forthwith pay to him the said A. W. the sum of 2*l.* 2*s.* 8*d.*, which appears to the said justices to be just and reasonable to be paid by him the said C. W. to him the said A. W., and the sum of 4*s.* 6*d.* for costs, making together the sum of 2*l.* 7*s.* 2*d.* And whereas it appears unto us, three of his Majesty's justices of the peace in and for the said county of Gloucester, by the confession of the said C. W., that the said C. W. hath not sufficient goods or chattels whereon to levy the said sums, and that the said C. W. hath not paid the said sums, or any part thereof, but therein hath wholly made default: these are, therefore, in his Majesty's name, in pursuance of the statute made and passed in the fifth year of the reign of his late Majesty King George the Fourth, intituled "An Act for the more effectual recovery of penalties before justices and magistrates on conviction of offenders: and for facilitating the execution of warrants by constables," to command you, the constable of Chel-
 *527] tenham aforesaid, to take the said C. W., and him safely convey *to the house of correction at Northleach aforesaid, and deliver him to the said keeper thereof. And we do hereby command you, the said keeper of the said house of correction to receive the said C. W. into the said house of correction, there to imprison him for the space of two calendar months, unless the said sum of 2*l.* 7*s.* 2*d.* shall be sooner paid, or until he shall be discharged by due course of law, and for your so doing this shall be your sufficient warrant. Given," &c. May 8d, 1834. Signed and sealed by the three justices.

The plaintiff remained in prison eight days, and then paid the said moneys and was discharged.

The questions for the opinion of the court were: First, whether the defendants were empowered by the statute 20 G. 2, c. 19, and 4 G. 4, c. 34, to order and adjudge the plaintiff to pay the said sums in manner before mentioned. Secondly, whether upon nonpayment of those moneys, and upon the plaintiff's confession that he had not sufficient goods and chattels whereon the same might be levied, the defendants were empowered by the statute 5 G. 4, c. 18, to commit the plaintiff to prison for two calendar months, unless the said moneys should be sooner paid. If the Court should decide in the affirmative, a *molle prosequi* was to be entered; if in the negative, judgment to be entered for the plaintiff by confession, for 5*l.* damages.

Erle, for the plaintiff. As to the first point, it does not appear on the face of these proceedings that Willicombe had contracted to serve the defendant; and unless the relation of master and servant was established between them, the power given to the justices by stat. 4 G. 4, c. 84, s. 5, of enforcing by distress the
 *528] *payment of wages due to the "servants in husbandry, artificers, labourers or other persons named in" stat. 20 G. 2, c. 19, and 31 G. 2, c. 11, does not attach: *Hardy v. Ryle*, 9 B. & C. 603, *Lancaster v. Greaves*, 9 B. & C. 628. In *Branwell v. Penneck*, 7 B. & C. 536, the Court was of opinion that the statute 20 G. 2, c. 19, applied only to labourers of a similar description with those specifically mentioned in the act; and chiefly to persons engaged in outdoor work or country labour; and *Bayley, J.* relied upon the words in 20 G. 2, c. 19, s. 1,—"although no rate or assessment of wages has been made that year by the justices of the peace of the shire, riding, or liberty, or by the mayor," &c., "where such complaints shall be made, or where such differences or disputes shall arise," as showing that the legislature had in contemplation those labourers only whose wages the justices were empowered to settle by stat. 5 Eliz. c. 4, s. 15. Secondly, however, the first point may be determined, the

statute 5 G. 4, c. 18, (a) does not extend the power of *commitment in default of distress to the case of nonpayment of wages. In *Hutchinson v. Lowndes*, 4 B. & Ad. 118, it seems to have been assumed that such a commitment might be good; but the point was not discussed; and there is as yet no decision authorizing such a construction of the statute. [*529]

R. V. Richards, contra. First, the interference of the justices in this case was under stat. 20 G. 2, c. 19, s. 1, and 4 G. 4, c. 84, s. 5. The enumeration of persons in the first of these clauses is sufficiently large to include a carpenter; and there is nothing in either to prevent such a person from recovering his wages, though he may not have been working by contract. It is supposed, however, that the third section of stat. 4 G. 4, c. 84, which requires a service by contract, controls, in this respect, the subsequent sections, and the provisions of the former act. Even assuming this to be so, the case here states that Willicombe had earned the wages as a journeyman carpenter, at 14s. a week. That implies his being hired as a servant by the week. But the act 20 G. 2, c. 19, does not warrant the limitation attempted. (b) [*WILLIAMS, J.* In *Lowther v. The Earl of Radnor*, 8 East, 118, under that act, stress was laid by the Court upon the generality of the words in sect. 1, "other labourers employed for any certain time, or in any other manner." Secondly, it must have been intended that the remedy afforded by stat. 5 G. 4, c. 18, should be available in the case of wages, and that the parties should not be driven to an indictment where payment is ordered and not made. The judgments of the Court in *Hutchinson v. Lowndes*, 4 B. & Ad. 118, particularly that of Patteson, J., are strongly in favour of this opinion. [*530]

Lord DENMAN, C. J. The statute 5 G. 4, c. 18, seems to me applicable to the case of penalties and forfeitures, and not to that of orders for the payment of wages. The case of *Hutchinson v. Lowndes*, 4 B. & Ad. 118, was argued

(a) Stat. 5 G. 4, c. 18. (For the title of the statute, see page 526, ante.) The first section empowers justices to detain persons upon whom penalties and forfeitures are imposed for offences against certain acts, till return shall be made to a distress warrant; or, if satisfied that they have no goods, to commit them for non-payment, without having issued such warrant.

Sect. 2. "And whereas by some acts certain penalties or sums of money are to be recovered before a justice or justices of the peace, or a magistrate or magistrates, and he or they is and are authorised to issue forth his or their warrant for levying such penalties or sums of money by distress and sale of the goods and chattels of the offender or defendant; but no further remedy is provided in case no sufficient goods and chattels can be found whereon to levy such penalties or sums of money; for remedy whereof, be it further enacted, that whenever it shall appear to any such justice or justices of the peace, magistrate or magistrates, by whom any penalty or sum of money is adjudged to be paid, upon the return of any such warrant of distress, that no sufficient goods and chattels of the offender or defendant can be found whereon to levy the sum adjudged to be paid, and all costs and charges, within the jurisdiction of such justice," &c.; "or in case it shall appear to such justice," &c., "either by the confession of the party or parties, or otherwise, that he, she or they have not sufficient goods and chattels within the jurisdiction of such justice," &c. "whereon to levy such sum of money, costs and charges, such justice," &c., "at his or their discretion, and without issuing any warrant of distress, may proceed in such and in like manner as if a warrant of distress had been issued and a nulla bona returned thereon; and it shall be lawful for such justice," &c. "to issue forth his or their warrant for committing such offender or defendant to the common gaol for any term not exceeding three calendar months, unless the sum adjudged to be paid, and all costs and charges of the proceedings, shall be sooner paid."

Sect. 3. "And be it further enacted, that in case of any offender or offenders committed to the common gaol or house of correction for default of payment of such penalty or forfeiture, together with the reasonable costs and charges attending the conviction, if such offender or offenders shall at any time, during the period of his, her or their imprisonment pay or cause to be paid to the governor or keeper of the prison, the full amount of such penalty, together with the costs and charges it shall be lawful for such governor or keeper of such prison, and he or they are hereby required forthwith to discharge such offender or offenders from his or their custody."

(b) See the observations of counsel, and of Bayley, J., on the second section of the act, in *Branwell v. Pennock*, 7 B. & C. 538, 540.

only on one side. If a rule had been granted, the opposing counsel would probably have directed attention to this point. As it was, the objection to the commitment was sufficient to satisfy the Court,

LITLEDALE, J. It is clear that the statute 5 G. 4, c. 18, applies only to the case of penalties. The title *and preamble both shew it. As to the other point, it is unnecessary to give a decision; but the information is that which gives the justices their jurisdiction, and that merely states that the wages were due to Willicombe "for labour as a carpenter." The evidence on the minute of petty sessions adds two things: that he was a journeyman carpenter, and at 14s. a week; and then the warrant improves upon that again, by stating the wages to have been due for work and labour "as a servant."

PATTESON, J. The statute 5 G. 4, c. 18, contains nothing that can give the power contended for, though the contrary is assumed in *Hutchinson v. Lowndes*, 4 B. & Ad. 118.

WILLIAMS, J., concurred.

Judgment for the plaintiff.

The KING *against* The Inhabitants of MABE.

The language of stat. 37 G. 3, c. 111, s. 3, exempting from a certain duty any indenture of apprenticeship, "where a sum or value not exceeding 10*l.* shall be given or contracted with or in relation to the apprentice," did not apply to cases where no sum or value was given or contracted for.

On appeal against an order of justices, removing Nicholas Halvosso and his family from the borough of Penryn to the parish of Mabe, both in the county of Cornwall, the sessions confirmed the order, subject to the opinion of this Court upon the following case. By indenture duly executed, bearing date October 16th, 1799, and since lost, the pauper, then being about fifteen years of age, was expressed to be bound an apprentice, with the consent of his surviving parent, to Thomas Bolitho, of the parish of St. Gluvias, tanner, until he should *attain twenty-one. No sum of money was given or contracted for, with or in relation to the apprentice. The indenture was stamped with the several stamps impressed on indentures of that class, by the several statutes prior to stat. 37 G. 3, c. 111, amounting to 10*s.*: but the Sessions, considering it liable under that act to an additional stamp duty of 10*s.*, held that evidence of it ought not to be received; and they confined the order as above.^(a)

Bere, in support of the order of sessions. The indenture was not admissible. The statute 37 G. 3, c. 111, s. 1, imposes an additional stamp duty of 10*s.* on every deed made after the 1st of August, 1797. Sect. 3 enacts, "That nothing in this act contained shall be construed to extend to any indenture of apprenticeship, where a sum or value not exceeding 10*l.* shall be given or contracted with or in relation to the apprentice." The question then is, whether the exemption applies when nothing is given. That case is unprovided for. It cannot be said here that a sum or value not exceeding 10*l.* is given. [PATTESON, J. The question is, whether *no sum* is a sum or value not exceeding 10*l.*] A sum or value not exceeding 10*l.*, *given or contracted for*. It may not have been meant that indentures, where nothing is given, should be exempted. The absence of any consideration is not a sure proof of the parties being poor; though a small consideration may indicate it. The Stamp Act, 55 G. 3, c. 184, Sched. Part I., tit. Apprenticeship, expressly provides for the case where there shall be no money or valuable consideration moving to the master or mistress, and limits *the duty in such a case to 1*l.* or 1*l.* 15*s.*, according to the number of words; ^(b) it having been perceived that the exemption clause in question

(a) It was taken as admitted, on the agreement, that the pauper was settled in Mabe if not settled in St. Gluvias.

(b) See also stat. 48 G. 3, c. 149, sched. part 1. tit. Apprenticeship, which contains a

here could not have the operation now contended for. In that part of the Schedule, Part I. to 55 G. 3, c. 184, which relates to leases, a particular duty is imposed on leases granted in consideration of a sum of money by way of fine, &c. *without any yearly rent*, or with any yearly rent, under 20*l*." The words, "*without any yearly rent*," would have been unnecessary, if it had been understood that a lease without rent was comprehended under the words "*with any yearly rent under 20l*." Wood v. Norton, 9 B. & C. 885, shews that the words of this Schedule are to be construed strictly, whatever may be urged as to the apparent intention of the legislature.

Crowder, contra. The true meaning of 37 G. 3, c. 111, s. 8, is, that the increase of duty shall not extend to any indenture, where a sum or value exceeding 10*l*. shall not be given or contracted for. According to the argument on the other side, the increased duty attaches if nothing be given; but not, if 10*l*. and no more be given. But the policy of the stamp act is, to regulate the duty by the amount of the premium. This is a clause of exemption from a burthen imposed by preceding clauses: The Court, therefore, will favour a liberal construction, *if possible. It has been held that "*and*," in a statute, may read "*or*," (see 2 Darris on Statutes, 772); the transposition of "*not*," [*534 here contended for, does less violence to the language, and prevents an absurd consequence, and one which would be against the intention of the legislature. In Wood v. Norton, 9 B. & C. 885, the words of the statute were wholly without ambiguity, and were introduced to prevent frauds, which a loose construction might have favoured.

Lord DENMAN, C. J. There is evidently a mistake in the act; but we have no power of correcting mistakes or omissions of the legislature. Giving this clause the construction which we are obliged to put upon it, we must say that the exemption applies only to cases where there is a money contract, or value given or contracted for, within a certain amount. If the binding be altogether gratuitous, there is no exemption.

LITTLEDALE, PATTERSON, and WILLIAMS, Js., concurred.

Order of sessions confirmed.

*The KING against The Church Trustees of ST. PANCRAS. *Satur-* [*535
day, June 6.

A mandamus to account before auditors under the Vestry Act, 1 & 2 W. 4, c. 60, recited that the auditors "duly appointed and acting under and by virtue of an act," &c., "*in exercise of the powers given to them by the said act*," had summoned the parties to account. Held that, in a mandamus for this purpose, it was not necessary to state more fully the adoption of the act by the parish, and the due appointment of the auditors.

The statute enacts that the auditors "*shall meet twice at least in each year, at the board room of the vestry, and (a majority of the said auditors being present at such meetings)*" shall audit the accounts of such vestry; and the vestry are required, "*at every such meeting*," to produce a true account in writing, &c. And the auditors are to have the same power of examining the accounts of certain other boards, and are to audit them in the same manner. A mandamus issued calling upon a board to attend with, and produce to the auditors, their accounts, *at such time and place, or at such times and places*, as a majority of the auditors might appoint, and then and there give such information as to the accounts as they might be enabled to give, *according to the directions of the act*.

On return to such mandamus, and consilium obtained on the part of the crown: Held

similar clause, limiting the duties to 15*s*. and 1*l*. 10*s*. The stat. 44 G. 3, c. 98, repealed the duties granted by 37 G. 3, c. 111, and (Sched. A.) fixed the duties on indentures of apprenticeship as follows:—"Indenture of apprenticeship, where the sum or value given, paid contracted, or agreed for, with or in relation to such apprentice shall not exceed 10*l*, 15*s*.;" "exceeding 10*l*, and not exceeding 20*l*, 1*l*. 10*s*." &c.

that the mandamus exceeded the authority given by the act; and that the court could not in part enforce it, by a peremptory mandamus limited as to the place of meeting. And the court quashed the mandamus. The court will, for the purpose of justice, mould the rule for a mandamus; but will not mould the writ itself, on application for a peremptory mandamus. When a return to a mandamus is made, and a concilium obtained, the counsel objecting to the return must be heard first, though the opposite counsel take an objection to the form of the mandamus.

By the act for the better regulation of vestries, and for the appointment of auditors of accounts in certain parishes, 1 & 2 W. 4, c. 60, provision is made (s. 33,) for the election of certain auditors; and by sect. 34, it is enacted as follows:—"That the aforesaid auditors of accounts shall meet twice at least in each year, at the board-room of the vestry, and (a majority of the said auditors being present at such meetings) shall proceed to audit the accounts of the said vestry for the preceding half year, in presence of the vestry clerk; and the said vestry are hereby required, by their said clerk, to produce and lay before the said auditors at every such meeting a true and just statement or account in writing accompanied with proper vouchers, of all sums of money which may have come to the hands of the said vestry or of their treasurer, and also of all moneys paid, laid out or expended by them, or by any churchwardens, overseers, surveyors, or other persons by them employed, and responsible to the said vestry, *586] since the last period up to which the accounts of the said vestry were audited; and in all parishes in which other boards shall have control over any part of the parochial expenditure, the said auditors shall have the same power of examining the accounts and officers thereof as of examining the accounts and officers of the vestry, and shall audit the accounts of the said boards in the same manner as they audit the accounts of the said vestries." Sect. 35, enacts, "That the said auditors shall have power to summon and call before them, by a writing for that purpose signed by any one of them, or by the clerk of the vestry of any parish adopting this act, any parish officer or other person or persons whatsoever concerned in the said accounts, and to require of him or her or them to attend the said auditors at any meeting or adjourned meeting, and to bring with them all books of accounts, writings, papers, and documents required, which may concern the said accounts, and to give such information as to the particulars of such accounts, as he, she, or they shall be enabled to give; and any parish officer or other person refusing so to attend, or otherwise wilfully obstructing the purposes of such inquiry, shall be deemed guilty of a misdemeanor."

By stat. 56 G. 3, c. xxxix, (local and personal, public), for building a new parish church and a parochial chapel in the parish of St. Pancras, Middlesex, &c., certain persons, and their successors, to be nominated and elected as was after-mentioned, were appointed trustees for putting the act in execution, and were invested with powers of levying rates and laying out the moneys so raised. Further powers of a like nature were also given them by a subsequent act, 1 & 2 G. 4, c. xxiv. (local and personal, public.)

*587] In Easter term, 1834, the Court made a rule absolute (a) for a mandamus calling upon the trustees by their clerk to lay before the auditors of the said parish elected under 1 & 2 W. 4, c. 60, pursuant to the said act, the accounts kept by them under the said acts of 56 G. 3, and 1 & 2 G. 4, as trustees as aforesaid, at a meeting or adjourned meeting of the said auditors at the board-room of the vestry of the said parish, and also calling upon their said clerk to attend the auditors at such meeting or adjourned meeting, and bring with him the books of accounts, &c., and to give such information as to the said accounts as he might be enabled to give.

(a) The proceedings on the application for this rule are not here reported, as the question respecting the liability of the trustees to account before the auditors under stat. 1 & 2 W. 4, c. 60, is still depending.

The mandamus issued, addressed to the trustees and to their clerk or clerks; and it recited "that the auditors of accounts of the Parish of St. Pancras, duly appointed and acting under and by virtue of an act" (1 & 2 W. 4, c. 60,) "heretofore, to wit, on" &c., "in exercise of the powers given to them by the said last-mentioned act, did, by a writing for that purpose, signed by three of the said auditors, summon and require you the clerks to the said trustees to come before and attend at a meeting of the auditors of accounts of the said parish at a certain time and place in the said writing specified, and to bring with you and produce to the said auditors at such meeting the book or books containing the account," &c., and then and there to give such information, &c.; and that the said clerks ought to have complied with such summons, but had neglected and refused *so to do. The writ then commanded the said trustees and the said clerk or clerks as follows:—"That you, or such of you [*538 as shall be thereto required, do attend with and produce to the auditors of accounts of the said parish of St. Pancras, acting under the said act of parliament passed in the second year of our reign, the book or books containing the account or accounts of all moneys received and of all moneys paid between Lady-day and Michaelmas-day, 1833, by or on account of said trustees under and by virtue of the said two first-mentioned acts of parliament, at such time and place, or at such times and places, as a majority of the said auditors may appoint and give notice thereof to the clerks of the said trustees, and then and there give such information as to the particulars of such accounts as you the said trustees and you the said clerk or clerks may be enabled to give according to the directions of the said acts passed," &c., "or that you shew us cause to the contrary thereof." The writ was not obeyed, and a writ was made excusing the non-compliance. A concilium having been moved for, and the case set down in the Crown paper,

Sir John Campbell, Attorney-General, was now heard against the return.(a)

Platt, contra, took four objections to the mandamus, of which two only are material here, as having been decided upon by the Court. First, the authority of the auditors does not sufficiently appear by the writ, which *only recites [*539 that "auditors, duly appointed and acting under and by virtue of" the act (1 & 2 W. 4, c. 60), did summon and require the clerks to attend. It does not shew that the act was ever legally adopted by the parishioners. The first eight sections of the act state the proceedings to have been taken for the purpose of adopting it in any parish, concluding with a notice of adoption; and sect. 10 enacts, "that in any parish in which public notice of the adoption of this act in the manner as aforesaid shall be so made and given, this act shall immediately become the law for electing vestrymen and auditors of accounts of the said parish in manner hereinafter mentioned." The mandamus passes over all these steps, and merely speaks of the auditors as "duly appointed." In Rex v. the Bishop of Oxford, 7 East, 345, the Court quashed a mandamus which called upon the bishop to license J. K. to be chaplain or curate of the church or chapel of P., alleging that he had been *duly nominated and appointed* by the inhabitants of the township of P., but not stating any consent of the rector, or any custom or endowment which might render such nomination effectual of itself. Lord Ellenborough there said, "the bishop is required by this writ to do an act, which he is alleged to have refused doing in breach of his duty. The writ then should state those facts which constituted his duty." [PATERSON, J. There it might have been true, as the writ alleged, that the curate was duly nominated and appointed by the inhabitants, and yet that would not have been sufficient to entitle him to the license.] Secondly, the thirty-fourth section of 1 & 2 W. 4, c. 60, enacts that the auditors shall meet twice a year at *the [*540 board-room of the vestry, and (a majority of the auditors being present)

(a) Platt, in support of the return, claimed to begin, inasmuch as he objected to the form of the mandamus. But, per Lord Denman, C. J., If that reason were allowed, every one who supported a return would take an objection to the mandamus.

shall proceed to audit the accounts of the vestry for the preceding half-year; and the vestry, by their clerk, shall produce before the auditors at every such meeting a true and just statement of account, &c.; the same power being given to the auditors as to the accounts of other boards having control over any part of the parochial expenditure. But this mandamus does not recite that the clerks were summoned to attend such a meeting as is here described; and in the mandatory part it merely calls upon the trustees or clerks to attend with, and produce to the auditors, their books, at such time and place as a majority of the auditors may appoint and give notice of; not specifying the description of meeting, nor fixing the time or the place. As to sect. 35, the requisition stated to have been made upon the clerks does not appear to have been founded on it, nor is the other part of the mandamus adapted to it. The power given to the auditors by this act, over the trustees, is *stricti juris*, and ought to be exactly followed.

Sir *John Campbell*, Attorney-General, contra. As to the first objection; this is not a motion for a mandamus to admit auditors. No question is depending as to their title. It cannot be said that, in a proceeding like this, where their character as auditors is only introduced incidentally, the writ must set out all the proceedings taken by the parish for adopting the act, and for appointing auditors properly qualified under sect. 33. There is no instance of a mandamus having been so framed. [Lord DENMAN, C. J. We are all satisfied that the *541] first objection is not good. It is enough here, *that the auditors appear to have been appointed by virtue of the act to this office, which is notoriously a public one. LITTLEDALE, J. I do not found my opinion on the word "duly." Then, secondly, sect. 34, is merely directory as to the place of meeting. If the auditors do not meet in the board-room no penalty is imposed, nor are their acts made void. And the place where they may determine to meet is the "board-room of the vestry" for that purpose. Sect. 35, mentions no room, but speaks only of attendance at any meeting or adjourned meeting. And when the writ calls upon the trustees to attend at such time and place as the auditors may appoint, that must be confined, in the interpretation, to such an attendance as might lawfully be required; to an attendance even at a particular board-room, if it could not legally be had elsewhere. [Lord DENMAN, C. J. The words of the requisition extend to any place, even if out of the parish. You claim to appoint any time or place you think proper. PATTESON, J. Such as a majority of the auditors may appoint.] The writ adds, "according to the directions of the said act." [Lord DENMAN, C. J. That is after the words "and then and there give such information as to the particulars of such accounts, as you may be enabled to give." Besides the writ speaks of a place or places; the act mentions only one place.] Supposing that the writ is too general in this respect, it is not therefore bad altogether. A peremptory mandamus may be granted for so much as may lawfully be enforced.

Lord DENMAN, C. J. It is quite clear that we cannot grant a peremptory mandamus calling on these parties to do what they are not obliged to do by law. *542] The *mandamus requires the trustees to do a particular act, that is, to attend with, and produce to the auditors, their accounts in any place and at any time that a majority of the auditors may think fit to appoint. The auditors had no power to make such a requisition. It may be that the power, if exercised, would not be abused, but we cannot call upon these parties to obey a demand made in terms which are contrary to the restriction of the statute. It is said that the generality of the demand is qualified by the words, "according to the directions of the said act;" but it cannot be so qualified by an expression which would require the parties to whom the writ is directed to look into an act of parliament. It is contended that the requisition of the writ may be partly good and partly bad, and that the valid part may be enforced: and it is true that, in *Rex v. The Justices of Leicester*, 4 B. & C. 891, on a motion being made for a mandamus, requiring more than the Court thought fit to be demanded, a

rule was granted in less comprehensive terms, adopting that part of the motion which the Court thought good. But here the thing which we are required to enforce is irregular. The Court said there, that they would mould the rule so as to meet the justice of the case. But here it is not a rule, but the writ itself, that is before us. We must enforce it in the terms in which it has issued, or not at all.

LITTLEDALE, J. The act 1 & 2 W. 4, c. 60, requires the auditors to meet at the board-room of the vestry. It is argued that this is merely directory: and in many cases enactments of this kind are so. But the vestry is the place where meetings of this kind ought to be held by law. The board-room is merely a convenient substitution for the vestry of the church, which is [543] the regular place for parish meetings. Then the mandamus requires the trustees and clerks to attend and produce the accounts, at such time and place, or at such times and places, as a majority of the auditors may appoint, and then and there give such information as to the particulars of such accounts, as the said trustees and clerks may be enabled to give according to the directions of the said act. It is contended that the concluding words of this clause over-ride the whole, and, therefore, that nothing is required which is inconsistent with the act; but if the act limits the meetings to a particular place, the mandamus should not do so too. It is said that the writ may be good in part and bad in part; but the requisition is to produce the accounts at such time and places as a majority of the auditors may appoint: and the whole depends upon that.

PATTON, J. The objection may seem at first sight a small one to prevail in such a case as this, but I am afraid of the principle which it is sought to introduce. If one thing only is directed by the mandamus, and that is against the act of parliament, it would be a dangerous precedent to grant a peremptory mandamus in the manner suggested. We should be remoulding the writ. We may mould the rule for a mandamus, but not the writ itself.

WILLIAMS, J. I am of the same opinion. No part of the writ is severable from the rest. Mandamus quashed.

*The Attorney-General then said that, although the writ, as he admitted, could not be moulded, the Court might now grant another mandamus, to be framed conformably to the act. [544]

Lord DENMAN, C. J. For that there must be a rule to show cause.

The KING against The OUZE Bank Commissioners. Saturday, June 6.

A statute directed that a sum of money should be paid to certain commissioners, who were therewith to execute all such works, &c. *as should from time to time be deemed necessary, proper, or expedient for putting certain banks and bridges in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable, upon one uniform system.*

By mandamus, reciting this clause, and that the money had been paid to the commissioners, they were ordered to proceed to put the banks forthwith in a permanent state of stability and security, and to construct the forelands and slopes of the banks, so far as practicable, upon one uniform system.

Return, that the commissioners had from time to time, at all times from the passing of the act hitherto, proceeded to execute all such works "*as should be, or were from time to time deemed necessary, proper, or expedient for putting the banks in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable, upon one uniform system.*"

Held an insufficient return, and a peremptory mandamus awarded.

A MANDAMUS issued in Trinity term, 1834, directed to The Commissioners of The Ouse Banks, appointed and acting under stat. 1 & 2 W. 4, c. lxxiii. (Local and Personal, Public), intituled, "An act to alter, amend, and enlarge the powers of the several acts now in force relating to the new river or cut from Eau

Brink to King's Lynn in the county of Norfolk, called The Eau Brink Cut ; and to raise further funds for carrying the said acts into execution." The mandamus, in substance, set forth that it was by the said act, sect. 1, recited that, by reason of the defective state of the banks and bridges of the river Ouze, in parts described in the act, some injury had been occasioned to them by the

*545] increased velocity of the current in consequence of the improvement of the outfall of the river into the harbour of King's Lynn, for which it was

just that compensation should be made from the funds of the commissioners of drainage acting under the authority of certain acts of parliament in the said act recited, and that (Sect. 39) in order to put an end to the disputes and differences between the commissioners of drainage, acting under the authority of certain acts of parliament therein recited, and the owners of or persons liable to the maintenance of the banks of the said river Ouze, touching the injury of the said banks, it had been agreed that the commissioners of drainage should raise and pay a sum of money (the amount to be fixed as in the act directed) as a final compensation for the damage occasioned or to be occasioned to certain parts of the banks of the Ouze described in the act, by the altered course of the Ouze, or the execution of any works of the commissioners of drainage; and that 12,000*l.* had been fixed as the amount to be paid for past injuries to the banks, and 46,000*l.* to be laid out in putting the banks into one uniform system of repair. The mandamus then went on to state that the act directed the payment of the 46,000*l.* at certain specified times to the treasurer of certain persons, who by the act (Sect. 40) were appointed commissioners to carry the act into execution so far as related to the repair and management of the said Ouze banks and bridges, to be designated "The Ouze Bank Commissioners;" and that it was by the said act further enacted, (Sect. 44), "that the said Ouze bank commis-

*546] sioners shall, and they are thereby authorised and required, *from time to time to make, do, construct, and execute all such works, acts, matters, and things, as shall from time to time be deemed necessary, proper, or expedient for putting the banks and bridges of the said river Ouze between" &c. "in a permanent state of stability and security, and for constructing the forelands and slopes of the said banks, as far as practicable, upon one uniform system,"

"and to set back the said banks where the force of the current or other circumstances may require;" . . . "and the water-ways of the said several bridges shall be extended on each side of the said river to such a width as shall be correspondent with the width of the said river, and the general line of the banks thereof above and below the said bridges respectively." The mandamus then stated that the 46,000*l.* had been paid to the Ouze bank commissioners, and that the commissioners of drainage and certain owners of land drained by the Ouze had had applied to them to proceed to put the banks of the said river Ouze, &c. (following the directions above); but the commissioners of the Ouze bank refused and neglected, &c., to the great damage, &c. The mandamus then commanded the Ouze bank commissioners "that immediately after the receipt of this writ you do proceed to put the banks of the river Ouze between" &c. "in a permanent state of stability and security; and that you do construct the forelands and slopes of the said banks, as far as practicable, upon one uniform system, and do set back the said banks where the same shall be necessary, and do extend the waterways of the bridges over the said river between" &c. "in a width corresponding with the width of the said river and the general line of the banks, above and below the said bridges respectively, or that

*547] *you show us cause to the contrary thereof," &c. Return: that, as to all the works, acts, matters, and things, by the said writ commanded to be done, except as to extending the waterways of the bridges over the said river Ouze between, &c., to a width corresponding with the width of the said river and the general line of the banks thereof above and below the said bridges respectively (part of the said works, acts, matters, and things), we the said Ouze bank commissioners have, from time to time, at all times from the passing of

the said act in the said writ first mentioned, to the time of issuing the said writ, and thence from time to time, at all times hitherto, proceeded to make, do, construct, and execute, all such works, acts, matters, and things respectively, as should be or were from time to time deemed necessary, proper, or expedient for putting the banks of the said river Ouze between, &c. in a permanent state of stability and security, and for constructing the forelands and slopes of the said banks, as far as practicable, upon one uniform system; and as to so much of the said writ as commands the said Ouze bank commissioners to extend the waterways, &c. (this part of the return is immaterial. A concilium having been obtained, and the case inserted in the crown paper,

Sir *W. W. Follett* was now heard against the return. The first part of the return is insufficient. It is not enough to say, that the commissioners have done what has been deemed necessary. Deemed necessary by whom? The mandamus is to try whether their discretion has been honestly used. The return should state what has been done; and should also expressly *allege that no more [548] was necessary. Then a traverse might be taken, which now is impossible. [He then argued against the other part of the return, as to the extension of the waterways, &c. upon the construction of the local act.]

Sir *John Campbell*, Attorney-General, contra. The first part of the return follows the words of the act of parliament. The act vests a discretion in the commissioners; the return substantially alleges that they have exercised that discretion. If the mandamus, in fact, goes beyond the act, it is bad pro tanto; if not, then the return, which follows the act, must be good. The words "should be" are perhaps not intelligible; but, if so, they may be rejected. Or the word "or" may be construed copulatively, instead of disjunctively; and then the return means that all has been done which has been and will be deemed necessary. The return might be traversed by denying that all which is necessary has been done. [The argument as to the other part of the return is omitted.]

Biggs Andrews (in the absence of Sir *W. W. Follett*,) in reply. The argument, that the return need only follow the act, for that the mandamus ought not to go further is, if of any force, an objection to the issuing of this mandamus; and that cannot now be made. But, besides, the return should at least go so far as to state whether, in fact, any, and what money has been expended upon the works. This Court should have the means of ascertaining whether the act has been complied with, which the return does not furnish.

*Lord DENMAN, C. J. This mandamus does not follow the precise [549] terms of the act. (His lordship then read the command in the writ.) I do not think it was requisite that the writ should use the words "such as shall be deemed necessary." The parties bringing the case before the Court had a right to assume that the things commanded to be done were necessary. If the return had stated that the commissioners thought such and such things necessary, and that they had done them, that would have been a sufficient answer. It might have been more satisfactory if they had shewn what they had done, and what they had spent: but I am disposed to think that it would have been enough if they had said that they had exercised their judgment, and done all they deemed necessary. But they have used unintelligible language, making an assertion in the alternative. No meaning can be given to the words "as should be or were from time to time deemed necessary." A party is not to return a nonsensical answer to the King's writ of mandamus, and leave the Court to interpret it. (His lordship then stated, upon the construction of the act, he considered the other part of the return bad.) The return seems to me bad in all its parts, and a peremptory mandamus must go.

LITLEDAL, J. As to the first part of the return, it was open to the commissioners to return in two ways. First, they might have returned in so many words that they had done such works as were necessary, and that the banks were put into a state of permanent stability. This they have not returned; and perhaps, in the time which has elapsed, they have had no opportunity of doing

*550] such works. Secondly, they might have said, "We *have from time to time executed divers matters and things for the purpose of putting the banks into perfect security, and are proceeding so to do." This they do not return. But they only return that they have done all such things "as should be, or were, from time to time deemed necessary," in the words of the act, without saying that they have done any thing. It seems to me that this is not sufficient. As to the disjunctive allegation (though I do not say that "or" may not sometimes be copulative), it seems to me that it is bad here.

PATTESON, J. I am of the same opinion. Possibly it might have been enough if the commissioners had returned that they had from time to time done all things necessary for putting the banks in a permanent state of repair; but I, for one, should have thought that not sufficient. The commissioners are appointed, and are intrusted with money, for a particular purpose; and I think they should shew that they have expended a part of the money in the works, and are proceeding with them. The Court does not, by the word "forthwith," mean to command them to do every thing instantly; but to set about the works directly, and do what they can. If they had done all they could, they should have said so: but this they do not say.

WILLIAMS, J. I am entirely of the same opinion. What does the return mean? How much, or how little, has been done? To whose satisfaction? The allegation here made might have been satisfied if nothing had been done.

Peremptory mandamus awarded.

*551] *FLETCHER *against* LEW. *Saturday, June 6.*

Since the rule Hil. 2 W. 4, I. 98, a defendant may, before issue joined, move to stay proceedings till security for costs be given, on account of the plaintiff's residence abroad, though he has pleaded after knowledge of that fact.

Held so, where plaintiff gave notice of action, describing himself as resident abroad, April 10th, served process May 12th, declared May 23d, and received plea May 27th, and the motion was made May 30th.

Where no application has been made to the plaintiff for security before moving, the court, in granting such rule, will oblige the defendant to pay the costs of the motion.

A RULE nisi was obtained in this case, for a stay of proceedings until the plaintiff should give security for costs. The plaintiff was resident abroad, and had, on the 10th of April last, given a notice in which he was described as of Nieuport in Belgium. He afterwards, May 12th, served the defendant with a copy of a writ of summons in an action of trespass, to which an appearance was entered on the 18th. The plaintiff delivered a declaration and rule to plead, May 23d, and a plea of not guilty was delivered May 27th. The defendant made the present application on the 30th, no copy of an issue having yet been served.

Platt now showed cause. The application is too late, after plea pleaded. The defendant knew, even before the action was brought, where the plaintiff resided. A motion like the present must be made as early as possible after the defendant knows that the plaintiff is resident abroad. In *Duncan v. Stint*, 5 B. & Ald. 702, it was held to be too late, where the plaintiff, having that knowledge, had pleaded.

Sir John Campbell, Attorney-General, contra. The new rule, Hil. 2 W. 4, I. 98, 3 B. & Ad. 889, fixes the practice now, that "an application to compel *552] the plaintiff to *give security for costs must in ordinary cases be made before issue joined." If so made, it is not too late. In *Fry v. Wills*, 3 Dowl. P. C. 6, a rule like this was made absolute, though the defendant had taken a fresh step in the cause (obtaining time to plead), after he knew that the plaintiff was absent from the country.

PER CURIAM.(a) We agree in the opinion there given. The rule must be absolute.

Platt then submitted that the plaintiff was entitled to the costs of this motion, no demand of security having been made upon him or his attorney before moving; and he cited *Baile v. De Bernales*, 1 B. & Ald. 331. [LITTLEDALE, J. The rule is so. Rule absolute on payment of costs.

In the Matter of ———, Overseer of ———. *Monday, June 8.*

The small-pox having broken out in a parish, an overseer became party to an agreement with a medical man that the latter should vaccinate the paupers. The overseer subsequently refused to carry the agreement into effect; after which all the paupers caught the disease, and one of them died of it.

The court refused to grant a criminal information against the overseer.

It is no part of the duty imposed on overseers by law, to cause paupers to be vaccinated.

SIR JOHN CAMPBELL, Attorney-General, moved for a rule to shew cause why a criminal information should not issue against the overseer of a parish. It was stated on affidavit that, the small-pox having broken out in the parish, an agreement, to which the overseer was a party, had been made with a medical man, that *the paupers should be vaccinated at 1s. 6d. per head. The overseer afterwards refused to allow this agreement to be carried into [*553 effect; every pauper in the parish caught the small-pox; and one of them died. It did not appear that any of the paupers had applied to be vaccinated, or had signified their consent to the operation. The Attorney-General referred to Matthews's Digest of Criminal Law, tit. Office, p. 336.

LORD DENMAN, C. J. Perhaps, if the agreement had been carried into effect, these unfortunate occurrences would not have taken place; and we may regret that the overseer has not exercised his discretion otherwise. But, before we grant a rule for a criminal information against a public officer for a neglect of duty, we must see that it is a duty which the law casts on him. I know of no law which prescribes that precautionary measures of this particular nature shall be taken by the overseer; nor, if he would take them, are the poor bound to submit to them. If the existence of the legal duty had been shown, the facts on these affidavits would show gross negligence; but I do not see the legal duty.

LITTLEDALE, J. This duty is not among those prescribed to overseers by acts of parliament; and I cannot see how it results from those which are prescribed. The paupers, or the parents of the paupers, might object to such a step being taken.

PATTESON and WILLIAMS, Js. concurred.

Rule refused.

*BLEWETT against TREGONNING.

[*554]

1. To an action of trespass for taking away sand from the plaintiff's close, it was pleaded that the close was contiguous to the sea shore, in Cornwall; that the sand had from time to time, before the times, &c., drifted and been carried by the wind from the sea-shore upon the said close, and been there deposited; that in the parish of E. there was a custom for all the inhabitants for the time being, occupying lands in E., to enter the close at seasonable times, and take therefrom reasonable quantities of all such sand as had so drifted, &c., for the purpose of manuring the lands in their occupation in the said county; and the defendant justified, as an inhabitant and occupier, &c.: Held, a bad plea; first, because the allegation of a custom was too vague; secondly, because

(b) Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

- the supposed custom was at all events void, inasmuch as the sand, when drifted upon a close, become part of it, and the claim therefore was to take a profit in aliena solo.
2. Issue being joined on a plea of prescription, pleaded to a declaration for trespass in G., if the plaintiff's witness be asked, in cross-examination, questions respecting the user in other places than G., and prove such user, the plaintiff in re-examination may shew an interruption of the user in such other places.
 3. If such witness, on cross-examination, voluntarily depose to such user, in answer to a question not relating to it, the plaintiff may still re-examine as above, unless the defendant apply to have such voluntary answer struck out of the Judge's notes.
 4. Quære, whether there can exist contemporaneously, in respect to the same land, a prescription and a custom, entitling to the same easement, &c.?
 5. Evidence which shews such a custom is not evidence of such a prescription, and vice versa.
 6. In trespass quare clausum fregit, defendant justified in several pleas alleging non-existing grants, by A., B., and C. respectively, being seised in fee of the locus in quo, of profits a prendre therein, to several parties respectively seised in fee of other land, occupiers, &c., in respect thereof. The replication traversed the several grants, but not the estate of any grantor or grantees. The only evidence was of immemorial user by occupiers of the lands last mentioned: Hold, that this did not support any of the pleas.
 7. So if the pleas be of grants by persons seised in fee, to all the inhabitants of a parish, or county, and the grants only be traversed, and there be evidence only of immemorial user by the inhabitants.
 8. On a plea that A. seised in fee granted a profit a prendre in his close to B., in respect of land of which B. was seised in fee, if issue be joined only on the grant: Quære, whether the plaintiff be estopped from disputing the seisin of A. and B.?

TRESPASS. The first count was for breaking and entering a close of the plaintiff, in the parish of Perranzabulo in Cornwall, treading down the grass with feet, and trampling the grass, &c., with cattle, &c., and crushing other the grass, &c., and subverting the soil, &c., with carts, &c., (with other trespasses not necessary to be mentioned, as they were not justified by the special pleas;) and digging up and getting sand, &c., from and out of the said close, and carrying away and converting the said sand. The second count omitted some of the trespasses mentioned in the first. The third count was for taking away and converting the sand, &c.

*555] **First plea.** Not guilty. Similiter.

Second plea: As to the trespasses mentioned in the first count and set out in the preceding page. That George Simmons before and at the times when, &c., was seised in his demesne, as of fee, of and in a certain messuage, and divers, to wit, 124 acres of land with the appurtenances, in the parish of St. Erme, in the county aforesaid, and that he, and all those whose estate, &c., from time whereof, &c., by himself and themselves, his and their tenants and farmers, occupiers of the said messuages, &c., have dug and got, and have been used and accustomed to dig, &c., and of right ought, &c., and still of right ought, &c., reasonable quantities of sand from and out of the said close in which &c., and to take and carry away the same from thence to the said messuage and land with the appurtenances, to be used and consumed on the said last-mentioned land, for the purposes of manuring the same, every year, at all seasonable times of the year, at his and their free will and pleasure, as to the said messuage and land, with the appurtenances, belonging and appertaining; and that the said G. S., being so seised of, &c., before the said times when, &c., to wit, September 29th, A. D. 1804, demised the same to the defendant, habendum as tenant from year to year; by virtue of which demise the defendant, before the said times when, &c., to wit, &c., entered into and upon the said messuage and land with the appurtenances, and became and was at the said times when, &c., possessed thereof, and hath continued so possessed from thence hitherto; wherefore the defendant on the said several days and times when, &c., having occasion for such reasonable quantities of sand for the purpose of ma-

PER CURIAM.(a) We agree in the opinion there given. The rule must be absolute.

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Lord DENMAN, C. J. Perhaps, if the agreement had been carried into effect, these unfortunate occurrences would not have taken place; and we may regret that the overseer has not exercised his discretion otherwise. But, before we grant a rule for a criminal information against a public officer for a neglect of duty, we must see that it is a duty which the law casts on him. I know of no law which prescribes that precautionary measures of this particular nature shall be taken by the overseer; nor, if he would take them, are the poor bound to submit to them. If the existence of the legal duty had been shown, the facts on these affidavits would show gross negligence; but I do not see the legal duty.

LITLEDAL, J. This duty is not among those prescribed to overseers by acts of parliament; and I cannot see how it results from those which are prescribed. The paupers, or the parents of the paupers, might object to such a step being taken.

PATTESON and WILLIAMS, Js. concurred.

Rule refused.

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Second plea: As to the trespasses mentioned in the first count and set out in the preceding page. That George Simmons before and at the times when, &c., was seised in his demesne, as of fee, of and in a certain messuage, and divers, to wit, 124 acres of land with the appurtenances, in the parish of St. Erme, in the county aforesaid, and that he, and all those whose estate, &c., from time whereof, &c., by himself and themselves, his and their tenants and farmers, occupiers of the said messuages, &c., have dug and got, and have been used and accustomed to dig, &c., and of right ought, &c., and still of right ought, &c., reasonable quantities of sand from and out of the said close in which &c., and to take and carry away the same from thence to the said messuage and land with the appurtenances, to be used and consumed on the said last-mentioned land, for the purposes of manuring the same, every year, at all seasonable times of the year, at his and their free will and pleasure, as to the said messuage and land, with the appurtenances, belonging and appertaining; and that the said G. S., being so seised of, &c., before the said times when, &c., to wit, September 29th, A. D. 1804, demised the same to the defendant, habendum as tenant from year to year; by virtue of which demise the defendant, before the said times when, &c., to wit, &c., entered into and upon the said messuage and land with the appurtenances, and became and was at the said times when, &c., possessed thereof, and hath continued so possessed from thence hitherto; wherefore the defendant on the said several days and times when, &c., having occasion for such reasonable quantities of sand for the purpose of ma-

on the said 1st of June, 1260, the said late sovereign lord Henry III. (seisin of Henry III., as in the preceding plea, and grant of letters-patent as before, with less and excuse of profert, the grant being described as follows), the said late king did, after reciting, among other things, *the great damage occasioned to the said several closes of and in which he was then so seised by the continual increase and drifting of the sea sand thereon, and that it had been represented to him that great benefit would accrue to the tenants and occupiers of messuages and lands within the parish of St. Erme in the said county, as well as great relief to the occupiers of the said several closes of and in which he was so seised, if the said tenants and occupiers of messuages and lands within the parish of St. Erme, from time to time, for ever thereafter, should have his royal license and liberty to do so as hereinafter next mentioned, grant to every person who then was, or thereafter should become and be, tenant, inhabitant, and occupier of any messuage and land with the appurtenances within the said parish of St. Erme, in the county aforesaid, the liberty and privilege at all reasonable times of digging and getting reasonable quantities of sand from and out (among others) of the said close in which, &c. in the said first count mentioned, and of taking and carrying away, &c. (substantially as in the preceding plea, but stating that the sand was to be used upon the lands of the party in the said parish;) by virtue of which said last-mentioned grant the defendant, so being such inhabitant of the said parish and occupier of the said last-mentioned messuage and land, &c. (title and justification under the letters-patent). Replication: That the said late King Henry III. by his certain other, &c. did not grant to any person who was, &c., in manner and form, &c. Similiter.

Ninth plea, as to the same trespasses. That defendant, before and at the said times when, &c., was and from thence hitherto hath been and still is an inhabitant *of the said county of Cornwall, and an occupier of a certain other messuages and divers, to wit, 124 acres of other land, with the appurtenances, situate and being in the same county; and that long before the said times when, &c., to wit, June 1st, A. D. 1240, Richard Earl of Cornwall, being seised in his demesne as of fee of and in (amongst other things) the said close in which, &c., by his certain deed poll (less, and excuse of profert), the date whereof was a certain day, &c., to wit, the day and year last aforesaid, did, for the considerations therein mentioned, grant to every person who then was, or thereafter should become and be tenant, inhabitant, and occupier of any messuage and land, &c., (as in the seventh plea, *mutatis mutandis*). Replication: That the said Earl of Cornwall did not grant to any person, &c., in manner and form, &c. Similiter.

Tenth plea, as to the same trespasses. That the said close in which, &c., before and at the said times when, &c., was and still is contiguous and next adjoining to the sea shore, to wit, in the county aforesaid; and that the said sand in the first count mentioned was and is sand which had been and was from time to time, before any of the said times when, &c., drifted and carried by and through the force and violence of the wind from and off the seashore aforesaid, unto, into, and upon the said close in which, &c., and there deposited and left. And that within the said parish of St. Erme, in the county aforesaid, there now is, and from time whereof, &c., hath been, a certain ancient and laudable custom there used and approved of, (that is to say,) that all the inhabitants for the time being of the said parish, occupying messuages and lands situate within the said parish, have had, and have used and *been accustomed to have, and of right ought, &c., and still of right ought, &c., the liberty and privilege of entering into and upon the said close in which, &c., every year at all reasonable times of the year at his and their free will and pleasure, and of collecting, getting, taking, and carrying away from and out of the said close in which, &c., reasonable quantities of all such sand as had been and was so drifted and carried unto, into, and upon the same, and there deposited and left, for the purpose of manuring the lands in the occupation of such inhabitants as last aforesaid, situate in

the county aforesaid, doing no unnecessary damage thereby. And the defendant alleged that he, before and at the said times when, &c., was, and from thence hitherto hath been and still is, an inhabitant of the said parish of St. Erme in the county aforesaid, and an occupier of a certain other messuage and divers, to wit, 124 acres of other land, with the appurtenances, situate and being in the same parish, to wit, in the county aforesaid, wherefore the defendant so being such inhabitant, &c., and occupier, &c., as aforesaid, on the said several days and times when, &c., having occasion for such reasonable quantities of sand as last aforesaid, for the purpose of manuring his said last-mentioned land, and the same then and there requiring such manuring, at the said times when, &c., being reasonable times of the year in that behalf, entered into the said close in which, &c., in order to collect and get such reasonable quantities of sand as last aforesaid, and to take and carry away the same for the purpose of manuring his said last-mentioned land; and the defendant on those occasions (justifying the trespass *564] mentioned in the introductory part of the plea). *Repleasation: That within the parish of St. Erme aforesaid, in the county aforesaid, there now is not, nor from time whereof, &c., hath been, a certain ancient and headable custom, &c., (traversing the custom as set out in the plea). Similiter.

On the trial before Williams, B., at the Cornwall Spring assizes, 1884, it appeared that the plaintiff was occupier, by an underlease from a lessee of the dean and chapter of Exeter, of a farm called The Gear, of which the locus in quo was a part. In the locus in quo there were certain sand hills, forming part of a line of sand hills called towans, one or two miles long, passing through the defendant's farm and extending into the adjoining lands. The property of the several owners there is called their Rights, as The Gear Right, Jenkins's Right, &c. The towans are covered with rush, and form a rabbit warren: they also afford some pasture to sheep and cattle. Between them and the sea, at the distance of a third of a mile, is a cliff, under which is the beach. If the towans are broken up, the sand, becoming loose, blows away, and nothing remains but rock. The defendant's witnesses stated that, when the wind was strong from particular quarters, great quantities of fresh sand were blown upon the locus in quo and the adjoining lands, and that this was the sand taken by the parties claiming the privilege in question; and that such accumulation, by the wind, took place every year. The locus in quo was in the parish of Perranabuth. The defendant was occupier of a farm called Trewaters, in the adjoining parish of St. Erme. The plaintiff proved that the defendant had taken the sand from *565] the towans in The Gear Right, on the 20th of May, 1882; previously, therefore, to the time to which the justifications in the third and fourth pleas were confined.

A witness for the plaintiff, on cross-examination, said that he recollected the occupiers of Trewaters, and of many adjacent farms in the same and neighbouring parishes, taking sand both from The Gear Right, and from the Rights of other occupiers through whose lands the line of the towans passed; but whether the evidence as to the taking sand from the adjoining Rights was in answer to a question put on that point by the defendant's counsel, or was voluntarily added by the witness to his answer to a question respecting The Gear Right only, was disputed. The plaintiff's counsel, on re-examination, asked whether there had not been interruptions to the taking of sand from the adjoining Rights. This question was objected to; but the learned Judge permitted it to be put, on the ground that the evidence on cross-examination had opened the inquiry as to the adjoining Rights. The witness then mentioned acts of interruption on the adjoining Rights.

The evidence of the several witnesses shewed that sand had been taken, as far back as living memory went, from the locus in quo, not only by the occupiers of Trewaters, but by numerous occupiers in St. Erme and several other neighbouring parishes. No particular preference to the occupiers of Trewaters was shewn. No commencement of the right appeared, nor unity of possession of

the locus in quo and the farms occupied by the persons taking the sand. The evidence in some instances went back for more than seventy years.

The learned Judge, in his charge to the jury, after pointing out that the issue on the first plea was proved *by the plaintiff, and that the third [*566 and fourth pleas were inapplicable to the trespasses proved, told them that the meaning of the second plea was that the defendant, by reason of his being the occupier of a certain particular messuage, was entitled to get a reasonable quantity of sand for manuring his land: and he added that he presumed they would expect, in order to sustain a plea of that description, proof that a particular farm in the parish of St. Erme, which was in the occupation of the defendant, and belonged to his landlord Mr. Simmons, should have been more favoured than the rest, and that he had some symptom of a right peculiar to that farm exclusively. He then pointed out that the farmers in several adjoining parishes had indiscriminately claimed to get the sand; and added that, if the particular farm of the defendant was not clothed with a particular right beyond any other, the defendant's allegation in the second plea was not proved. As to the issue on the fifth plea, his lordship asked the jury what evidence there was of the grant, or proof that such a person as Sir Richard Beville had ever existed, or had been the owner of Trewaters; and he said that it was for the defendant to prove that in point of fact the grant was made. As to the issue on the sixth plea, his lordship asked what evidence there was of the grant being made, and said that it was a thing not to be governed by imagination; that no evidence was given of the existence of John de Trewaters, and that one king might have made such a grant as well as another. As to the issues on the seventh and eight pleas his lordship asked what evidence there was to establish, in the slightest degree, the existence of the letters-patent, or to draw a line between Henry III. and any other king. As to the *issue on the ninth plea, his [*567 lordship asked what evidence there was to cause an inference that there ever was such a man as Richard Earl of Cornwall, or, supposing his existence, that he had made such a grant rather than any other person. As to the issue on the last plea, his lordship said that the whole evidence bore on that, for that the defendant's messuage did not, upon the evidence, stand out as distinguished from the rest. The jury at first said that they found for the defendant on the second and tenth plea, and for the plaintiff on the rest. His lordship then asked if they found any right in the particular farm of the defendant; to which they replied, not independently of the custom, but in common with all the other farms and parishes; and, in answer to another question from the learned Judge, they said that they found no right in the particular farm of the defendant, beyond the general custom. The verdict was then given for the plaintiff on all / the issues, except that on the tenth plea: and on that for the defendant.

In Easter term 1884 (April 18th,) *Follett* obtained a rule calling on the defendant to shew cause why there should not be judgment for the plaintiff, non obstante veredicto, with 1s. damages, on the tenth plea, or why the verdict obtained in the cause should not be set aside, and a verdict be entered for the plaintiff with 1s. damages; and, on the following day, *Coleridge*, Serjt. obtained a rule nisi for a new trial in case the court should make the plaintiff's rule absolute, on the grounds of the admission of improper evidence, and of misdirection.

**Crowder* and *Butt*, in this term (June 8th,) shewed cause against [*568 the rule obtained by *Follett*. The tenth plea set out a valid custom. It will be contended, on the authority of *Gateward's Case*, 6 Rep. 59, b, that the right here pleaded is matter of prescription, and cannot be the subject of custom, being a claim to take a profit in alieno solo. But it is material to consider in this case the nature of the thing taken, and the manner in which it becomes lodged upon the plaintiff's soil. [LITLEDAL, J. How is it possible to distinguish, for the purpose of establishing a custom, the sand which you allege to be drifted upon this close by the wind, from the sand which may be there

independently of that cause, as constantly happens to closes near the sea?] The evidence on this trial shewed that there may be a case 'in which the drift sand can easily be distinguished. The coasts is a peculiar one. And the taking of sea sand for manure on the coasts of Cornwall and Devon generally is a practice which has been recognised by statute, 7 Jac. 1, c. 18. [Lord DENMAN, C. J. Not the taking of it from another's soil adjoining the sea-shore.] This is merely something which has accidentally lodged on the soil, and is no part of it or of its produce; as, for instance, grass eaten in right of common of pasture is. The sand is taken on the close, instead of being collected on the sea-shore, from which it came, and where it might have been taken without objection. It is as if parties claimed to go upon a close for the purpose of picking up sticks, or seaweed. The two distinctions laid down in *Gateward's Case*, 6 Rep. 59 b, are, "between a charge in the soil of another and a discharge in his own soil," and "between an interest or profit to be taken or had in *569] another's soil and an easement in another's soil." The Court will not extend those distinctions; and here no claim is made to a profit in the soil. The custom falls within the same rule with that of dancing, *Abbot v. Weekly*, 1 Lev. 176, or that of playing at lawful games, *Fitch v. Rawling*, 2 H. B. 398, on the soil of another, which are good, though it may be said that they are attended with some injury to the land. The objection which has been taken to claiming some rights of this kind by custom and not by prescription (*Grimstead v. Marlowe*, 4 T. R. 717, cited note (8) to *Mellor v. Spateman*, 1 Wms. Saund. 341,) viz. that, if claimed by the custom, they cannot be released (as they may if annexed to the fee,) appears somewhat refined. The real question is, whether the thing claimed be or be not a profit à prendre in the soil. Here the right asserted is merely that of following a chattel; it is as much an easement as a right of way, or the rights of exercise or amusement already referred to. In *Stile v. Butts*, Cro. Eliz. 484, a custom for every tenant and inhabitant in Brookbank to dig, have, and carry away clay in Brookbank Green was pleaded, and no objection taken to the custom. A custom to turn the plough upon headland has been held a good justification of trespass and subversion of soil in the adjoining land for the purpose of turning the plough; 7 Vin. Abr. p. 174, tit. Custom (P.) pl. 4, See 7 Vin. Abr. 183, Customs (F.) pl. 1: that is a stronger case than the present. In the *Bishop of Lincoln v. Atwood*, cited 7 Vin. Abr. p. 176, tit. Custom (P.) pl. 14, a custom for the meadow-reeve to have, for his pains in collecting the bishop's rents, *a cartload of *570] hay out of the meadow in quo, &c., seems to have been allowed a good one. In the same volume, p. 179, tit. Customs (C.) pl. 10, p. 180, a case is cited, where a custom that if hogs came into the street they should be taken and killed and carried to the hospital for sustenance of the poor there, was allowed good, "though contrary to equity." There was a more objectionable custom than the present. The customs "when a man hath agisted his cattle in my park, in the time of a great snow, for necessity to cut the branches of the oaks for them," 7 Vin. Abr. p. 182, tit. Customs (E.) pl. 12; "to dry nets upon the land of another man," *ibid.* p. 183, tit. Customs (F.) pl. 2; and "for those that govern the common to enclose to their proper use," *ibid.* p. 186, tit. Customs, (G.) pl. 7: have all been held good. In 7 Vin. Abr. p. 179, tit. Customs (C.) pl. 4, it is said that there "are many cases of customs allowed for particular reasons in particular places, which if they were general would be contrary to law and common equity, and this in lands, goods, and liberties," which customs are allowed on reasons "not now disputable." And it is again laid down, shortly afterwards, that customs have become established *ratione loci*, which are not allowed throughout England: 7 Vin. Abr. p. 187, tit. Customs, (H.) pl. 10, in marg., where "the custom of the Isle of Man to hang for stealing a capon, but not an ox," is referred to. The practice of "bounding" in Cornwall, mentioned in *Rowe v. Brenton*, (a)

(a) See Appendix F. to the report of this case, 3 Mann. & R. 497. See also *Cress v.*

by which any tinner, under certain regulations, may acquire a right to search for tin in any waste lands within the county of Cornwall, paying one *fifteenth to the lord of the soil, is a stronger instance of a right exercised [*571] by local custom than the present. The render to the lord, there, of some part of the thing taken, makes no essential difference. The matters of easement claimable by the inhabitants of a district, in the soil of an individual, first, for the enjoyment of their estates, and, secondly, for the public good, are enumerated in the argument of counsel against the custom set up in *Fitch v. Rawling*, 2 H. B. 396; among them is the right "to water cattle at a certain watering place;" and such a custom appears to be recognised in *Pain v. Patrick*, 3 Mod. 294, (but *quære*); yet the water is more strictly the property of the individual over whose soil it flows, than the sand is that of the person upon whose land it has drifted. In *Selby v. Robinson*, 2 T. R. 756; a custom to break off, gather, and carry away the rotten wood of the branches of trees growing in a chase, for fuel, was held bad; but that was because the persons claiming were too vaguely described, and the case differed from this, inasmuch as the thing to be taken was part of the permanent produce of the soil. In *Oxenden v. Palmer*, 2 B. & Ad. 286, a custom was pleaded, for all persons residing in a parish, whose duty required them to amend the highways within the parish, to dig up and carry away stones and shingle from the plaintiff's close, being parts of the waste land between high and low water mark; and no question was there made, whether or not such a custom was valid in law. There is no authority, and there appears no reason, for saying that the privilege here in question may not be claimed as well by custom as by prescription; it is as easily defined in the one case *as the other, and not more injurious to the land-owner; the plea limits the custom to a reasonable quantity and reasonable times: and [*572] a distinct line is drawn as to the persons entitled. [LITTLEDALE, J., in the course of this argument, inquired if there were any case in which the inhabitants of one parish had established a custom to take a thing in another.]

Sir W. W. Follett, contra. The argument on the other side assumes that the inhabitants have a right to take the sand on the sea-shore. But that shore is the soil of an individual, as well as any other close, and there cannot be a custom to take the sand from it. If raised by the wind, the sand still belongs to the owner of the sea-shore. It is true that there is a legal right of getting sand for manure on the coast of Cornwall, but that is a right given by statute (7 Jac. 1 c. 18,) and limited thereby to the space below high-water mark. Many of the estates on this coast are bordered by sand-hills, which are merely the accumulation of the sand blown up by the wind in the manner stated on the trial. The sand-hills, when bound by the rushes growing on them, are a defence against the sea, and afford a pasture; and the loosening of those hills, by destroying the rush or otherwise, is a serious mischief. The manner in which this happens is very fully stated in the recital of stat. 15 G. 2, c. 33, s. 6, which forbids the cutting of bent from such sand-hills on the north-west coasts of England. Now the plea states that the sand in the first count mentioned was sand which had been and was "from time to time before any of the said times when, &c.," drifted by the wind from the sea-shore "unto, into, and upon the said close in which &c., and there deposited *and left;" and it asserts a [*573] right in the inhabitants to enter the close and take away reasonable quantities "of all such sand as had been and was so drifted and carried unto, into, and upon the same, and there deposited and left." There is, therefore, a privilege claimed of taking any sand, without limit, which may at any time, no matter how long since, have been drifted on the coast. The same pretension might be set up as to every field in that part of the county. If they may take one portion of the sand, they may take the whole; all the neighbouring soil has origin-

ally come by drifting; or, if not, no one can distinguish, after a time, what part of it has or has not so originated. The vagueness alone would make such an allegation of custom inadmissible. As to the validity of customs, the rule is, not merely that a custom to take part of the soil is bad, but that there cannot be a custom to take a profit from the soil. Such a right may be prescribed for in a free estate: but a prescriptive claim may be released and got rid of; a custom cannot. The cases cited from Viner's Abridgment cannot all be sustained, if it is to be supposed that in each of them the distinction between a custom and a prescription is kept sight of. But it is evident that in some instances the two are spoken of promiscuously. The custom, as it is termed, that a man, having agisted his cattle in a park, shall, in time of a great snow, for necessity, cut the branches of the oaks for them, is an example of this; a privilege so claimed could not be the subject of a custom. It may be laid down generally, that there cannot be a valid custom to do an injury to another's soil, or take a profit in it. A custom to hang nets may be good; but a case is cited *574] in 7 Vin. Abr. p. 178, *tit. Customs, (C) pl. 2, where a custom for all the men of Kent, when they fish in the sea, to dig in the land adjoining, and pitch stakes to hang their nets to dry, was held bad, as "contrary to common right and reason." (He was then stopped by the Court.)

LORD DENMAN, C. J. It is clear that this cannot be a good custom. The sand, the article claimed, is a part of the soil, and inseparable from it. And, if there were a distinction capable of being ascertained, there must surely be a limitation of the alleged right, as to time. It cannot be said that the inhabitants may take the sand which has drifted, at any distance of time; that would place the whole soil at the mercy of any person claiming under the custom. There is no necessity for entering into the particular instances which have been referred to in argument.

LITLEDALE, J. The right as here claimed is at any rate attended with great uncertainty. It would apply to many places which are not separated from the sea-shore by hedges, and where all the soil has been thrown up from the sea-shore; and in such cases the custom, as alleged, might go the length of taking the whole away. But, independently of this, sand, even if blown into an inclosed field of grass or corn, becomes soil. Of what is soil in general composed? Many things enter into it which are brought artificially or by accident, and the moment they are so brought they become part of the soil. The inhabitants themselves in this case, allege that they carry away the sand to *575] manure their lands; by using it as such manure they would make it part of their own soil; and thus they claim, by their treatment to make it soil, or no soil, as they think proper. This plea is an attempt to get rid of the necessity of stating a prescription and the facts necessary to support a prescriptive claim, by alleging a custom for the occupiers of tenements within the parish to do something within the close, each for the benefit of his particular tenement. I think the plea cannot be supported.

PATTERSON, J. It is clear that there cannot be a custom to take a profit in alieno solo. This evidently is a profit, since the parties take the sand to manure their own lands. Then it is not in alieno solo? That is denied, because it is contended that the taking is not in the soil. But the claim is clearly to take a part of the ground; whether sand be blown in or mud lodged, it is part of the close when once upon the land. A distinction may be attempted between the sand lately drifted and the other soil of the close; and, where the sand forms a considerable mound, it may be easy to say that the upper part is drifted; but if that were removed, and the lower arrived at, it would be impossible to distinguish. I am, however, of opinion that when any thing in the nature of soil is blown or lodged upon a man's close, it is part of the close, and he has a right to it against all the world. This therefore was a claim of profit to be taken in alieno solo.

WILLIAMS, J. I am of the same opinion. The custom alleged is uncer-

tain, indefinite, and absurd. In point of fact there can be no rule for ascertaining, in a case like this, what is sand blown from the sea shore, *and what is the original soil. And, in law, I do not see how there could be any such custom as this. [*576]

Rule absolute for judgment non obstante veredicto. ¶

Sir *W. W. Follett*, on a subsequent day of this term, (a) shewed cause against the rule for a new trial. First, the direction to the jury, that proof of a general custom would not sustain proof of the prescription, was accurate. The learned judge did not tell the jury, that the prescription could not exist in right of one estate, if it also existed in right of several others; but that a proof of a general custom could not be proof of the prescription: and this was correct. The attempt on the part of the defendant, was to turn a bad custom (as this is now decided to be by the judgment on the tenth plea) into a good prescription. The evidence shewed a general custom; there was nothing to connect it with the estate of *George Simmons*; the custom no more proved a prescription than a prescription would prove a custom. In a case at nisi prius, in Cornwall, before *Patteson, J.*, that learned judge held, that a private and public way could not co-exist. Secondly, the direction as to the issues joined on the pleas of non-existing grants was substantially correct. No evidence of such grants existed: the generality of the usage was incompatible with its originating in a grant to the occupier of the particular farm. It was impossible for a jury to refer such a usage to the grant alleged to have been made by the dean and chapter, or by the Crown, or by the Earl of Cornwall, unless further evidence had been given, pointing to some particular time, place or person. One step in such *further evidence would have been to shew the existence, for example, of *John De Trewaters*: and so as to the other [*577] suggestions made by the learned Judge. In *Livett v. Wilson*, 3 Bing. 115. (S. C. 10 B. Moore, 489,) a non-existing grant of a right of way was pleaded and traversed; the only evidence was a user, as to which the proof was doubtful; and the judge having left it to the jury, whether there had been an exercise of the right by virtue of a lost deed, and the jury having negatived it, the finding was supported. Here the evidence no more shewed a grant to the owner of *Trewaters* than to any other person. Thirdly, the evidence of interruptions on lands adjoining *The Gear Right* was properly admitted. The defendant, in cross-examination, had obtained the fact that the usage contended for by him had prevailed on a part of the towans not comprehended in *The Gear Right*, and the plaintiff of course was entitled to meet that fact by shewing that the usage had not been acquiesced in. But even if this evidence were not admissible, its reception could be no ground for a new trial. The only effect of it was to weaken the evidence, not of the right in the locus in quo, nor of that in respect of *Trewaters*, but of the general usage: but the jury found in favour of the general usage, and therefore against the evidence to which the objection is made. But, further, it is evidence which the plaintiff was entitled to introduce in chief, to meet the claim as to the locus in quo, in respect of *Trewaters*; for it appears that the towans constitute a line of sand-hills of the same kind, a part being in the locus in quo: this species of property is the same throughout, though in different hands. The case falls therefore within the principle of *Stanley v. White*, 14 East, 382. In *Tyrwhitt v. Wynne*, 2 B. & Ald. 554, (b) evidence of reservations of mines in one part of a waste was [*578] held not admissible to support a plea, in trespass quare clausam fregit, of soil and freehold in another part of the same waste; but the judgment of *Abbott, C. J.*, proceeded upon the principle that the evidence, even if admitted, could have been of no importance to the verdict: and it is clear, that the right of the minerals

(a) Saturday, June 13th.

(b) See *Hollis v. Goldfinch*, 1 B. & C. 205, and the judgment of *Bayley, J.*, there, p. 219.

could not affect the question of right to the surface. Here the verdict was against the party giving the evidence which is questioned.

Crowder and Butt contra. First, the direction was wrong as to the plea of prescription. It is not necessary, in order to show a prescriptive right, that no other party should have done the act justified under the right. The evidence in fact showed that the former holder of Trewaters, and all previous holders, for more than seventy years, had exercised the right. That is not met by showing a right, or a practice, in others. Those others might also have a prescriptive right or rights, or they might claim a right under some custom. And such a custom would not be inconsistent with the defendant's prescription. The custom is now decided to be bad; but the plaintiff is not entitled to meet evidence of a legal prescription by proofs of a claim made by others to such an illegal custom. If a legal and an illegal claim exist, the act should, if possible, be referred to the legal claim. [PATTERSON, J. Here are two issues, one on the custom, one *579] on the prescription. Evidence being given, *the judge must tell the jury to which issue it applies.] There might be a right by prescription in the owner of Trewaters as such, and also a right in the same person by custom as occupier of land in St. Erme, if the custom were legal. The evidence might prove both. But it was put to the jury as if the proof of the custom negatived the prescription. And, even if the prescription and custom were inconsistent, the defendant might apply the evidence to the prescription. Otherwise the proof of a prescriptive right of common will become almost impossible. Secondly, as to the direction respecting the issues on the lost grants. [PATTERSON, J. Was there any evidence as to the commencement of the right?] There was not. [PATTERSON, J. Then the evidence would prove a prescription, if any thing. The non-existing grants may be left out of the question.] They would be applicable, in case a unity of seisin were shown. [LITLEDAL, J. I doubt whether the 7th, 8th, and 9th pleas be not objectionable on the same ground as the 10th.] The present question is, whether the evidence supported them; and whether it supported the 5th and 6th pleas. There was good evidence on all. The learned Judge pressed upon the jury that there was no proof that such a man as Sir Richard Bevil ever lived. But his seisin was admitted by the traverse of the grant; *Cowlishaw v. Cheslyn*, 1 Cr. & J. 48, where evidence offered to disprove the seisin was held inadmissible. [Lord DENMAN, C. J. I do not think that that case was much considered.] It goes much farther than the present. In *Stott v. Stott*, 16 East, 343; see p. 349, it was laid down that seisin could not be disputed on a similar issue. For the same reason, it should *580] not have *been put to the jury, whether they believed that Henry III. or Richard Earl of Cornwall granted. The only question open was, whether a valid grant could be presumed; if so, there could, on these pleadings, be no question as to the person granting. And the want of direct proof of the letters-patent was put too strongly. The jury should have been told to explain the user, either by a lost grant, or by a prescription, according to their discretion; and the evidence should have been applied to each of the 2d, 5th, 6th, 7th, 8th, and 9th pleas. *Livett v. Wilson*, 8 Bing. 115, (S. C. 10 B. Moore, 439), differed essentially from this case. The evidence as to user there was conflicting, which circumstance took the case out of the general rule. It is true that, in *Doe dem. Fenwick v. Reed*, 5 B. & Ald. 282, Lord Tenterden said that presumptions of grants and conveyances had gone to too great length: and it was held that a jury must believe in the actual existence of a deed: but there the possession, which was shown in order to raise the presumption of the deed, might, on the facts proved, be legally accounted for upon another supposition, and that is the ground upon which the judges proceeded. (a) There is no greater

(a) Holroyd, J. distinguished the case from a right of way; and Bayley, J., at Nisi Prius, told the jury that the loss of a grant of right of way was more probable than that of a conveyance.

objection to presuming a lost grant from user than there is to inferring a prescription, which always implies a grant. [WILLIAMS, J. No particular person is specified in laying a prescription.] But the grantor's seisin is admitted here. Thirdly, as to the admissibility of the evidence. The defendant's case, in support of the prescription, was simply that the user existed in the locus in quo; *but the witness, on cross-examination, being asked as to this user, chose to add that as to which no question was asked, namely, that it existed [561] elsewhere. This has not the character of evidence given by the defendant; and the plaintiff was therefore not entitled, in re-examination, to show the interruptions of the user elsewhere. [WILLIAMS, J. I am perfectly satisfied that the evidence, as to the user elsewhere, came out in answer to questions from the defendant's counsel.] But net to questions respecting the user elsewhere. As to the argument, that in fact the custom was found in favour of the defendant, it is plain that the evidence of any interruption was likely to prejudice the other parts of his case.

LORD DENMAN, C. J. (After stating the pleadings.) The questions are, whether the evidence was properly received, and whether the jury were misdirected. The nature of this record must have made it very difficult for a judge to deal with it, so as to avoid introducing expressions not technically and strictly correct. I am not however, prepared to say that in fact any thing incorrect was said. As to the evidence, it was shown that persons not proprietors of the defendant's farm had taken sand in places besides the locus in quo. On looking at the report of the evidence, it is clear that this proof came out on the cross-examination of the plaintiff's witness. But it is suggested that this was thrown in voluntarily by the witness, and that therefore the defendant is not bound by it as his own evidence. It did, however, come in, and the plaintiff was, therefore, entitled to pursue it, unless the defendant got it struck out; and that was not done. The re-examination, therefore, might properly take place as *it did. And, indeed, it seems rather more probable that the evidence [562] was given in answer to a question from the defendant's counsel than otherwise; although that is a fact not agreed upon at the bar. The next objection is, that there was a misdirection in telling the jury that evidence of exclusive enjoyment was requisite; and the language objected to was, "that the farm of the defendant should have been more favoured" than the rest, and expressions to a similar effect. Now supposing that to be put to the jury by way of stating that there were two issues, one on the prescription, and one on the custom, and desiring them to say which they inferred from the evidence, there would be no misdirection, except on the supposition that in law there could be, at the same time, both a prescription and a custom in respect of the same land. If there could, the question should not have been put in the alternative. On that point we entertain doubts, and will take time to consider. The other objection relates to what was laid down respecting the pleas of lost grants. I think it sufficient on this point to observe that, if there was evidence of any one of the alleged grants, there was evidence of all. The Jury might infer one as much as the other. That, therefore, makes an end of the question; for, that being so, there can really have been no evidence to support any one. Without inquiring how far the record estopped the plaintiff, there was no evidence to point the user to any one grant in preference, and therefore, clearly no evidence for any. As, therefore, the defendant could not possibly entitle himself to the verdict on those pleas, it is immaterial whether the language of the learned Judge was more or less strong.

*LITTLEDALE, J. As to the evidence, the proof respecting the adjoining land was brought out upon the defendant's cross examination. If [563] the witness threw that in voluntarily, the defendant might have had it expunged from the judge's notes. As to the expression, that this farm should have been shown to be particularly favoured, I do not say that such evidence is essential to the proof of a prescriptive right: it is material only for the purpose of showing whether the user resulted from prescription or custom. If prescription and

custom can exist together, the question should not have been left in the alternative. As to the observations made by the learned Judge on the 5th, 6th, 7th, 8th, and 9th, pleas, it is said that the want of evidence as to the existence of Sir Richard Bevill or John De Trewaters should not have been put to the jury, because the plaintiff was estopped by the admissions on the record. Now, as to pleas of this kind, which have arisen in one's own memory, no one ever heard of grantors being introduced on the stage unless they had actually existed. Whether their existence must be proved is a point that has never arisen. Suppose the plea had been that the dean and chapter of Hampstead in Middlesex were seized in fee of the locus in quo, and that John Duke of Westminster was seized in fee of the defendant's estate, the defendant's argument would be, that we must take the existence of such personages for granted. Now as to these pleas, I think this general answer may be given:—that if the evidence establishes an user as far back as memory goes, and there does not appear to have been any time at which it did not exist, that is proof of a prescription: and, supposing the evidence sufficiently strong, a prescription is what the jury would find; and *584] the evidence in such a case to leave it doubtful whether the right existed sixty or seventy years ago, it may be protected under the plea of a non-existing grant; but, if the evidence of user goes far enough to prove a prescription, such evidence cannot be relied on to prove a grant. The learned Judge, therefore, was right in telling the jury that there was no evidence of the grants. The same remarks apply to the pleas of grants to the inhabitants as of grants to an individual.

PATTESON, J. With respect to the question, whether the evidence was improperly admitted, I confess that I felt considerable doubt till I heard the state of the case at the time when it was admitted. No name is given to the close in the declaration, so that there was nothing to draw the judge's attention to the fact that it was called The Gear Right; and the learned Judge says that, in fact, he had at that time, no notion that this was the distinctive name of the close, but thought that the name designated some extensive district. Had it appeared that the cross-examination of the defendant went only to shew that other persons exercised the right on this close, I should have thought the evidence in question was not let in. But, when it was left on the Judge's notes that the user had been in other places, that, however it got upon the notes, let in the re-examination. If it arose from the voluntary evidence of the witness, it should have been expunged; for an adverse witness cannot let in evidence against a party, on cross-examination by him, which he could not give in chief: but here I must take it that the defendant, in some way or other, let in the evidence in *585] cross-examination: no fault, *therefore was committed in receiving the evidence on re-examination. Sir William Follett urges that, even supposing the admission to have been improper, no harm was done; and it does appear that the defendant was not in fact, prejudiced. What the consequence of that would be, I will not say. As to the pleas of non-existing grants, I wish to give no opinion whether the onus probandi of the existence of the persons is thrown on the party pleading: for I throw these pleas out of the question. If there was proof of any private right in the defendant, it was proof of a prescription. No commencement of the right was shewn. Where that is so, the evidence is held to prove a prescription, not a grant: to prove a grant, it should at least be shewn that the usage commenced about the time stated. No one can say which grant was proved of all those pleaded. It is therefore, immaterial to consider whether the expressions of the learned Judge were strictly warranted or not: on that I wish to give no opinion. The third question depends upon this, whether private prescription and customary right can exist together. If they could not, and the evidence must necessarily be applied to one or the other, the direction was substantially correct; for, though a faulty expression may occur in a long summing up, the summings up of Judges are not scrutinized so

minutely as to make that of importance. Therefore, as to the phrases "favoured" and "exclusive," in one sense a prescriptive right is exclusive: it is not common to all mankind: we are not bound to interpret it to mean that others cannot have it: so the word "favoured" was to point out to the jury that they must be satisfied that the occupiers of the farm enjoyed the privilege, because they were *occupiers, *and that the right was attached to the farm. I can see no fault, therefore, in the charge, on the supposition that the [*586 prescription and custom cannot co-exist. As to that, we will take time to consider. No case has been cited to shew that they can co-exist: I should like to hear whether there be any such. I hope the case in Cornwall, alluded to by Sir William Follett, will not be considered as authority. The opinion which I then expressed was on the sudden, at Nisi Prius; and, on reflection, I am by no means disposed to say that a private right of way may not exist together with a public right of road. (See *Chichester v. Lethbridge*, Willes, 71.) But that would be a question on the evidence. If there were no evidence except of user by all persons indiscriminately, I should say there was only evidence of a public right of road: if there was only user by an owner of a particular farm, then I should infer a prescription.

WILLIAMS, J. The pleas on the record placed my mind in uncertainty: for it appeared to me that, so far as the evidence was in favour of the custom, it was against the prescription. How far there was any fault in the pleas, or otherwise, I cannot say. I left it to the jury that, if they thought the getting the sand was referable to the custom, without reference to the particular farm, there was no evidence of prescriptive right. Certain expressions in my summing up remind me how far I was attempting to explain to the jury the distinction between a prescriptive right attached to a particular farm, and a general custom: especially the expression as to the defendant's message standing out as distinguished from the rest. So the words "exclusive" and "favoured" were used to bring the attention of the jury to [*587 the point, whether the right was particular or general; for instance, if a man set up a right of common attached to tenement A., a usage in respect of tenements B., C., D., &c. proves nothing. With respect to my having pressed upon the jury that there was no proof of the existence of the persons named in the pleas of non-existing grants, that proceeded from my not being able to see what was to satisfy them whether one person had granted rather than another. How could it be said that there was evidence of any particular grant, when the proof applied equally to all? *Cur. adv. vult.*

Lord DENMAN, C. J., on a subsequent day of the term, (June 16th), delivered the judgment of the Court.

This case, when last argued, was considered to be in the same position as if there had been only two pleas of justification: one under a prescription to take sand upon the plaintiff's close; the other under a custom; and as if my learned brother who tried the cause had told the jury that they were to consider which, if either, of these pleas was proved, for that they could not find both in the affirmative. We desired them to consider whether this proposition of law was correct: but, upon reflection, it appears to me that this was not the question, but that the ruling must be taken with this qualification, viz. that they could not find both these things upon the particular evidence laid before them, but must decide which of the two they thought it proved.

*Whether a prescriptive and customary right to the same privilege can [*588 by possibility exist in respect of the same land, if each be distinctly proved by proper evidence applicable to each, is an abstract question which we need not determine. On looking back to the statement made at the time of moving for a new trial, we find reason to doubt whether the learned Judge did so submit it to the jury; for he was ready to receive their verdict on the second plea, affirming the prescriptive right, if they had chosen to persevere in it. But the ruling, if it had been in those terms, must be taken with reference to the

fact that the *same evidence* was offered in support of both the issues. It was evidence of enjoyment only, by which the party pleading his right undertook to prove it. But it would be inconsistent with common sense to say, that the very same facts could prove two rights of a completely different nature, such as that of one taking sand by prescription to himself and to his ancestors alone in respect of particular lands, and to himself in common with his brother farmers in respect of all lands in the parish in respect of which the prescription is claimed, *and also to himself and all the inhabitants of the county.* It was manifestly necessary that the jury should make that election among inconsistent rights which the evidence should appear to them to establish. We think, therefore, that the question was properly submitted, and the direction right.

Rule for a new trial discharged.

*589] *BARONS *against* LUSCOMBE, FORD, and LEAMAN. *Monday, June 8.*

Two justices allowed the accounts of overseers going out of office. By a subsequent warrant, reciting that on the accounts a certain balance appeared to be in the hands of one of the overseers, which he had neglected and refused to pay, they required the succeeding overseers to distrain for the balance on his goods, under stat. 50 G. 3, c. 49, s. 1. Afterwards, a doubt being raised whether the balance was correctly ascertained, they signed an order to the overseers to suspend, and not execute, the warrant of distress. This was delivered to one of the overseers, who nevertheless distrained. An action of trespass being brought against him,

Held, that the justices had no power to suspend the order on account of a doubt as to the correctness of the balance; that the defendant, therefore, was acting under a legal warrant, and was entitled to a demand of a copy of the warrant, under stat. 24 G. 2, c. 44, s. 6.

Quere, whether the justices who issued the warrant could have suspended it under any circumstances, as, for instance, upon discovering that the balance had been paid before the warrant was signed.

TRESPASS for seizing and distraining the plaintiff's cattle, and converting, &c. Plea, not guilty. On the trial before Bosanquet, J., at the Exeter Spring assizes, 1834, the following facts appeared. The plaintiff was one of the overseers of the parish of Ashburton, for the year ending Lady-day, 1832. The accounts for that year were allowed by two magistrates, Mr. Drake and Mr. Kitson. Subsequently, upon complaint before two other magistrates, (a) Mr. Lane and Mr. Monro, that the plaintiff had not paid over the balance in his hands to the succeeding officers, a warrant was issued, directed to Luscombe, who was one of the four overseers of the succeeding year, and to the other three overseers, under the hands and seals of the latter magistrates, adjudging that, on examining and stating the accounts, 81*l.* 7*s.* 9*d.* was remaining in the plaintiff's hands, and that he neglected and refused to deliver it over to the overseers of the present year, and requiring the four overseers, or one of them, to levy the *590] sum by distress upon the plaintiff's goods. This warrant was *dated 30th October, 1832. Some doubt having afterwards arisen whether the balance had been correctly ascertained, Mr. Monro signed an order, directed "to the churchwardens, constable, and overseers of the parish of Ashburton," and stating that the undersigned justices did order and command them to suspend, and not put in execution, the said warrant. This order was dated 19th February, 1833. After Mr. Monro had signed this, he sent it to Mr. Lane, who signed it and sent it back to Mr. Monro. The order was not sealed. Mr. Lane stated at the trial that he had had no previous conversation with Mr.

(a) It appears to have been assumed, in the judgment, that the justices who allowed the accounts were the same as those who signed the warrant and order of suspension; and this is, therefore, so stated in the marginal abstract.

Monro about rescinding the warrant, and that he did not recollect having seen him between the signing of the warrant and receiving the order of suspension. The order was shortly after served on Luscombe by the magistrates' clerk. Luscombe afterwards, in March, 1833, with the assistance of the other two defendants, distrained the goods in question. No proof having been given of any demand of a copy of the distress warrant, the defendant's counsel contended that the plaintiff must be nonsuited. under stat. 24 G. 2, c. 44, s. 6. It was answered, that the magistrates had a right to suspend the warrant, and that, while it was so suspended, the defendants were not acting under it, and, therefore, that they were not entitled to a demand of a copy. The learned Judge reserved the point, and directed a verdict for the plaintiff. In Easter term, 1834, *Bompas*, Serjt., obtained a rule nisi for a nonsuit.

Sir W. W. Fallett now showed cause. The magistrates, on discovering a mistake, and finding reason to believe that the plaintiff was not in arrear, had power *to suspend their previous order; and the order of suspension was signed [591] by the magistrates who made the first order. The defendant had notice of the suspension before the distress was made. As to the general question of the power to suspend, a magistrate cannot be irretrievably bound by merely having put his name to a warrant. On discovering that a party against whom a warrant has issued is not liable to the charge, he may direct the constable, who is merely his servant, not to act on the warrant. An order of removal may be superseded, before it is executed, in a case of surprise, *Pancras v. Rumbald*, 2 Bott, pl. 781, p. 661, (6th ed.) citing 1 Str. 6. (See also note (6) to Nol. P. L. 213, (4th ed.) And see *Rex v. Smith*, 2 Bulst. 342;) or it may be superseded after execution, *Rex v. The Justices of Norfolk*, 5 B. & Ald. 484. [PATTERSON, J. That was by agreement of the parties. So a Judge who has signed the order for the execution of a convict may respite him; and this Court may stay the execution of its own judgments. And this is a beneficial power. Such a power may be exercised at any place or time before the execution of the original order, as in the case of a respite; the principle being that the officer, whose only authority is the order of the judge or magistrates, cannot act while that order is suspended. The overseer here is merely a ministerial officer; his authority is revocable by the party conferring it, as that of a commissioner of bankruptcy is revocable by the great seal. There can be no necessity that the magistrates should meet, if they concur in suspending their own order. One of several judges acting under a special commission might, if he felt *doubts [592] as to the propriety of a conviction, communicate his doubt as to the other commissioners, and they might concur in a respite without meeting. Suppose magistrates issued a warrant to take goods, and afterwards discovered that they had no jurisdiction, and countermanded the order, and the party having the warrant chose still to execute, it is clear that the owner of the goods must have a remedy; yet he could have no remedy against the magistrates who had countermanded: the person executing the warrant must, therefore, be liable. If a constable were indicted for not issuing a warrant, would it not be a defence to shew that it was countermanded?

Bompas, Serjt. (with whom was *Crowder*) contra. First, the magistrates had no power to suspend; secondly, if they had, this was not a regular exercise of such power; thirdly, the parties here, as they acted bonâ fide, were at any rate entitled to a demand of the warrant. First, the only instance in which an order has been held capable of suspension (independently of express enactment) have been where no third party had become interested, or where the proceeding was a criminal one. A Judge respites a criminal whom he has tried, not simply because he is in the commission, but because he is considered to represent the Crown, who is the party adverse to the prisoner. But it is very doubtful whether, if a third party became interested, as by escheat, the authority of the Judge by itself would be sufficient. A warrant to apprehend is a mere *ex parte* proceeding, in which no other party is interested; and, therefore, that case is

*593] reduced to the principle already referred to, of a *consent by all parties interested. But here the succeeding churchwardens and overseers are interested; and, even in the event of an appeal against a disallowance of accounts under stat. 60 G. 3, c. 49, s. 2, the appellant must, in the first instance, pay over to the succeeding officers the sum admitted by him to be due, and give recognizance to abide the order of sessions as to the rest. Besides, here the magistrates were not acting under their general power as justices of the peace, but as arbitrators under the statute, and their decision had the effect of an irrevocable award. [PATTESON, J. I agree, if the suspension had the effect of re-opening the accounts; but the warrant proceeds not merely on the settlement of the accounts, but also upon a neglect or refusal to pay.] The facts of the case show that the object was merely to re-open the accounts. Secondly, that the act of the magistrates must at any rate be joint. According to the argument on the other side, a single magistrate might in all cases protect himself against an action by his single revocation. Thirdly, the defendant, at any rate, was acting *bonâ fide* under the warrant (unless it was a nullity), and therefore was entitled to the benefit of stat. 24 G. 2, c. 44, s. 6, which was meant to protect officers who have innocently exceeded the strict limits of their authority. It is not necessary, for this purpose that the warrant should be legal; *Price v. Messenger*, 2 B. & P. 158. It is a fallacy to assume that the constable can be sued wherever the magistrate cannot: there is no general right of action in every case of an irregular proceeding, where the party acts *bonâ fide*. (He was then stopped by the Court.

*594] *Lord DENMAN, C. J. The very general way in which the argument was put on the plaintiff's side startled me. If the warrant was wholly invalid, and the magistrates gave notice of nullity to the officer before it was executed, more especially if the party interested had not then required him to execute it, possibly the officer, if sued, would not be entitled to a copy of the warrant. But that is not the present case; and it is not necessary for me to give any opinion on the more general doctrine. It appears that the question which arose here was, whether the accounts had originally been settled rightly by the magistrates. After that settlement the magistrates had no right to rescind their decision. The decision of the justices, and the order to pay the balance, were legal; and the magistrates could not afterwards entitle themselves to rescind by saying, "we now doubt as to the state of the accounts." The constable therefore was justified in acting on the warrant, and was not acting of his own wrong. The *bona fides* is not impugned; he acted on a warrant; and therefore the copy should have been demanded.

LITTLEDALE, J. By stat. 50 G. 3, c. 49, s. 1, the accounts are in the first place, to be submitted to two or more justices, who are, if they think fit, to signify their allowance and approbation. After they have done this they are *functi officio*, and cannot open the accounts. Then if the churchwardens and overseers, who have accounted, refuse to pay the arrearages which appear on the allowance of the account, two or more justices (not necessarily the same as these who allowed the accounts) may issue their warrant to the subsequent *595] churchwardens and overseers to levy such arrearage. *Here it is said that the justices who allowed the accounts had made a mistake. Be it so. Still they had no more right to make an alteration afterwards than an arbitrator has to alter his award. Their power was at an end. The parties, if dissatisfied, should have appealed under the second section. The justices were authorised to issue their warrant; and they have done so. They had no right to suspend on account of a supposed mistake. If it had appeared that they had made a wrong inference as to the fact of a refusal to pay, I will not say whether they might or might not have countermanded their warrant; but they had no right to examine the accounts again. On this ground, therefore, I am of opinion that the warrant remained in full force, and that there should have been a demand of the copy.

PATTESON, J. The doubt on my mind all along has been as to the general question, whether the warrant could in any case be revoked, upon its being discovered that it had issued improperly. I do not say whether it could or not: no authority goes the length of determining this point; and, if it were now necessary to enter into the general question, I should wish for more time to consider it. But here it is plain that the warrant was revoked with the view of reconsidering the state of the accounts, which the magistrates clearly had no power to do. The accounts had been rendered, had been the subject of discussion, and had been allowed. The act, after directing that two or more justices shall examine and allow, authorises any two or more justices to issue their warrant for levying the arrears in case of refusal to pay. Suppose the parties had gone to two other justices, what right could these justices have had to enter into the question? But, for this purpose, the justices who issue [*596 the warrant are other than the justices who allow the accounts. If it had appeared that the warrant was issued on the notion that the money had not been paid, and that in fact it had been paid, that would have raised the general question, on which I give no opinion whatever. On the facts of this case the warrant remained good, and the defendant was therefore entitled to a demand of the copy.

WILLIAMS, J. I need not give any opinion how far, upon the discovery of a mistake in a matter of fact, the justices would have power to withdraw their warrant. But here the evidence satisfies me that the real cause of superseding the warrant was a doubt entertained respecting the propriety of the allowance of the accounts. They wished to enter again into the consideration of the accounts. But they had no right to rescind their warrant for this purpose.

Rule absolute.

*The KING against JOHN HENRY MANNERS SUTTON, Esquire. [*597

An infant, eleven years old, inherited land charged with repair of a bridge. His guardian in socage resided on the property; the infant did not, except on occasional visits: Held,

1. That although the infant was actually seised, yet, being so by the possession of his guardian, he was not such owner or occupier of the land, as to be chargeable by indictment for non-repair of the bridge. 2. That the guardian was such an owner and occupier.

Semble, that infancy would not exempt a party, liable in other respects, from indictment for such non-repair, if there were no other person against whom performance of the repairs could be enforced.

Quære, Whether an owner, who is not the occupier, of lands charged with repair of a bridge, be indictable for non-repair?

THIS was an indictment for the non-repair of Kelham Bridge, in the county of Nottingham, which the defendant was alleged to be liable to repair, *ratione tenuræ*. The indictment was in the common form. At the trial before TINDAL, C. J., at the Derby Spring assizes, 1834, the following facts appeared. The defendant's father died intestate, seised of the estate in respect of which the obligation to repair was said to attach, and leaving his widow, the defendant's mother, and the defendant, his son and heir-at-law, him surviving. The defendant was eleven years old, and was in a course of education from home, but passed his vacations there, and occasionally made a visit there at other times. His mother was his guardian,^(a) and resided on the property, dwelling in the mansion house. The jury found for the crown.

(a) At the time of the trial she was acting under an order of the Court of Chancery, which, however, appears to have been made after the day laid in the indictment. No notice was taken of it in the arguments on shewing cause, or in the judgment of the Court.

In Easter term 1834, Sir John Campbell, Attorney-General, moved, upon leave reserved, for a rule to shew cause why the verdict should not be set aside and a verdict entered for the defendant, or a new trial *had. The grounds *598] of motion were, first, that the defendant was not liable to this indictment, because he was an infant; secondly, that he was not liable, inasmuch as he was not the occupier of the land; thirdly and fourthly, that evidence had been improperly admitted and rejected; and, lastly, misdirection. A rule nisi was granted on all the points except the last, which was of no general importance; and in the ultimate judgment of the Court the first two only were noticed.

Sir F. Pollock, *Balguy, N. R. Clark, and Waddington* shewed cause in last Easter term. (a) First, as to the liability in respect of occupation. It is not correct to say that an occupier only is liable to the repair of bridges, *ratione tenuræ*. To this point, 1 Roll. Abr. p. 390. tit. Chimin Common (B) pl. 2, was cited in moving for the rule. It is said there "un owner de terre qui nest l'occupier de ceo, ne poet estre charge a repaireur un common chimin; mes solmen le occupier. Hil. 11 Car. B. R. en un Forster's case." And this is repeated in Com. Dig. Chimin (A. 4.) p. 27, and occurs also (apparently translated from Rolle) in 1 D'Anvers's Abridgement, 783, tit. Chimin (B.) (a) pl. 2, where Palm. 389 (b) is referred to for the same point. But these authorities relate to highways only; the case in Palmer (also reported in 2 Roll. Rep., (Nottingham's case, 2 Roll. Rep. 412,) arose upon an indictment under stat. 2 & 3 Ph. & M. c. 8, which expressly mentions occupiers; and the placitum in Roll. Abr. may probably have reference to the same statute. The result of the authorities *as to bridges, is, to throw the liability *ratione tenuræ* upon the *599] owner. The charge is in respect of the estate, without regard to the person who may occupy; and therefore Lord Coke says, 2 Inst. 703, s. 5, "An infant that hath house or lands by descent or purchase, is liable to this public charge" (repair of bridges under stat. 22 H. 8, c. 5, s. 3,) "and so is the husband of a feme covert." [LITLEDALE, J. In *The Queen v. Sir John Bucknell*, 7 Mod. 55, (S. C. 2 Ld. Raym. 792, 804. 4 Vin. Abr. 288. tit. Bridges, B, pl. 26, and in marg.) Lord Holt speaks of the liability to repair a bridge *ratione tenuræ*, as a charge on the possession, and says that "every tenant in possession, be he but tenant for years or at will, is bound to repair." No doubt that is so as to a tenant for years; and in *Regina v. Watson*, 2 Ld. Raym. 856, (S. C., as *Regina v. Watts*, 1 Salk. 357,) it was adjudged that a tenant at will was bound by reason of his possession to repair his house adjoining a common bridge: that, however, was in order that the public might not be prejudiced; but it was said that he was not compellable to repair as to his landlord. LITLEDALE, J. Do you say that both owner and occupier are chargeable? There is no reason why they should not be so. When the occupier is chargeable it is because the owner cannot be found; the occupier is then *prima facie* the owner. And that is consistent with the doctrine laid down in 2 Wms. Saund. 158d. note (9) to *Rex v. Stoughton*, where it is said, "It seems that the occupier and not the owner is the proper person" to be indicted, "for how are the public to know who is the owner of the lands charged with the repair?" and *Regina v. Watts*, 1 Salk. 357, and *The Queen v. Bucknell*, are cited. But, *600] if the owner can be found, as in this case, *there is no need to indict the occupier, and thereby occasion a multiplicity of proceedings. The liability is, in principle, a charge upon the land, and in the nature of a service: and therefore it belongs, properly, to the owner. [LITLEDALE, J. You say, then, that if tenant in fee leased for ninety-nine years, and the tenant underlet for twenty-one, and the under-lessee from year to year, all would be liable.] That would follow. But the occupier is liable only for the sake of public

(a) April 29th. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

(b) *Thomas Bole's Case*. See 4 Vin. Abr. 507, tit. Chimin Common (E.), pl. 9. *Serjeant Hoskin's Case*, Godb. 400.

convenience. And, if a tenant at will were indicted and fined, he would have his remedy against the owner or any other party chargeable. *The Queen v. Sir John Bucknell*, 7 Mod. 98. A corporation may be liable *ratione tenuræ*, though they cannot, properly speaking, have any personal occupation of the land. It would be a hardship on the public, if an owner could relieve himself from the duty by putting in an insolvent tenant: at any rate it would be an inconvenience if an expensive repair might in any instance be thrown upon a multitude of small farmers. He who is in the receipt of the rents and profits, is the proper person to be looked to. The very expression *ratione tenuræ* does not imply a mere occupation; and repairs done by a mere tenant or undertenant, who might not have sufficient interest to induce him to defend an indictment, would be no satisfactory evidence of liability on a subsequent occasion.

But, further, if an occupation is requisite, the defendant here did occupy, by his guardian. Where there is a liability in respect of an estate, it attaches to every part of the estate, though the whole be divided among several hands; *Regina v. The Duchess of Buccleuch*, 1 Salk. 858. The guardian here occupied the mansion house, and *possession by the guardian in socage was possession [601 by the ward, 1 Cruise's Dig. p. 50. tit. I. s. 25., 4th ed. 1835, Goodtitle dem. *Newman v. Newman*, 3 Wils. 516, See Co. Litt. 15 a, and Co. Litt. 88 b, where it is laid down that guardian in socage "hath nothing to his own use, but to the use of the heir." [COLERIDGE, J. Do you consider the guardian an occupier?] She is at all events not so while the infant remains with her. [COLERIDGE, J. A guardian in socage gains a settlement by residence with the infant on the estate, *Rex v. Oakly*, 10 East, 491. And if the guardian is an occupier, is the infant so at the same time?] It is true the guardian gains a settlement; but that is merely by the right of residing irremovably on the estate, which the infant has also. And if the guardian is liable as an occupier, it does not follow that the infant may not be so too.

Then as to the objection that an infant is not liable to this indictment; in support of that proposition, 4 Bla. Comm. 22, was cited, where it is said, "The law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemeanors; so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences; for, not having the command of his fortune, till twenty-one, he wants the capacity to do those things, which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit) for these an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty-one." The exemption from penalties *for non-repair of a bridge is stated on the authority of Hale; but the passage referred to, 1 Hal. P. C. 20, directly contradicts the proposition. [602 Lord Hale says: "If an infant under the age of twenty-one years be indicted of any misdemeanor, as a riot or battery, he shall not be privileged barely by reason that he is under twenty-one years, but if he be convicted thereof by due trial, he shall be fined and imprisoned; and the reason is, because upon this trial the Court ex officio ought to consider and examine the circumstances of the fact, whether he was *doli capax*, and had discretion to do the act wherewith he is charged; and the same law is of a femme covert. 2. But if the offence charged by the indictment be a mere non-feasance, (unless it be of such a thing as he is bound to by reason of tenure, or the like as to repair a bridge, &c.) there in some cases he shall be privileged by his nonage, if under twenty-one, though above fourteen years, because Laches in such a case shall not be imputed to him." The dictum of Blackstone is therefore unsupported; and it is observable that he draws no distinction between infants under fourteen and under twenty-one. But here that is not material. The distinctions as to the criminal liability of an infant at different ages below twenty-one turn upon his being or not being *doli capax*. Civilly, he is liable for a tort at any age,

as appears from the Yearbook Mich. 85 H. 6, f. 11 B. pl. 18; and an indictment for the non-repair of a bridge is in its nature no more a criminal proceeding, as it affects the infant, than an action of waste. It is only a mode of ascertaining whether or not an obligation attaches to him by reason of his title to certain lands. No *malus animus* is charged, or need be shewn. *There
 *603] is no reason, therefore, that an infant either above or below fourteen, should not be subjected to such an indictment. And the passage cited from Lord Hale justifies this position. It is said there, that in some cases of non-feasance, an infant, though above fourteen, shall be privileged; but the cases are not specified, and the omission to repair a bridge is excepted. In 2 Inst. 703, the infant's liability is stated without limit as to the age. The authorities on this subject are collected in 4 Bac. Abr. 7th ed. 1832, p. 352, Infancy and Age (H.) where it is said that in cases of misdemeanors, &c., where an infant is privileged by his nonage "the privilege is all one, whether he be above the age of fourteen, or under, if he be under one-and-twenty years, but with these differences: if an infant" &c., then follows the passage already cited from Hale, with the exception in the case of non-repair of a bridge. To put an analogous case; a corporation, as such, cannot, in the ordinary sense of words, commit a crime: it can have no *malus animus*; yet it is indictable for neglect of repairs; because, although the words "indictment" and "misdemeanor" are used, the matter charged is only that the body is liable to something which has not been performed; the proceeding is merely a mode given by the *English* law, of ascertaining who is subject to a particular obligation. A strong argument arises from the inconvenience which the public would suffer if this proceeding could not take place till the infant attained majority. There are several instances, in civil proceedings, where it has been laid down the parol should not demur on account of infancy, because of the public or even private inconvenience which
 *604] would *be thereby occasioned: as, for instance, in a *quare impedit*, in an action of waste, (2 Inst. 308. Co. Litt. 54, a,) a writ of *estrepement*, or a writ of *dower*. Many other instances are collected in 2 Vin. Abr. 137, tit. Age (B.) (And 4 Bac. Abr. Infancy and Age (L.) p. 387, 7th ed. Com. Dig. Infant (D 3.) Here the duty in question is in the nature of a service, the proceeding by indictment does not alter its character in that respect, and there is no other mode of enforcing the service. The nonage, therefore, ought not to be an answer. It was holden in *Conny's Case*, (9 Rep. 85, a,) that, in a *per quæ servitia*, an infant, who has the tenancy by descent, should not have his age. [LITTLEDALE, J. There are many cases in which infants are answerable if they do not perform a duty; as if an infant has a grant of an office exercisable by deputy, and if he do not appoint a sufficient one, it is a forfeiture of the office. *Young v. Fowler*, Cro. Car. 555.] It is true that the infant, if convicted on such an indictment as this, cannot be imprisoned; and some difficulty may be raised as to fining: but the difficulties, if he be held not liable, are greater; and it is to be presumed that, if the verdict passes against him, the guardians will perform what is necessary on his part. The excuse of infancy is rather matter for a plea in abatement than for a defence under the general issue, since there is neither *malus animus*, nor any other material fact charged by the indictment, to which infancy could be an answer. [LITTLEDALE, J. Who ever heard of pleading infancy to an indictment? Can the infant pray that the parol may demur till he is of age? COLERIDGE, J. According to the assumption on the defendant's
 *605] side, infancy would be a defence under the general issue, *because an infant could not be guilty of the wrongful omission charged in the indictment. (a)]

Sir John Campbell, Attorney-General, Adams, Serjt., and Amos, contra. First, as to the liability of an infant. It is admitted on the other side that the case, if it were that of an infant of the most tender years, would not be

(a) The arguments as to the reception and exclusion of evidence are omitted.

distinguishable from the present. And it is contended that an indictment lies against him, although it is granted that on conviction there could be no imprisonment, and it would be difficult to levy a fine. Then *qui bono* is the alleged liability? The non-repair of a bridge is, in law, a crime; it is presented by the grand jury among felonies and misdemeanors, and is as much a misdemeanor as any nuisance by the non-repair or obstruction of a highway. The king prosecutes; the pleading, and the process relative to it, are like those in other cases of misdemeanor; and the prescribed punishment, on conviction, is imprisonment and fine. [COLERIDGE, J. How is the infant to appear, and to avail himself of his infancy?] No mode is pointed out, in any stage of the proceedings. And how could a *distringas* to compel appearance be made available against an infant eleven years old, who has nothing to do with the land? All these difficulties show that the course now attempted, against an infant of tender years, is not known to the law. With respect to pleading in civil causes, the law points out a mode of proceeding; the infant appears by his guardian or next friend. In the cause of an indictment there is no such provision. And yet, if judgment goes by default, it is conclusive for ever *after. There is no necessity that this mode of proceeding against an infant should be adopted. [*606 The occupier may be resorted to. Here an occupier is found, namely, the mother, who is the common law guardian in socage, and occupies the mansion-house. If this had been the case of a guardianship in chivalry, when the rents and profits were all taken by the lord, it cannot be contended that the infant would have been held liable: the change of tenure by stat. 12 Car. 2, c. 24, has not changed the liability and thrown it upon the infant. A guardian in socage does not indeed receive the rents to his own use, but they vest in him till the infant attains the age of fourteen. In *Rex v. Toddington*, 1 B. & A. 565, Holroyd, J., recognizes the obligation of the guardian in socage to perform the services annexed to the infant's estate. As to his interest, in *Rex v. Oakley*, 10 East, 494, Lord Ellenborough says, "The only difference which can be pointed out between the cases of an executor or administrator and of a guardian in socage, in this respect" (the right of a personal occupation and superintendence of the infant's estate), "is that the one is accountable for the profits by statute, and the other at common law. The law considers a guardian in socage as entitled to the possession of the ward's property, and incapable of being removed from it by any person. Such a guardian has not a mere office or authority, but an interest in the ward's estate." The same view of the guardian's interest in the estate is taken in *Osborn v. Carden*, Plowd. 293, and *Bedall v. Constable*, Vaugh. 182, 183. The guardian in socage obtains a settlement by his residence on the estate; no case has *been cited to show that the heir does so too. Here, [*607 then, the mother might have been indicted, or the tenants on the estate; if the infant is to be prosecuted, the estate may be unjustly burdened by a proceeding against one who cannot defend.

And, as neither necessity nor convenience are in favour of an indictment against the infant, so also is it unsupported by authorities. No precedent is shown for it. The passage cited from 1 Hale, 20, only states that in some cases of non-feasance the infant shall be privileged if under twenty-one, "though above fourteen years;" "unless," &c. The case of an infant under fourteen is not at all adverted to. The dictum in 2 Inst. 703, (which is referred to in the passage of Hale just cited), that an infant having house or lands by descent or purchase "is liable to this public charge," does not necessarily imply that he may be indicted. It means, only, that the infant may be rated as an inhabitant of the county, and that, if the county be indicted (in which case there is no difficulty as to the infant's pleading), his land is liable to contribution. As to the cases in which it has been laid down that an infant should not have his age, *Conny's Case*, 9 Rep. 84 b, was that of a civil action; and in all the other instances the infant might appear by guardian. On the other hand, it is evident, from several authorities, that the law is tender of fining and amercing

infants. Thus, in Hawk. P. C. book 2, c. 23, s. 159, it is said; "Also it is certain that an infant is in no case to be fined for a false appeal; but some have holden that he may be amerced, which is contradicted by others, who say, that an infant can in no case be amerced." And in Co. Lit. 126 b., it is asked:

*608] "What then if a *præcipe* be *brought against an infant, and, hanging the plea, he cometh of full age? He shall be amerced after his full age." [Lord DENMAN, C. J. Suppose, in the present case, the infant himself had been the occupier; would no person have been liable to indictment?] There would be either a testamentary guardian or a guardian in socage to proceed against. [Lord DENMAN, C. J. Not necessarily. He might be nullius filius. LITTLEDALE, J. If he were above fourteen, or took by purchase, (See Harg. Co. Litt. 87 b., note (1),) there would be no guardian in socage.] Perhaps the Court of Chancery would appoint a guardian. [PATTESON, J. A guardian appointed by the Court of Chancery would be only in the nature of a receiver. He would be little more than a bailiff or servant. And such a guardian does not occupy personally.] The cases put are too improbable to guide the judgment of the Court in laying down a rule. At all events an infant of tender years would not be indictable; he could not be an occupier for this purpose. And the Court cannot draw a line between infants of one age and another. Lord DENMAN, C. J. An infant of tender years may be executed for felony. Is an infant guilty of no punishable offence, if he, being liable by tenure to repair, and being in receipt of the rents, refuses to do repairs?] No line can be drawn as to this, between one infant and another, at least below the age of fourteen. Lord DENMAN, C. J. Lord Hale, in speaking of misdemeanors for which an infant may be indicted, says, 1 Hal. P. C. 20, that the Court "ought to consider and examine the circumstances of the fact, whether he was *doli capax*, and had discretion to do the act wherewith he is charged." Supposing that test *609] applied, the defendant, *under the circumstances of this case, could not be held responsible. [PATTESON, J. As to the question of liability: an infant is liable to an action in case of tort. Suppose a person had a limb broken in consequence of the defective state of the bridge. Would not an action lie at his suit against the infant who was bound to repair?] The difficulty of the present case would not be felt there. A guardian might be appointed to defend. On indictment there is no course by which the interests of the infant could be protected.

As to the point of occupation; the owner, if he is not also the occupier, is not liable for non-repair. 1 Roll. Abr. p. 390, tit. Chimin Common (B) pl. 2, Com. Dig. Chimin (A 4), are clear authorities on this point, unless a distinction can be made between a bridge and a highway, for which there is no ground, a bridge being part of the highway. Note (9) to *Rex v. Stoughton*, 2 Wms. Saund. 158 d. 5th ed., and the cases there cited are to the same effect. The possession of the mother as guardian, whatever might have been its effect with reference to the *possessio fratris*, is not such an occupation by the infant as can subject him to this indictment.

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day of this term, (b) delivered the judgment of the Court. After stating the nature of the indictment, and the verdict, his lordship said:—

Upon the argument on a motion for a new trial, several points were insisted on; but, as this case will be decided upon one only, it is unnecessary to do *610] more *than to state that one, with the facts on which it rested, and the reasons for our decision.

It appeared that the defendant was the son and heir of the Reverend Frederick Manners Sutton, who died intestate and seised of the property on which the obligation to repair attached; that he was an infant of the age of eleven years, in a course of education from home, passing his vacations there, and

occasionally visiting it; that his mother was his guardian, and resided on the property.

Under these circumstances it was contended, that the defendant was not the occupier, and that the occupier only could be indicted for non-repair. As we are of opinion that he was neither an owner nor an occupier in the sense required to make him chargeable upon this indictment, it will be unnecessary for us to decide generally, whether owners, merely as such, and not in occupation, are liable to charges of this description, as no doubt can exist as to the liability of occupiers. Considering it then as settled law, that the occupier of land charged with the repair of a bridge is liable to the performance of that duty, and assuming only for the purpose of the argument, that the owner, as such, may be also liable, the question for our consideration will be, whether the defendant is either the occupier or the owner of the lands here charged, in such a sense as is required for the purposes of the present indictment; and this will depend upon a consideration, as well of the facts above stated, as of the nature of the duty for the neglect of which he is charged.

Now as to the former we can only take the possession of the defendant's mother to be that of a guardian in socage; and it is clear from several authorities, that to the same purposes the infant, whose guardian in socage has entered and *is in possession, is considered in law as not merely the owner in right, [*611 but the owner in actual seisin of the lands. This is so for the purpose of transmitting land by descent, or excluding the half blood by a *possessio fratris*; Bro. Abr. Discent. 19; Goodtitle dem. *Newman v. Newman*, 3 Wils. 516, in each of which cases an actual entry and possession, at least by construction of law, are necessary. The defendant therefore may be taken to be an owner actually seised; but then it is by his guardian: and his wardship precludes him entirely from any control over the land, or any disposal of the issues; he can at present claim his maintenance from it and no more. This is the nature of the defendant's present relation to the land.

Next, as to the duty to be performed, it is to be observed, that this is not merely the duty of any inhabitant of a county with regard to a bridge repairable by the county, to submit, namely, to an assessment on his lands, and a distress in case of non-payment, the amount of the assessment being to be paid over to public officers, who are charged with the actual superintendence and performance of the repairs. To this duty an infant is expressly declared by Lord Coke to be liable, if he hath house or lands by descent or purchase; 2 Inst. 703. But an individual, charged as the defendant is, is himself required to do the act, the law not interfering either to control or assist him in the manner of procuring or applying the funds necessary for the purpose. It should seem reasonable therefore to suppose that the owner or the occupier, who is to be held liable criminally for non-repair, should be one in whom *the law supposes to be [*612 vested a command over and actual possession of the profits of the land; and we ought to require some principle or authority for holding that the liability attaches under other circumstances.

It is true that, if it could be shown that no other person was in a situation to be called on for the performance of the duty, and that the public would receive detriment by considering the ward not liable, there are not wanting analogies in the law which would justify us in enforcing the performance of it by him. It is sufficient to refer for this purpose to the numerous cases collected in 4 Bac. Abr., Infancy and Age, (L) in which an infant suing or being sued, his age was not allowed, nor the parol permitted to demur, the principle of which was, that thereby some inconvenience would ensue to the public, or some injustice be done to the parties, more than countervailing the acknowledged inconvenience of suffering the suit to proceed during the nonage.

The remaining question, therefore, is, whether the guardian in socage in possession is such an owner or occupier as to be properly liable to the discharge of this burden. Now it is clear that the guardian in socage, after entry, has the

legal possession of the land to the use of the infant. It is observed by Bayley, J., in *Rex v. Oakley*, 10 East, 495, that the form of pleading by a guardian in socage was, that he entered as such, and was possessed. During the continuance of his interest he is in the entire receipt of the profits, and he is invested *613] with the absolute control over their immediate disposal, subject *only to the maintenance of the heir. He may bring trespass or ejectment in his own name, and make a lease also in the same, until the infant's age of fourteen; *Wade v. Baker and Cole*, 1 Lord Raym. 131. The courts should be held in his name; *Shopland v. Ryaler*, Cro. Jac. 99: and he may grant copyholds, in reversion, even the grants of which will be good, though they come not into possession during the nonage of the ward; 2 Roll. Abr. 41. Garde, (Q.) pl. 3.

The guardian then being in possession, and receiving and disposing of all the issues, subject only to the infant's maintenance and a future account, is undoubtedly such an owner and occupier as may properly be looked to by the public for the discharge of those obligations to which the land is bound; and there is no injustice or inconvenience in this, because, upon the account which he is to render to the infant, he "shall have allowance for his reasonable costs and expenses in all things." Litt. s. 123.

Upon the whole, therefore, we conclude that, even assuming it to be true, generally, that an owner not in possession may be bound, as well as the occupier, to the performance of repairs to a bridge, *ratione tenuræ*, still that an infant in ward to a guardian in socage in possession, does not fall within the reason of that rule; and, consequently, that the defendant in the present case, and on the facts now appearing, should have been acquitted.

Rule absolute to enter a verdict for the defendant.

*614]

*Ex parte WINFIELD. Tuesday, June 9.

The Court will grant a rule absolute in the first instance for a mandamus to the archdeacon, to swear in a party as church-warden, on affidavit of due election, demand, and refusal, and of notice to the archdeacon of the application to the Court; the ground of refusal not appearing by the affidavit in support of the rule.

Hill applied for a mandamus to the Archdeacon of Coventry, directing him to swear in John Winfield as churchwarden of the parish of St. Martin's, in Birmingham, in the county of Warwick. The affidavit stated that Winfield had been unanimously elected at a regular meeting of the inhabitants of the parish in vestry assembled, and afterwards received a notice from the officer of the ecclesiastical court of the Bishop of Litchfield and Coventry, in which diocese the parish is situate, to attend the archdeacon's visitation to qualify, &c., that he subsequently attended at the appointed time and place, and presented himself to the archdeacon to take the oath, and in consequence of an informality was directed to present himself again on another day; that he did so present himself on that day, when objections were made to him by another person, which he considered untenable (but which were not stated in the affidavit,) in consequence of which the archdeacon had refused to swear him in.

Notice had been given to the archdeacon that this Court would be applied to.

The Court(a) granted a rule absolute in the first instance.(b)

(a) Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

(b) See the next two cases.

*[The following case was decided in Michaelmas term, 1835.]

The KING *against* The Archdeacon of MIDDLESEX and Another.
Monday, Nov. 9.

A rule nisi having been obtained for a mandamus to an archdeacon and surrogate, to swear in certain persons as church-wardens and sidesmen of a parish, it appeared by affidavit that the parties were colourably elected, but that the validity of the election was disputed; that there was an usage in the archdeaconry to swear in the parties elected, on a certain day subsequent to the election, appointed annually by the archdeacon; and that the surrogate, being applied to immediately after the election to swear in the parties, had said that they must wait till the day appointed, but that he would not disobey a mandamus from this Court: Held, that this was a refusal, and that the usage, if a good one, should be returned to the mandamus; and the Court made the rule absolute, without entering into the question of the validity of the election.

SIR W. W. FOLLETT, had obtained a rule in Easter term last, calling upon the archdeacon, and the official duly constituted surrogate of the archdeaconry of Middlesex, to shew cause why a mandamus should not issue, commanding them, or one of them, or other competent judge in that behalf, to swear in James Haward and Robert Taylor as churchwardens, and four others as sidesmen, of the parish of St. Martin-in-the-fields, in the county of Middlesex. The affidavits in support of the rule stated that Haward and Taylor were on Easter Monday and Tuesday, April 21 and 22, duly elected as churchwardens, and the other four as sidesmen, and the result of the scrutiny on the election finally reported at a vestry meeting on the 27th of April, 1835; and that they, after the meeting, had attended at the chambers of Dr. Phillimore, the surrogate, and required to be sworn in. That Dr. Phillimore had declined to swear them until the annual visitation of the archdeacon, on the 19th of May, had taken place, stating, however, that, although it was customary to wait till the visitation, the churchwardens had sometimes been admitted immediately on their election, if he (Dr. Phillimore) were satisfied that it was a case of emergency, and adding, that he *would obey the mandamus of the Court. Notice was [*616 then given to him that application would be made to the Court. There was also an affidavit that Dr. Phillimore had, on a subsequent day, stated that he declined to swear in the applicants, on the ground of the conflicting claims of other candidates. The affidavits in answer stated that it was the immemorial usage and custom in the parish, and other parishes in the same archdeaconry (of Middlesex,) that a day should be appointed by the archdeacon to swear in the churchwardens of all the parishes, and that the day appointed in the present year was the 19th of May. The affidavits in support of the rule also contained statements to shew the due election of the applicants; and those against the rule to shew that other candidates ought to have been declared elected under stat. 58 G. 3, c. 69.

Sir John Campbell, Attorney-General, now shewed cause. It is true that, as Haward and Taylor have a colourable title, the Court will direct a mandamus to swear them in, without deciding on the title at this stage. But here there has been no refusal.

Sir W. W. Follett, (with whom was Steer,) contra, contended that what had passed amounted to a refusal. He also proceeded to argue that the usage was not a good answer; but he was stopped by the Court.

Lord DENMAN, C. J. It is to be lamented, either that this motion was made, or that the opposing party did not consent to the rule being made absolute. There has been a refusal. When the party says, "I will wait, because

*617] there is a custom," he, in effect, refuses. If *there be such a custom, he may return it; and to say that he will not disobey the order of this Court, amounts to a refusal to comply without the order.

PATTESON, WILLIAMS, and COLERIDGE, Js. concurred.

Rule absolute.(a)

[The following case was decided in Trinity term, 1836.]

Ex parte DUFFIELD and Another. *Tuesday, May 24.*

The Court will grant a mandamus by rule absolute in the first instance, to compel the official to administer the oath or declaration to a party claiming to have been elected as chapelwarden of a chapel (under a local act, conferring upon the officer elected the power of a churchwarden for the purposes of the chapel), though other parties claim to have been elected.

LUMLEY moved for a mandamus commanding the official principal of the royal peculiar and exempt jurisdiction of the collegiate church of Wolverhampton, and his surrogate, or other competent judge, to administer the declaration appointed by stat. 5 & 6 W. 4, c. 82, s. 9, to William Duffield and Joseph Waltho, as chapel-wardens of the chapel of St. John, Wolverhampton. By the affidavits in support of the rule, it appeared that the chapel was within the jurisdiction; that it was erected under a local act, which directed an election, by the inhabitants, of chapelwardens for the chapel, who were to have the same power of making rates, and for other purposes relating to the chapel, and the repairs and ornaments thereof, as the churchwardens or chapelwardens of any other church or chapel in the diocese of Litchfield and Coventry; that Duffield and Waltho were duly elected, but that the validity of the election was disputed, *618] and other parties claimed to be elected; that, *at the instance of the principal official, Duffield and Waltho presented themselves to be sworn in, or make the declaration; and that the official refused to allow them to swear in or qualify.

Lumley referred to *Rex v. The Archdeacon of Middlesex*, ante, p. 615; and see *ex parte Winfield*, ante, p. 614.

Lord DENMAN, C. J. You are entitled to a rule absolute in the first instance.

LITTLEDALE, PATTESON, and WILLIAMS, Js. concurred.

Rule absolute.

*619] *The KING against The Company of Proprietors of the MONMOUTH-SHIRE Canal Navigation. *Wednesday, June 10.*

1. By a canal act (passed in 1792, when tolls were considered rateable per se), a company was incorporated, and authorized to take lands, and to take and erect buildings, for the purpose of constructing a canal and railways, and to take tolls; and it was provided that *the tolls should not, at any time or times thereafter, be subject to taxes or rates, and that the company should, from time to time, be rated in respect of the lands and grounds to be taken, and the buildings to be erected by them, in the same proportion as, and not at any higher value or improved rent, than other lands, grounds, and buildings adjacent were or should, for the time being, be rated, and as the lands, grounds, and buildings, to be taken and erected by them, would have been rateable, in case they had continued in their former state, and not been used for the purposes of the undertaking.* The adjacent lands and buildings improved in value, from the time of the commencement of the undertaking, partly in consequence of the undertaking being carried into effect, partly from independent causes: Held, that the land and buildings used for the canal

(a) See the preceding and the next case.

were to be rated at the value which the adjacent lands, &c., bore at the time of the rate; and not at the value which these latter bore at the commencement of the undertaking, nor in that which they would have borne at the time of the rate if the undertaking had not been carried into effect. Although, from the passing of the act to the time of the question being raised (forty years), the rate had always been made according to the original value of the lands adjacent.

2. A subsequent statute authorized the company to extend the canal, and to purchase lands for that purpose; and it provided, that they might take the like tolls on the new canal, &c. as under the former act, and have the like powers and remedies for recovering them. And that the *clauses, powers, authorities, provisos, orders, rules, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions* contained in the former act, should, so far as the same would apply and the case would admit, extend to the new canal, &c. and should *take effect, operate, be put in execution, used, and exercised* by the company, and *be applied and enforced in respect of making, maintaining, and using* the new canal, &c. and *regulating the navigation thereon, for punishing offences relating thereto, for purchasing lands and assessing damages, and with respect to all matters in anywise touching* the new canal, &c. in the same manner to all intents and purposes as if the same clauses, &c., had been inserted, repeated, and enacted, at full length, by the subsequent act, and as if the new canal, &c. had been a part of the canal authorized to be made by the former act: Held, that the provision as to rating the original canal extended to the new part.
8. By a third statute, a tramroad company was incorporated, and it and the canal company were authorized to make railways, and to take such tolls on these railways as the canal company might take by the first statute; and it was provided, that the clauses, powers, authorities, regulations, &c. (as in the second statute), of the first statute, should extend (in the same terms as in the second) to the rail ways last-mentioned, and to regulating the carriage or conveyance of goods thereon, as if these railways had been authorized to be made by the first statute, and the tramroad company had been therein named instead of the canal company: Held, that the provision as to rating the original canal extended to these railways.

By a poor-rate made for the borough of Newport, Monmouthshire, the Company of Proprietors of the Monmouthshire Canal Navigation were rated as the occupiers of that part of their canal lying within the borough of Newport, and a house, tramroad, weighing machine, coach-house, &c., also within the said borough, in the following form:

Valuation.	Assessment.	Canal house, canal, tramroad,
£100 0 0	Canal Company £20 0 0	weighing machine, coach-house, &c.

*On appeal, the sessions confirmed the rate, subject to the opinion of this Court upon the following case: [*620

By stat. 32 G. 3, c. 102, *The Company of Proprietors of the Monmouthshire Canal Navigation* were incorporated, and empowered to make, amongst other canals and railways, and to keep navigable, a canal from some place near Pontnewynydd, in the parish of Trevethin, in Monmouthshire, to the river Usk, at or near Newport, and to purchase lands for the use of the said undertaking; (a) and by sections 91 and 95, they were empowered to take certain tolls. By sect. 101, it was enacted, that "the said rates, tolls, and duties by this act granted" to the said company, "shall not at any time or times hereafter be charged with or be subject or liable to the payment of any parliamentary or parochial rates, taxes, assessments, or impositions whatsoever; and that the said company of proprietors, and their successors, shall from time to time be rated to all parliamentary and parochial rates, taxes, assessments, and impositions, for and in respect of the lands and grounds to be purchased or taken, and the warehouses and other buildings to be erected or set up, by the said company, or their successors, in pursuance

(a) By the first section, the company were empowered to make rail or wagon ways, or stone roads, from the canals or railroads mentioned above, to any iron works, limestone quarries, or coal mines, within eight miles thereof, and to enter upon lands, &c.; and, by sect. 38, the purchase money and compensation to be paid to the owners of lands used was to be settled by certain commissioners, with an appeal to a jury.

of this act, in such and the same proportion as, but not at any higher value or
 *621] improved rent, than other lands, *grounds, and buildings lying near or adjacent thereto, are or shall, for the time being, be rated, and as the lands, grounds, warehouses, and other buildings so to be purchased and taken and erected, would have been rateable in case the same had continued in their former state, and not been used for the purposes of the said navigation or undertaking." By virtue of this act the company purchased lands, and made the intended canal; part of which lies within the borough of Newport, and is the land taken for the purposes of such canal, included in the above rate.

Stat. 37 G. 3, c. 100, after reciting stat. 32 G. 3, c. 102, empowered the canal company to extend the said canal about one mile and a half beyond its then termination, and to purchase lands for the purpose of such extension: and, by sect. 1, of the statute of 37 G. 3, it was enacted, that the company should take like tolls on the canal thereby authorized to be made, as they were empowered to demand by the former act; and should "have such and the like powers and remedies for recovering the same; and that the said recited act, and the several clauses, powers, authorities, provisoes, orders, rules, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions therein contained, shall, so far as the same will apply, and the nature and circumstance of the case will admit, and so far as the same are not repealed, altered, re-enacted, or otherwise provided for in and by this present act, extend and are hereby extended to the said canal and other works hereby authorized, and shall take effect, operate, and be put in execution, and shall be used and exercised by the said company of proprietors, and their agents, servants, and labourers, *and shall be applied and enforced in, by, and for and in respect *622] of the making, completing, repairing, preserving, maintaining, and using, the said canal and other works hereby authorized, and for supplying the same with water, and for regulating the navigation thereon, and for the punishment of offences relating thereto, and for the purchasing, selling, and conveying of lands, tenements, and hereditaments, and ascertaining the value thereof, and for the determining and assessing of damages, as well as with respect to all other matters and things whatsoever, in anywise touching or concerning the said canal and other works hereby authorized to be made, in such and the same manner in all respects, and as fully and effectually, to all intents and purposes, as if the same clauses, powers, authorities, provisoes, orders, rules, &c. "had been inserted, repeated, and enacted, at full length, in and by this present act, and as if the canal and other works hereby authorized to be made and maintained had been authorized to be made and maintained in and by the said recited act, or been part of the canals and works thereby authorized to be made and maintained." By virtue of the last-mentioned act, the canal company extended their said canal: and part of the land taken for that purpose is included in the above rate.

Stat. 42 G. 3, c. cxv. (local and personal, public), after reciting stat. 32 G. 3, c. 102, and stat. 37 G. 3, c. 100, and that it was expedient that a railway should be made from Sirhoway furnaces, in the said county, to communicate with the said canal and the river Usk, at or near Newport, together with certain branches of railway from the said last-mentioned railway, and after incorporating a certain *623] company called the Sirhowy Tramroad *Company, empowered the Company of proprietors of the Monmouthshire canal navigation to purchase lands, and to make a certain portion of the said last-mentioned railways; and, by sect. 3, it was provided that the said Sirhowy tramroad company, and the Monmouthshire canal navigation company, respectively, might take the like tolls, for the tonnage of commodities conveyed on the said railways or tramroads, as the Monmouthshire canal navigation company are authorized to take by stat. 32 G. 3, c. 102, for tonnage, &c., on the canals and railways thereby authorized to be made, except as was after provided; and should, respectively, have the like powers for recovering such tolls as were given by the first-mentioned act, for recovering the rates, tolls, and duties therein mentioned: "and that the said first-

mentioned act, and the several clauses, powers, authorities, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions therein contained and mentioned, shall, so far as the same will apply," &c. (Here followed a clause precisely similar, *mutatis mutandis*, to the latter part of that extracted above, p. 621, from stat. 37 G. 3, c. 100, s. 1, but slightly varying in the conclusion, viz.) "as if the same clauses," &c., "had been inserted, repeated, and enacted at full length in and by this present act, and been hereby made applicable to the said Sirhowy tramroad company, as well as to the said company of proprietors of the Monmouthshire canal navigation, and as if the said railways or tramroads, and other works hereby authorized to be made by the said last-mentioned company, had been authorized to be made by them in and by the said first-mentioned act" [32 G. 3, c. 102], "or been part of the railways and other works thereby authorized *to be made by them, and [*624 as if the said railway or tramroad, and other works hereby authorized to be made by the said Sirhowy tramroad company, had been part of the railways and other works authorized to be made by the said first mentioned act, and the said Sirhowy tramroad company had been therein named and authorized to make the same in the stead and place of the said company of proprietors of the Monmouthshire canal navigation." By virtue of the last-mentioned act, the Monmouthshire canal navigation company made a portion of certain railways, part of which lies within the said borough, and is included in the above rate.

Before and at the time of the formation of the said canal and railways, the land purchased by the canal company for the purposes of the said canal and railways, and the land on each side of it, was of very much less value than at present. The whole of the land taken for the railways, and a part of the land taken for the purposes of the original canal, was then used for agricultural purposes, and let at the rent usually given for good meadow land in the neighbourhood of towns: other part of the land taken for the said original canal was, at the time it was so taken, used as wharf ground to the river Usk; and other part of the same land then formed a part of the streets of Newport. But, in consequence of the formation of the canal and railways, great alterations have been made in the lands adjacent to the said canal, as to the manner of their occupation and the purposes for which they are used; and, by means thereof, their present annual value is very much greater than it was at the time of the formation of the canal and railways. Their value has also since increased from other local causes, independent of the *said canal. The canal runs for some distance within the borough of Newport, parallel with the river Usk, [*625 which, before and at the time of the formation of the said original canal, was, and ever since has been, used as a navigable river; and, when the canal was formed, a convenient space of ground was left between it and the river for making wharfs, and wharfs have been from time to time constructed on that space (but not by the canal company), at which the coals and other goods conveyed along the canal are landed, and thence loaded on board vessels lying in the river, and at which also goods conveyed in vessels up the said river are landed, and thence loaded on board boats on the said canal. On the opposite side of the canal dwelling houses have been erected, and yards and docks formed, extending for a considerable distance along the side of the said canal, within the said borough; none of which belong to the canal company. The said wharfs, houses, yards, and docks, are now of large annual value. Some part of the lands adjacent to the canal, within the borough of Newport, still continues to be used for agricultural purposes.

Until the present rate was made, the canal company had been rated for the sum of 5*l.* 5*s.* only. By the present rate, the appellants are rated for the lands taken by virtue of stat. 32 G. 3, c. 102, according to the present improved actual value of the lands and premises adjacent to the said canal; and for the lands taken by them under 37 G. 3, c. 100, and stat. 42 G. 3, c. c*xv.*, at the present improved actual value of the lands so taken, arising from such lands being used for the purposes of the last-mentioned acts.

*626] The appellants contended at the sessions, First, that *the provisions of stat. 32 G. 3, c. 102, s. 101, were incorporated (see *Rex v. Barnby Dun*, 2 A. & E. 551,) in stat. 37 G. 3, c. 100, and stat. 42 G. 3, c. cxv., or in one of them, so as to exempt the lands taken by the canal company under the last-mentioned acts from being rated according to their actual improved value arising from the tolls.

Secondly, That the canal company were only liable to be rated in proportion to the actual value of the adjacent lands at the time when the lands held by the company were originally taken for the purposes of the canal or railways.

Thirdly, That, at all events, the canal company were only liable to be rated in proportion to such value as the adjacent lands would now possess, supposing that the canal and railways had not been made, but that the adjacent lands had continued in their former state, and were now used for the same purposes as when the lands were taken by the canal company; and that any increase of value arising from, or depending upon, the existence of the said canal or railroads, ought not to be taken into consideration in ascertaining the value of the adjacent lands for the purposes of fixing the amount of rate on the canal company.

If this court should be of opinion with the appellants on the first and second or first and third points, the rate was to be amended by reducing the sum assessed on the appellants in a proportion which was fixed by the case.

Maule and Talbot in support of the order of sessions.

*627] First, The 101st section of stat. 32 G. 3, c. 102, was *not incorporated in the two later acts. The earlier of these two, stat. 37 G. 3, c. 100, was passed five years after the first statute, and after the undertaking had been found to be beneficial; the protection, therefore, given to the undertaking while the result was uncertain, was no longer needed. [LITTLEDALE, J. It might as well be said, that it had been found that the undertaking did not answer, which made the extension necessary.] The words of stat. 37 G. 3, c. 100, s. 1, (which are substantially the same as those of stat. 42 G. 3, c. cxv. s. 3,) though strong are not sufficient to comprehend the proviso of exception from rate. The words, "clauses, powers, authorities, provisoes, orders, rules, regulations, limitations, exceptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions," appear to apply altogether to enactments of a different class; and this also appears from the words "used and exercised," and "applied and enforced," which are inapplicable to the exemption contended for. The court will construe such a clause strictly; and the exemption is less needed for the extension of a canal, than for the original work; *Rex v. The Birmingham Canal Company*, 2 B. & Ald. 570. In a case(a) which was before the Court, on these acts, the Court certified that the stat. 42 G. 3, c. cxv. s. 3, had not the effect of incorporating, in this latter act, the 128th section of stat. 32 G. 3, c. 102,(b) which gives *power to proprietors of lands, &c., within eight *628] miles of the canals and railways made under the authority of the first

(a) See note (a) at the end of the case, p. 640.

(b) Stat. 32 G. 3, c. 102, s. 128, enacts, "That if the owner or owners of any manor, estate, or lands, containing any mines, seams, or veins of iron, ironstone, lead, coals, or other minerals, or any quarries of limestone, or other stone, or slates, or tiles, or the proprietor or proprietors of any iron furnaces, forges or other works, or the renters lessees, or occupiers of the same, or of any or either of them, situate and lying within the distance of eight miles from any part of the said canals, or railways, hereinbefore particularly described and authorised to be made as aforesaid, shall deem it expedient or necessary that any railways or wagon roads should be made over, through, to, along, in upon, or under the lands or grounds of any other person or persons, or across any highway or highways, or private road or roads, or that any bridges should be erected over and across any rivers, brooks, or watercourses, for the purpose of conveying his, her, or their iron," &c. "or any goods, wares, or merchandizes, to or from the said canals, or railways, hereinbefore particularly described, and if the said company of proprietors shall refuse

act, to call upon the company of proprietors of the Monmouthshire canal navigation to make railways or wagon roads for conveying articles to and from the canals and railways so made. But the words of incorporation apply quite as strongly to such a power (and "powers" is a word used in the incorporating clause) as to an exemption from tolls: and the presumption that the legislature meant to apply the enactment *of sect. 128, to the extension of the original work was much stronger; since the enactment, both in the case of [*629 the original work and extension, was in furtherance of the public object of the undertaking, namely, facilitating communication

Secondly. The rating is to be in the same proportion as adjacent lands, &c., are or shall be rated for the time being. The time of rating is thus the time at which the comparison is to be made. The legislature might easily have said, if it was intended, that the lands were to be rated according to the value they possessed at the time of the act passing. But the fair way of applying the enactment is, to take the value which the lands in question would have had if the canal had been made in adjacent lands. Why is the particular time at which the acts passed to be fixed upon as that after which the value of the land is not to be considered capable of increase or diminution? As to the warehouses and buildings to be erected, how can they be rated according to the value they had when the act passed? Is the original value of the sites alone to be taken? [PATTESON, J. The provision is intelligible with respect to the buildings purchased: the framers of the act added the words "and erected," without perceiving the inconsistency with the other words of the clause.] The legislature had two objects. First, the undertaking was to be encouraged, for which purpose the tolls (then considered rateable per se) were exempted. Secondly, the parish was not to lose its vested right in the improveable value of the surface; for which reason the criterion of the value at any time is declared to be the value of adjacent property "for the time being." This was *the construction put upon a similar provision, not, however, containing the words [*630 "for the time being," in *Rex v. The Regent's Canal Company*, 6 B. & C. 720, where the judgment of Bayley, J., explains the principle upon which the legislature introduces such clauses. The land is rateable for its value as land, without taking into consideration its use as a canal; *Rex v. The Leeds and Liverpool Canal Company*, 5 East, 325: now that is a fluctuating value. The Court will construe the ambiguity, if there be one, against the party obtaining the act; *Rex v. The Birmingham Canal Company*, 2 B. & Ald. 570, *Stourbridge Canal Company v. Wheeley*, 2 B. & Ald. 792. This is the first time that any attempt has been made to construe a clause of this kind so as to limit the rate to the value which the canal possessed before the act passed: hitherto, the attempt has always been to limit it to the value which it possessed, as land, at the time of the rating. Thus, in *Rex v. The Grand Junction Canal Company*, 1 B. & Ald. 289, the company succeeded in reducing the rate to the value which adjacent

to make any such railway, or wagon road, or to erect any such bridge, in virtue of the powers hereinbefore given them in that behalf, for the space of three calendar months after an application and request in writing shall have been made to them for that purpose, at a general meeting or assembly to be held as hereinbefore is mentioned, by the person or persons so deeming it expedient that such railway or wagon road should be made, or such bridge erected as aforesaid, then and in such case, and from time to time as often as the same shall happen, it shall and may be lawful to and for the person or persons making such application and request, at his or their own proper costs and charges, at any time after the expiration of such three calendar months, without the consent of the owner or owners of such lands or grounds," &c. "to make any such railways, or wagon ways, or to erect any such bridge or bridges as shall be deemed expedient to be made or erected as aforesaid, he or they first paying or tendering satisfaction," &c. The act then prescribed the method of ascertaining the compensation, directed certain specifications to be made, if required, to the company, and enacted that the railways, &c. so to be made, should be open to the public on payment of the like tolls as those payable to the company.

lands then had : but it was never suggested that it could be reduced to the value which it or they formerly had. The same remark applies to *Rex v. St. Peter the Great, Worcestershire*, 5 B. & C. 473, *Rex v. St. Mary, Leicester*, 6 M. & S. 400, and *Rex v. The Chelmer and Blackwater Navigation Company*, 2 B. & Ad. 14, where Lord Tenterden's judgment, p. 18, 19, bears closely on the point. The land is to be rated on the same principle as at the time of its being taken for the act, not on the same value. The case states that the appellants have *hitherto been rated only at the 5*l.* 5*s.* It is true that, in *Rex v. The* *631] *Calder and Hebble Navigation Company*, 1 B. & Ald. 267, Lord Ellenborough seems to have held that an exemption of duties taken in respect of the navigation of a canal, was an absolute exemption of the land used for the canal, on the ground that the land had not been rated since the act passed, which was nearly fifty years. [Lord DENMAN, C. J. I think such a fact as that ought not to be taken into consideration in construing an act of parliament.] Even if it could, the acquiescence in a particular value proves much less than the acquiescence in an absolute exemption from rates.

Thirdly. It is against general principles to rate the property at the value which the adjacent lands would have possessed if the undertaking had not been effected. Such a value cannot be estimated. If the works had not been constructed, and all other events had been the same, the effect might have been different in different years. But the hypothesis cannot be reasoned upon at all. Perhaps the want of a canal might have produced a railroad, which might have raised the value ; perhaps, instead of this, trade might have been diverted to other quarters for want of communication, which would have lowered the value. It would be as practicable to assess according to the value which the lands would bear forty years after the time of rating.

Greaves, contra, was desired by the Court to confine himself to the second and third questions stated in the case.

As to the second question. The stat. 32 G. 3, c. 102, *was passed at *632] a time when tolls were considered rateable. *Rex v. Page*, 4 T. R. 543, in which that doctrine was upheld, was decided on the 3d of February, 1792. Accordingly, sect. 101, clearly exempts the tolls from being rated, which, as the law was then understood, amounted to an absolute exemption of the lands taken for the purposes of the act. The arguments on the other side would go the length of showing that the tolls are not exempted in this section ; for, according to *Rex v. The Calder and Hebble Navigation Company*, 1 B. & Ald. 263, the rate now contended for would be an indirect rate upon the tolls. It is clear, however, that the first words of the section repealed, so far, the statute 48 Eliz. c. 2. The affirmative part of the section, by which the rate is imposed, must be construed strictly. The statute recites, 32 G. 3, c. 102, s. 1, that the undertaking will be of great public utility ; and it is very natural that the parish should have consented never to receive a rate upon a higher than the present value, on condition of never receiving it upon a lower, especially as the value of the lands adjacent to the canal would be raised if the undertaking were profitable. The value which the lands possessed at the time of the act passing would be easily ascertained. Again, as these statutes are in the nature of a bargain between the parties, the usage is entitled to some weight, as interpreting the intention. [Lord DENMAN, C. J. The usage may have been the result of a composition, or of many other circumstances of which we know nothing.] The latter words of the clause, " would have been rateable in case the same had continued in their former state, and not been used *for the purposes of the *633] said navigation and undertaking," are strongly in favour of the appellants. The expression " for the time being," does not mean for all future time ; that meaning is expressed in the 101st section by the phrases " at any time or times hereafter," and " from time to time." The words " for the time being" mean, either the time at which the lands were first taken, or that at which they were first rated ; and the object of inserting these words may have been to pre-

vent the company from insisting that they were not to be rated at all for lands which might happen not to be rated when the act passed. It clearly could mean only one particular time. The attempt is to impart a subsequent value, accruing from the conversion of the lands into a canal and railway, into an estimate which, by the express words, is to be made as if the lands had not been so used. Suppose, by the formation of a new railroad, or any other circumstance, the canal were to become unprofitable, while the lands maintained their present value; then, on the construction contended for on the other side, the company, although losers, would be rated on the improved value. [Lord DENMAN, C. J. You might as well, on the other hand, suppose an event to take place which made the adjacent lands untenable.] Then, according to the appellants' construction, the parish, so far as relates to the canal, would be protected from loss.

As to the third question. Objections have been made to the precise test suggested. But, at all events, it is sufficient for the applicants to shew that the rate is not to be imposed according to the whole improved value of the adjacent lands, and that therefore, by some rule or other, the value of the adjacent land, independent of the result of the undertaking, must be resorted to. The first act, by section 1, empowers the company to make reservoirs and aqueducts. These of themselves produce no profit. Suppose the canal, by passing a reservoir, rendered it highly profitable; would the company be rateable for such an increase in value? Lord Ellenborough, in *Rex v. The Leeds and Liverpool Canal Company*, 5 East, 331, said, "The meaning of the clause of exemption was, that the land or space occupied by the canal should be liable to be taxed as it was before;" and Lawrence, J., said, "As to the exemption itself, the object of the clause was to take care that when the company were engaging in a hazardous undertaking which was considered to be beneficial to the public, they should not be liable to any other taxes than those which the land they made use of in their undertaking was before liable to." That is inconsistent with a progressive value. In *Rex v. The Grand Junction Canal Company*, 1 B. & Ald. 293, Bayley, J., says, that the rate was imposed according to the value of the land "when first taken for the purposes of the canal." In *Rex v. St. Peter the Great*, 5 B. & C. 478, Bayley, J., says, that in some canal acts the clauses of exemption are so framed "as to leave land upon the same footing in this respect, as it was when first taken for the purposes of the canal." In *Rex v. The Chelmer and Blackwater Navigation Company*, 2 B. & Ald. 19, Lord Tenterden considered that the object contemplated was, that no parish should "become a loser by the diminution of the value of rateable property within it, at whatever period of time such diminution might happen to take place." That is all which the appellants ask. And no one of the local acts, upon which the above decisions took place, contained words so strong as the later words in the 101st section of stat. 32 G. 3, c. 102. [*634]

Lord DENMAN, C. J. I cannot think that there is any substantial ground of doubt as to any of the questions. As to the first, the exemption is, I think, incorporated in the two later statutes. It is not however, necessary to detail the reasons for my opinion on this point, nor to point out the distinction between this case and that in which the certificate was given. As to the second question, if, as the appellants argue, the legislature meant that the land was to be estimated according to the value which it bore when taken for the purposes of the acts, I must say that it would have been much better that an estimate should have been put on the land by the legislature at the time; for it would now be a very difficult inquiry for the parish officers. But it is said that the words are clear: if they be, they are clear against the appellants. The words are, not at any higher value than other lands adjacent are or shall for the time being be rated. The legislature contemplated, not merely the time at which the act passed, but all the time during which the property was to be rated. If the value of the adjacent lands fluctuated, how could that of the lands taken for the canal be kept from fluctuation? It is true that the section goes on to add, [*635]

"and as the lands," &c. "would have been rateable in case the same had continued in their former state, and not been used for the purposes of the said navigation or undertaking." It does not prescribe that the land shall be rated at the value which it would have borne if the undertaking had *never been *636] carried into effect, but only at that which it would have borne if never used for the purposes of the act. The language of the clause is not critically or grammatically correct. But I think the meaning is, merely, that the land shall be rated as it would have been if it had remained in the hands of individuals. As to the cases cited, they have been very industriously collected, and very ingeniously commented upon; but the Judges who decided those cases were deciding on a different question. Where they say that the improved value is not to be taken into the estimate, they do not refer to the improvement in the value of the land as land, but to the improvement arising from its being used for the particular undertaking, and they decide against such improvement being liable to rate. Their attention was not directed to the distinction now suggested, though the expressions which they use certainly have the appearance of bearing the sense attributed to them. As to the third question, I do not know whether that too be not answered by what has already been said. The words certainly do not naturally bear the meaning contended for; and there is no reason for our introducing such a meaning. On the contrary, the parish and the neighbouring proprietors would be losers if their lands were to be rated on their improved value, but those used for the canal only on the old value. The result is that, though the appellants are right on the first question, the other two questions must be decided in favour of the order of sessions; and the order, therefore, must stand.

LITLEDALE, J. As to the first point, I have no doubt. It seems to me *637] that the later acts incorporate *the exemption given by the first. Allusions have been made to a case on which a certificate was sent from this Court. There the question was, whether a power given to proprietors within eight miles of the canal was, under the particular circumstances, continued with respect to an additional undertaking. I suppose that it would not be so continued; but that case has nothing to do with the present. It is not, however, necessary to go at length into the first question. As to the second, it does not admit of the slightest possible doubt. There might have been some doubt if the words "for the time being" had not been introduced; but these words show that the future value was contemplated. It is now more than forty years since the act was passed: how could the original value be ascertained forty years hence? There certainly is more difficulty as to the third question. The case states that the value of the adjacent land has been increased by various circumstances, some of which are independent of the canal; and it is contended that the advance in value only which these circumstances have caused should be taken into the estimate. The last words of the 101st clause may create some doubt as to this. But I think we must take the improved value as it is. When the act passed, it was thought that tolls were rateable per se; the act therefore, in the first place, exempts the tolls from rate. Then, as to the part which follows, there have been cases in which the question has been whether, under such clauses as this, the value of the land was to be estimated as increased by the tolls; here the act says that the company are to be rated in respect of *638] their lands, not as raised in value by the tolls, but as mere land, *taken at the value of the adjacent lands. This is highly reasonable. The clause is indeed not accurately worded, and may give rise to some doubt. The phraseology varies throughout: the clause first speaks of "lands and grounds to be purchased or taken," and of "warehouses and other buildings to be erected or set up;" but afterwards it says that these are to be rated "as the lands, grounds, warehouses, and other buildings so to be purchased and taken, and erected, would have been rateable in case the same had continued in their former state." The buildings to be erected could not exist in any former state.

We may, however, take the meaning to be, that all is to be estimated according to the value of adjacent lands and buildings. Then is that value to be taken at the present increased value or not? The increase is produced by the canal and other causes. But how can you discriminate? I think the meaning is, simply that the estimate of the value is not to be increased by reason of the tolls.

PATTERSON, J. As to the first question, I think it must be answered in favour of the appellants. We do not know the precise ground of the case in which the certificate was given; it arose on the 128th section, which is not like the 101st. I think that the general provisions in the 101st section are incorporated in the later act. As to the second question, I certainly cannot make sense of all the words; yet I think that the words approach nearer to sense than the words of such acts sometimes do. It is true, as Mr. Greaves remarks, that tolls were thought to be rateable at the time when the act passed. The meaning of the legislature was to *exempt the tolls from rate, and to exempt the lands from being rated in respect of the tolls. In almost all the cases cited, [*639 the question was whether, in rating the premises, the additional value arising from the tolls was to be taken into consideration; certainly it is not to be so taken here. Mr. Greaves says that the variation of expression from the phrases "at any time or times hereafter," and "from time to time," to the phrase "for the time being," shews that the last phrase does not refer to a future time. I think the phrases all mean the same thing. "For the time being" sometimes means identity of time: but it often means continuity: and that is, I think, the meaning here, "as they shall be rated from time to time." Then what is the value referred to? His lordship then read the 101st section.) As for the buildings to be erected, they had no "former state." But if the clause had stopped at the words "are or shall, for the time being, be rated," there could have been no doubt: and I think that the following words mean that the value is to be taken which the lands would have had in the hands of any other person. The second question, therefore, must be decided against the appellants. As to the third question, how can a man tell what the value would have been in the case supposed? That question, therefore, must be answered against the appellants.

WILLIAMS, J. I am of the same opinion. First, as to the question of incorporation, I have no doubt whatever. The words themselves remove all difficulty. That unprofitable point, therefore, is in favour of the appellants. As to the second question, Mr. Greaves brought forward many cases to induce us to think that the *proper time for fixing the value was that of the formation of the canal. All, however, turns, upon the language of the particular act. One argument is sufficient, to my mind, to shew that it is impossible to suppose that the value was to be fixed as the appellants contend. How is the value of the adjacent lands to be estimated? Clearly by the fluctuating value; and that is the value assigned by the sessions. As to the third question, all the reasons applicable to the second apply there also, with this besides, that the test introduced is quite unmanageable. I do not know how it could be dealt with. The second and third questions must, therefore, be decided against the appellants. Rate confirmed.(a)

(a) The following is the case referred to in the arguments and judgments in the text.

The SIRHOWY Tramroad Company *against* JONES and Others.

AND

HOMFRAY *against* JONES.

An act of parliament empowered a canal company to construct certain canals and railroads, paying compensation to the owners of lands used; and also to make railroads to iron works, &c., within eight miles of the canals or railroads first mentioned; and it provided that, if the owners of certain species of property situate within eight miles from any part of the canals or railways before particularly described and authorised to be made, should think it expedient that railways should be made through the lands of

other persons, for the purpose of conveying goods from the canals or railways before particularly described, and if the company should refuse to make such railways under the powers given them by the act, such owners might, at their own cost, make the railways, paying compensation to the proprietors of the lands over which they were to be made; and that the railways so made should be open to the public, on payment of such tolls as the company could demand.

A subsequent act incorporated a tramroad company, and gave them, or the canal company, power to make certain railways, and to take thereon the tolls authorised by the former act; and it provided, that the companies should have the same powers for recovering the tolls as were given by the first act; and that *the several clauses, powers, authorities, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions therein contained*, should, as far as the same would apply, and the case would admit, extend to the works constructed under the new act, and should *take effect, operate, and be put in execution and used and exercised, and be applied and enforced*, in respect of the making, maintaining, and using the said works, and *regulating the conveyance on goods thereon, for punishing offences relating thereto, and for purchasing and selling lands and ascertaining the value thereof, and determining and assessing damages, and with respect to all matters whatsoever in anywise concerning the works made under the new act*, as fully and effectually, to all intents and purposes, as if the same clauses, &c. had been repeated and enacted in the new act, and as if the work authorised by the new act had been part of the undertaking authorised by the first act, and as if the tramroad company had been therein named instead of the canal company:

Held, that this did not authorize owners of the specified kind of property within eight miles of the new works (unless authorised by the first act) to make railways, &c. from their property to the new works.

By an order of the Lord Chancellor, made in these causes, 9th March, 1822, a case for the opinion of this court was stated, substantially as follows:—

In 32 G. 3, an act of parliament passed (c. 102, ante, p. 620, and note (b) p. 627,) for *641] making and maintaining certain navigable cuts or canals, *from and to certain places in the county of Monmouth; and for making and maintaining railways or stone roads from such cuts or canals to several iron-works and mines in the counties of Monmouth and Brecknock.

In 37 G. 3, an act of parliament (c. 100, ante, p. 621,) passed, for extending the Monmouthshire canal navigation; and for explaining and amending the act first mentioned, for making the said canal.

In 42 G. 3, an act of parliament (c. cxv. local and personal, public, ante, p. 622,) passed, for making and maintaining certain railways to communicate with the Monmouthshire canal navigation; and for explaining and amending the two statutes previously mentioned. Either party was to be at liberty to refer to these three acts.

The tramroad authorised to be made by the last of these acts was completed some years since, and is called the Sirhowy Tramroad. It no where communicates or forms a junction with the canals or tramroads made under the act of 32 G. 3. John Jones, Esquire, was, at the time of making the application and request hereinafter mentioned, and still is, the owner of certain lands called Tir Lewis David, containing unopened coal mines. These are situate within much less than eight miles of part of that proportion of the Sirhowy tramroad which is below a place called The Nine Mile Point, mentioned in stat. 42 G. 3, c. cxv., and are within eight miles of the main canal made in pursuance of stat. 32 G. 3, c. 102, s. 1. (The case gave other details as to the situation of the lands, which are not material here). The said John Jones deemed it expedient that a railway or wagon road should be made from his lands for the purpose of conveying the coals in his lands to a part of the Sirhowy tramroad which is immediately below The Nine Mile Point, over, through, and along the lands of several other persons, owners of lands situate between his lands and the said Nine Mile Point, and who refused to consent to the making of the said railway or wagon road; and he, being advised that the provisions of section 128, (ante, p. 627, note (b)) of stat. 32 G. 3, c. 102, were to be considered as incorporated into stat. 42 G. 3, c. cxv., so as to authorise the making of such railway or wagon road from his lands to any part of the said Sirhowy tramroad within eight miles of his lands, made an application and request in writing to the company of proprietors of the Monmouthshire canal navigation, at a general assembly or meeting, &c., to make such railway or wagon road. (The case then stated the steps taken by Mr. Jones, and also stated particulars respecting the road which *642] he proposed to make, and other circumstances which became unimportant from the decisions of the court, and as to which no opinion was pronounced).

The questions for the opinion of the court were,

Whether the provisions of the 128th section of the 32 G. 3, are, by the force and effect of any clause, enactment, or words, in the act of the 42 G. 3, to be considered as so incorporated into and made part of the provisions of the act of the 42 G. 3, as that the whole, or any and what part or parts, of the Sirhowy tramroad is or are to be taken and consi-

dered as a railway to which the said provisions are applicable, so as to authorize the making of such railways or wagon roads to the said Sirhowy tramroad, or such part or parts thereof, from any lands within eight miles thereof, as are authorised to be made by the said 128th section, to any of the railways mentioned in the act of the 32 G. 3, from any lands situate within eight miles of such last-mentioned railways; and, if the judges of this court shall be of the opinion in the affirmative, then, &c. (The other questions became unimportant, from the decision on the first).

The case was argued at the sittings in banc, after Hilary term (February 20th) 1833.

Fuller, for the Sirhowy Tramroad Company and *Mr. Homfray*, contended that stat. 42 G. 3, c. cxv. s. 3, applied only to powers to be exercised by the companies.

Campbell, for *Mr. Jones*, contended that the objects of the three acts were the same, and that the intention of the legislature was to place the works executed under each of the acts under the same circumstances with respect to the lands in the neighbourhood; that the words of stat. 42 G. 3, c. cxv. s. 3, were sufficiently ample to effect this; and that, if the 128th section of stat. 32 G. 3, c. 102, had been inserted, *mutatis mutandis*, in stat. 42 G. 3, c. cxv., the power now claimed would have been expressly conferred.

The following certificate was afterwards sent.

This case has been argued before us by counsel; and we are of opinion that the provisions of the 128th section of the 32 G. 3, are not by force and effect of any clause, enactment, or words, in the act of 42 G. 3, to be considered as so incorporated into and made part of the provisions of the act of the 42 G. 3, as that the whole, or any parts, of the Sirhowy tramroad is to be considered a railway to which the said provisions are applicable, so as to authorise making of such railways or wagon roads to the said Sirhowy tramroad, or any part thereof, from any lands within eight miles thereof, as are authorised to be made by the said 128th section, to any of the railways mentioned in the said act of the 32 G. 3, from any lands situate within eight miles of such last-mentioned railways, *unless the lands from which such railways are to be made to the Sirhowy tramroad are within eight miles from some part of the canals or of the railways particularly described in the 32 G. 3, so as to warrant making a railway therefrom under the 32 G. 3.* [*643]

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

The Lord Chancellor (Lord Eldon) subsequently made the following observations, which were handed with the certificate to Mr. Justice Bayley:—

"This matter has come again before me, *Mr. Fuller* and *Mr. Campbell* attending with the chancery counsel. On neither side are they able to state what is meant by the words scored under" [printed in italics], "If they except any railways to be made to the Sirhowy tramroad out of the negative answer contained previously in the certificate, then, as to such railways the other questions in the case stated, which have not been answered, should receive an answer from the judges, but are not notified in the certificate at all. If the words scored under do not import that some railways are such as do not fall within the preceding negative answer, what is the exact meaning of the words?"

Mr. Justice Bayley's answer was as follows:—

"The judges before whom the case of the Sirhowy tramroad was argued were of opinion that the Sirhowy tramroad was not under 42 G. 3, made a new terminus, so as to warrant railways upon all lands within eight miles thereof; and that the 42 G. 3, gave no right to make a railway to the Sirhowy tramroad upon lands which before that act were not liable to that burthen.

"But, as there might be lands within eight miles of the termini specified in the 32 G. 3, (*viz.* the canals and the railways specially described in that act,) and railways over those lands to those termini might touch upon or fall in with the Sirhowy tramroad, the qualification at the end of our certificate was intended so intimate that such railways as, independently of the 42 G. 3, could have been made under 32 G. 3, might still be made."

*The KING against The Inhabitants of St. MARY LEICESTER. [*644]

On appeal against a removal, the respondents proved that the pauper was born in the appellant parish; the appellants proved that his mother's maiden settlement was in a different parish; but neither side gave any evidence of the father's settlement, or of any attempt made to ascertain it:

Held, that as against the birth settlement relied upon by the respondents, proof of the mother's maiden settlement was sufficient to invalidate the order.

ON an appeal against an order of two justices, removing John Cathbert from

the parish of Swepstone in Leicestershire to the parish of St. Mary in the borough of Leicester, in the same county, the sessions confirmed the order, subject to the following case.

The respondents, on hearing of the appeal, proved that the pauper was born in the appellant parish; which was met by the appellants proving that the pauper's mother, before her marriage with his father, acquired a settlement by hiring and service in the parish of St. Martin, in the borough and county aforesaid. The court of quarter sessions confirmed the order, on the ground that no evidence was offered to shew that the pauper's father had no settlement.

Humfrey and Burnaby in support of the order of sessions. It must be contended, on the part of the appellants, that every settlement, however remote, as that of a grandmother, for instance, may be relied upon, without tracing the settlement of the father of the pauper. In *Rex v. St. Matthew, Bethnal Green*, Bur. S. C. 485, it is said by Wilmot, J., "The positive law in these cases of settlements, is that the child's settlement follows that of its father, if the father can be found; and that no recourse shall be had to the mother's settlement, till that of the father, can be traced no father." The party, there-
 *645] fore, who *insists on the settlement which cannot be set up till that of the father has been inquired into, is the party bound to trace that of the father. Here the appellants call upon the sessions to presume that the father had no settlement; whereas the presumption is that every person has a settlement. The necessity of adhering to the rule laid down in *Rex v. St. Matthew, Bethnal Green*, Bur. S. C. 485, appears from the liability to surprise which there would be if it were enough, in order to meet a birth settlement, to shew any settlement, however remote. In *Rex v. Harberton*, 13 East, 311, it was said by the Court, that evidence of the wife's maiden settlement (in a question as to the settlement of wife and daughters) was *prima facie* sufficient, and that it lay upon the other side to rebut it by giving evidence of the husband's settlement in a different parish. But *Rex v. St. Matthew, Bethnal Green*, Bur. S. C. 485, was not cited there: and the actual decision may be explained on other grounds; for, there, unless the wife's settlement was effectual, no settlement at all appeared; but here the birth settlement was proved. In *Rex v. St. Mary, Beverley*, 1 B. & Ad. 201, it was held that a maiden settlement of a married woman was not, of itself sufficient to establish her settlement in the appellant parish; but, there, proof was given that the husband was born in another parish though it could not be discovered what the other parish was; and there, also, *Rex v. St. Matthew, Bethnal Green*, Bur. S. C. 485, was not cited. In *Rex v. Westerham*, 2 Bott, 68, pl. 108, (6th ed.) the maiden settlement of a wife was held good, as to herself and her child, upon its being shewn that the hus-
 *646] band had run away, and that his settlement was not *known, which satisfied the requisite that the father's settlement must be traced, or evidence be given of a reasonable attempt to discover it, before the mother's settlement be resorted to. If this order were quashed, the result would be conclusive as between the two parishes; and, if hereafter the husband's settlement should be discovered to be in the appellant parish, the respondents could not avail themselves of it.

Hildyard and G. T. White, contra. The order of removal is wrong, upon any supposition. If the father had a settlement, then the removal to the birth settlement was wrong; if he had not, then the child's settlement is that of the mother. The parish removing is thus the party upon whom it lay to trace the father's settlement. But again, as the father's settlement was not shewn, it is as if he had none; this is, indeed, the very principle upon which the removal to the birth settlement must be defended. The appellants are entitled to have the order, removing to the birth settlement, quashed, if either father or mother had a settlement; and they have proved one alternative which entitles them to succeed, whether the other be true or not. *Rex v. St. Mary, Beverley*, 1 B. & Ad. 201, shews that here the removing parish, being bound to prove the last

legal settlement, are the party on whom it lies to support, if possible, the birth settlement, by proving the absence of settlement by parentage. In *Rex v. St. Matthew*, Bethnal Green, Bur. S. C. 485, the first husband's settlement was expressly found to be not known; and the second husband had no settlement; it did not become a question which was the party on *whom the onus of tracing the husband's settlement lay. The appellants could not here be called [*647 upon to disprove every possible species of settlement which the father might have had. In *Rex v. St. Mary*, Beverley, 1 B. & Ad. 206, the authorities are discussed by Bayley, J.; and he afterwards says, "They prove at the utmost that where there is no sufficient evidence of any settlement in the husband, and where the only settlement as to which there is any, is the wife's maiden settlement, the wife may be removed to that settlement." The general rule is that proof of a negative is not required: this case is not among the exceptions to that rule. In *Rex v. Wakefield*, 5 East, 338, Le Blanc, J. said, "The place of birth is the weakest evidence of settlement:" and thus the proof of the mother's settlement here destroyed the *prima facie* case of the respondents. [WILLIAMS, J. referred to *Rex v. Whitley*, 2 Bott, 13 pl. 30, 6th ed.] That case shews that proof of the birth settlement is "sufficient to throw the burden on the other side, of proving a different place of settlement by *parentage*:" here the appellants have given a proof of settlement by parentage, which is sufficient till it is met. The rule laid down in Nolan on the Poor Laws is, Vol. i. p. 307, (4th ed.), "Where the father has not a known settlement before his child becomes chargeable, that which the mother had previous to her marriage is communicated in the same manner, and subject to the same rules."

Lord DENMAN, C. J. My first impression was that, upon the authority of the rule laid down in *Rex v. St. *Matthew*, Bethnal Green, Bur. S. C. 485, it was incumbent upon the appellants to prove either the father's settlement, or that inquiries had been made as to his settlement and that none had been found; neither of which had been done. But the respondents rely upon the birth settlement. If the father had a settlement in the same place, they should have shewn it; but they rely upon the *prima facie* case of the birth. That is good till a settlement by parentage be shewn. Here, that is shewn by proof of the mother's settlement. It is argued that the mother's settlement cannot be taken to be that of the child, till the fact of the father's settlement be disproved: but that is not so here, because the mother's is good as against a birth settlement. [*648

LITLEDALE, J. The respondents, without giving any account of the parents, shew a *prima facie* settlement by birth. The appellants, to get rid of that, shew a settlement in one parent, the mother: neither party gives any proof as to the father. The father's settlement would displace that of the mother; but it would also displace the birth settlement. How, then, does the case stand? It may be presumed, indeed, that every man had a settlement; but, if the father had one, it would displace the settlement relied upon by the respondents, as that of the mother will do in the absence of the father's settlement.

PATTESON, J. The birth settlement is the lowest and weakest. If you shew a better, you get rid of that: *the birthplace is the place of settlement, [*649 because no better settlement can be found. Here, a better is found.

WILLIAMS, J. I accede to the view of the case taken by Mr. Hildyard. How do the respondents make good a settlement by birth? Only by supposing that the father has no settlement. Then the appellants shew the mother's settlement. On what supposition is that a good settlement? On the very supposition necessarily made by the other side. Order of sessions quashed.

DOE on the Demise of CHANDLER and Another against FORD. *Thursday, June 11.*

In ejectment by grantee of an annuity against the grantor, for premises on which the annuity was secured, it appeared that no memorial had been enrolled. The lessor of the plaintiff contended that none was necessary, by sect. 10, of the Annuity Act, 53 G. 3. c. 141, the premises being of greater value than the annuity, in proof of which he relied on a clause in the annuity deed, wherein the defendant covenanted that the premises were of more than sufficient value to answer and pay the annuity. The defendant offered evidence to prove that the premises were not of such value when the annuity was granted.

Quære, whether a covenant, as above, is a declaration which estops the party making it from afterwards disputing in an action the fact covenanted for. But, assuming that it were so in other cases,

Held, that it could not preclude a party from giving proof that the annuity was granted in contravention of the statute.

EJECTMENT for a barn, stable, and land. The cause was tried before Lord Denman, C. J. at the Winchester Summer assizes, 1834. The lessor of the plaintiff, Chandler, claimed as trustee under an annuity deed for the yearly payment of 20*l.*, executed by the defendant in 1826. The defence was, that the deed was void, not having been properly enrolled pursuant to stat. 53 G. 3, c. 141, s. 2. In answer, it was alleged that the deed came within sect. 10, which exempts *650] from the operation of the act any annuity secured upon freehold or copyhold lands, &c. "of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon," &c. To prove this, the plaintiff relied upon the following covenant by the defendant in the deed in question. "And moreover, that now, and at the time of the sealing and delivering these presents, the said barn, stable, buildings, pieces, or parcels of land, hereditaments and premises hereby demised or intended so to be, are of more than sufficient annual value to answer and pay the said annuity or clear yearly sum of 20*l.* hereby granted, over and above all reprises, charges and incumbrances whatsoever, payable out of, or affecting the same." For the defendant it was urged that this covenant was not evidence of the value; for that an annuity deed could not be exempted from the operation of the statute by a clause which the parties thought proper to insert in the deed itself, perhaps with that very intention. The objection was over-ruled. A witness was also called, who proved that the defendant had represented the value as exceeding 20*l.* to a party acting on behalf of the lessor of the plaintiff, Chandler, and had referred that agent to another person, who said the statement was correct. It was then proposed, on behalf of the defendant, to prove that the actual value of the premises in 1826 was below 10*l.*; but it was urged, on the other side, that his covenant estopped him from shewing this. The Lord Chief Justice, however, admitted the evidence, giving leave to move upon the point; and he left the case to the jury upon the question of value. The jury found that the premises were not worth 20*l.* a year, and gave a verdict for the defendant. In Michaelmas term, 1834, *Coleridge*, Serjt. obtained a rule to *shew cause *651] why a verdict should not be entered for the plaintiff.

Erle (with whom were *Bingham* and *Dampier*) now shewed cause. The covenant that this property was of a certain value, cannot be deemed equivalent to a direct allegation that it was so. But, assuming this to be otherwise, although in ordinary cases a party is estopped from giving evidence in direct contradiction to the statement of his own deed, that rule cannot prevail here, where an act of parliament has been manifestly infringed, and might be altogether evaded by means of covenants like the present, if they created an estoppel. *Saunders v. Wright*, 1 Taunt. 869, shews that the grantor of an annuity may prove the land to be of inadequate value, though by evidence contrary to his

own representations, and even to the recital of his deed. A covenant, for a purpose against law, is void and does not bind; Shepp. Touchst. 163. Where the consideration of a bond is illegal (as simony, usury, or compounding of felony,) the defendant may plead the fact, although there be a different and legal consideration recited in the bond; Bull. N. P. 178. In *Hill v. The Manchester Waterworks Company*, 2 B. & Ad. 544, it was considered clear that a deed does not estop where the matter relied upon as creating the estoppel has been introduced to effect a fraud or a purpose contrary to act of parliament. In *Paxton v. Popham*, 9 East, 419, where it was observed in argument that in cases of usury, gaming, and stock-jobbing, a bond is constantly framed, stating a legal, but untrue consideration, yet the courts always allow the true one to be shewn, Le Blanc, J. said, "This has frequently *occurred in cases of annuity [*652 transactions, where, as in cases of usury, goods have been given to the obligors instead of money, as stated in the condition of the bonds." The Court here called upon

Manning, contra. The doctrine in *Hill v. The Manchester Waterworks Company*, 2 B. & Ad. 544, might have applied if the annuity act had required every deed to be registered. But it requires registration in those cases only, where the property is below a certain value: and, therefore, unless the grantee knew that the property was so here, there is, in him, no fraud or evasion of the act, and, consequently, the estoppel as against him ought not to be defeated. The representation made to him, and which he believed was, that the property was of sufficient value to answer the annuity. If he had known the contrary, he had no motive for permitting the deed not to be registered, as the expense of registration would have been borne by the grantor. The cases, in which statements have been inserted in deeds as a colour for usury or other illegal transactions between the parties, have no application here. If this had been an action of covenant, and the defendant had pleaded the want of a memorial, the plaintiff, to make the estoppel conclusive, must have replied it, *Vooght v. Winch*, 2 B. & Ald. 662; but, in an action where there is no opportunity of pleading the estoppel, it is conclusive if raised by evidence under the general issue.

LITLEDAL, J. I am of opinion that the defendant was not precluded from offering this evidence. It is not necessary to decide whether this covenant amounted *to an estoppel or not. At all events it could not have that [*653 operation here. The effect of which took place was to prevent the deed from being registered. The parties were in fact doing something by which the act would be evaded. It is urged that the lessor of the plaintiff had no motive for permitting the deed not to be registered. I cannot say how this may have been; the motive may have been kind feeling towards the grantor, and a desire to save him expense; but, however this may be, if the grantee chose to rely upon the accounts given him by the grantor, he must be bound by the consequence. It was his duty to inquire more strictly as to the value: if he had done so, the result would probably have been a discovery of that which now appears by the verdict. The effect of his omission was to prevent the enrolment of the deed, and any inquiries to which that might have led.

PATTESON, J. I do not say whether, in a different case, this covenant would have been an estoppel or not. But the question here arises on a statute which says that an annuity deed, if no memorial is enrolled, shall be void, unless it falls under certain provisions, contained in the tenth section. To enforce the deed, where there is no memorial, the parties must shew that it comes within one of these provisions; in the present case, that the lands are of equal annual value with the annuity, or greater. To establish that here, the defendant refers to a covenant, by which, as he says, it is stated that the lands are of such value. But that is not sufficient for the purpose. If it were held so, an instrument which the parties might choose to prepare would defeat the statute from beginning to end. They insert a covenant that the land is of the requisite

*654] value; *they might equally well put in a statement that the annuity was given by marriage settlement, or without regard to pecuniary consideration, and then contend that the grantor was estopped to shew the contrary. It is argued that the grantee could have no motive for allowing the enrolment not to take place. I cannot say what the motive may have been here, but many reasons may be suggested; as to save expense, to avoid publicity, or to frustrate inquiry by persons who may subsequently wish to have annuities secured on the same land. The security of such persons is one object of the statute. It could not be contended, on motion to set the deed aside, that the grantor was estopped from taking this objection; and I do not see why it should be more available here.

WILLIAMS, J. *Hill v. The Manchester Water Works Company*, 2 B. & Ad. 544, is an authority against the plaintiff, because it was held there that the pleas might have been an answer if they had disclosed that the bonds were given for an immoral purpose, or in contravention of a statute, (See *Fairlittle dem. Mytton v. Gilbert*, 2 T. R. 169, or of public policy. The judgments of the Court proceed expressly on the ground that the pleas do not, upon the face of them, present any sufficient statement of that kind, and are therefore no defence. Here, the evidence in question was offered to shew that the act of parliament had been evaded; and it was admissible for that purpose.

Lord DENMAN, C. J. I should not have reserved the point, but for the advantage which the grantor of the annuity was probably about to derive from his own *wrong. I doubt whether a covenant can operate as an estoppel at *655] all; but at any rate this covenant could not have the effect of preventing the defendant from shewing that the deed was not within the clause of exemption. Rule discharged.

ELIZABETH POUND *against* PENFOLD and WIFE. *Thursday, June 11.*

Where the defendant in a country cause had obtained time to plead, on the usual condition of taking "short notice of trial if necessary;" and the plaintiff delivered a replication tendering issue, with notice of trial, to the defendant's agent in London, after post-time on the 27th of February, for the 3d of March, the commission day of the assizes, and on that day the trial took place, the defendant not being ready, or appearing; the court, under special circumstances shewn by affidavit, held itself not precluded by the general rule, *Hill* 2 W. 4, l. 58, from granting a new trial.

CASE for slander. The cause was tried before Patteson, J., at the Spring assizes at Winchester, 1835, and the plaintiff had a verdict for 50*l.* In the ensuing term a rule nisi was obtained for a new trial, upon affidavits. The material facts, as stated in the affidavits for and against the rule, were as follows:—

The slanderous words complained of imputed to the plaintiff that she had been dismissed from a service for certain improper conduct. The summons was served 18th September, 1834: defendant appeared on the 27th. The declaration, laying the venue in Hampshire, was delivered January, 30th, 1835, and a plea demanded on the 31st. Time to plead was obtained, on summons, February, 7th, on the usual terms in country causes; viz. to plead issuably, rejoin gratis, and take short notice of trial, if necessary, for the next assizes. A summons for further time was served Feb. 11th, and a week granted, on the former terms, Feb. 12th. On the 19th, at half-past seven in the evening, the defendants' agents delivered the pleas, filling twenty folios, to the plaintiff's agents, who, on the next day, sent a copy to the plaintiff's attorney at Ringwood, Hants. He received it on the 21st. The pleas contained, besides the general issue, justifications, in which it was stated that the plaintiff had been *turned away *656] from the service of a Mrs. Osey for the improper conduct imputed by the words complained of. This rendered it necessary for the plaintiff's attorney

to make certain inquiries, particularly at Southampton, where Mrs. Osey lived. The answer to those inquiries was received February 25th; and the plaintiff's attorney, upon that day (which he stated to have been the earliest possible time after the justification was ascertained to be untrue), wrote to his agents in London to prepare the replication, issue, and notice of trial. The agents obtained a draft of the replication, which was *de injuriâ*, on the 27th, and on that day gave the draft of the issue to a clerk to be copied. The issue extended to sixty folios, and was therefore not ready till the evening of the 27th. It was delivered, with notice of trial, to the defendants' agents at a quarter-past, or (as they stated) half-past, seven. In the morning of the 27th the plaintiff's agents had told the agents for the defendants that the issue was engrossing and would be delivered, with notice of trial, before post-time if possible, but that they might write to their client and inform him that the issue and notice would be delivered that day. The defendants' attorney lived at Salisbury. On the 28th the defendants' agents told the plaintiff's agents that they should treat the notice as a nullity, to which the latter replied that they should send down the record that night, and should rely upon the notice of trial as being sufficient under the new rules of Court. They did accordingly send down the record and jury process, and copies of the issue and notice of trial, by that night's mail to the plaintiff's attorney, who received them on the 1st of March. No summons was taken out for setting aside the notice of trial.

It appeared, by the affidavits in support of the rule, that, on the morning of February 28th, the defendants' attorney at Salisbury received a letter from his agents, stating that the plaintiff had no notice of trial; and the attorney, in consequence, subpoenaed no witnesses. On the 1st of March, which was Sunday, he received another letter from his agents, stating that notice of trial had been given, but he considered it then too late to subpoena his witnesses, several of them, whose evidence was material, living in different places, and many at a considerable distance from Salisbury and Winchester. [657]

The cause was tried on the 3d of March, the commission day of the assizes, when the plaintiff gave the evidence which had been inquired for, as above stated, after the delivery of the pleas. The defendant Penfold and his attorney were in Court till the verdict was given, but made no defence, or application to put off the trial. The defendant's attorney now deposed that they did not appear, in consequence of his belief that the notice was improper: and he and the defendant Penfold made affidavit of merits.

Dampier now showed cause, and contended that the notice of trial was sufficiently early, under the circumstances. By the rule of Court, Hil. 5 W. 4, I. 58, 3 B. & Ad. 381, "short notice of trial shall, in country causes, be taken to mean four days." That rule is peremptory: *Lawson v. Robinson*, 1 Cro. & M. 499, (S. C. 3 Tyrwh. 490). And, by rule viii. of the same series, 3 B. & Ad. 393, the days must be reckoned exclusively of the first, and inclusively of the last. Here the notice was given on the 27th of February, for the 3d of March. And by the rule of Court, Hil. 2 W. 4, I. 50, 3 B. & Ad. 380, "service of rules and orders, and notices, if made before nine at night, shall, be deemed good, but not if made after that hour." The defendants objected to plead upon the very terms now complained of; and an extension of that time was granted them afterwards. If, nevertheless, they felt themselves prejudiced by the notice of trial, they might have applied to a judge at chambers. [658]

Kelly, contra. The shortness of the notice arose from the plaintiff's own delay. At least the defendants should have been allowed twenty-four hours to rejoin. The four days here include a Sunday and the day of the trial. The terms, on which time to plead was granted, were, to take short notice of trial, "if necessary." The short notice here insisted upon would not have been necessary if the plaintiff had used due diligence. The time taken for replying was much more than could be necessary for a replication of "*de injuriâ*."

LORD DENMAN, C. J. On the whole, the trial does not appear satisfactory, though neither party has much to complain of. The rule must be absolute; the costs to abide the event of the next trial.

LITTLEDALE, PATTESON and WILLIAMS, Js. concurred.

Rule absolute.

*659] *HOW, Clerk, *against* KENNETT and GOUGH. *Thursday,*
June 11.

Where a termor assigns his goods, estate and effects to trustees for the benefit of his creditors, Quare, whether the trustees have the same option of accepting or rejecting the term, with assignees of a bankrupt; and whether they can divest themselves of it without a formal disclaimer?

But, although the assignment be sufficient to vest the term in the trustees unless disclaimed and they do not disclaim, assumpsit for use and occupation cannot be maintained against them without proof that they have actually occupied.

It is not sufficient for this purpose to prove that they placed persons temporarily upon the premises to take care of and sell goods which were part of the assigned property, and which were accordingly sold on the premises; and that, under a mistake of the law, they paid rent to the landlord for the half year in which the assignment took place.

ASSUMPSIT for use and occupation of a dwelling-house and land. Plea, that the defendants did not use and occupy, &c. The particular of demand was for rent, from December 25th, 1832, to March 25th, 1834, of premises formerly occupied by George Hawkins, and since by the defendants, assignees of G. H. On the trial before Lord Denman, C. J., at the Hampshire summer assizes, 1834, the material facts appeared to be as follows:—Hawkins took the premises of the plaintiff from year to year, commencing at Midsummer, 1831, at a rent payable quarterly, under a written agreement. He carried on business as a grocer in the house, and underlet the land. In 1832, being in difficulties, he executed a deed of assignment to the defendants of all his stock in trade, household goods, debts, estate and effects, in trust to sell for the benefit of his creditors. No express mention was made in the deed of his interest in the premises demised to him by the plaintiff. The defendants executed the deed on the 20th of December, 1832. Hawkins's family continued on the premises a short time after the assignment, carrying on the business and accounting to the defendants. On the 22d (Hawkins and his family having then gone away) the assignees put in a shopman who continued to carry on the business, accounting to them, for about a week. No new stock came in. On the 29th the shop was shut up; but the man slept at

*660] the house for the purpose of taking care of *the goods, till the following February, when the property remaining on the premises was sold by auction, by Kennett's order. On the 19th of March, 1833, Kennett wrote to the plaintiff as follows:—"Sir, I beg to say I am prepared to settle the half year's rent for Hawkins's house, which the trustees consider themselves accountable for: please say if I shall wait on you this morning, or whether you wish to go into the house before I deliver you the keys. I am," &c. The plaintiff wrote in reply (March 19th), that he was ready to receive the rent, but had nothing to do with the keys till Midsummer, 1834. He added, in another note on the same day, "I beg leave to inform you that if the trustees see fit (any time betwixt this and Saturday) to offer an acceptable proposal, I may thereby be induced to relieve them very considerably as to the tenancy with which they have burthened themselves." On the 23d, Kennett, having in the mean time tendered the keys, which were refused, wrote as follows: "Dear Sir, not having an opportunity of consulting my partner trustee on the subject of replying to your proposition, I take upon myself to offer, for the trustees, half a year's rent, without prejudice, in lieu of holding possession such time as they may be liable." On the 25th, the plaintiff not having agreed to this proposal, Kennett

paid the rent up to that day, and tendered the keys, which were again refused. On the 29th of January, 1834, the plaintiff's solicitor gave notice to the defendant's to repair the premises, threatening an action if any damage ensued for non-repair.

King, the auctioneer who sold the goods by order of Kennett, stated that, a few days before they were sold, the plaintiff told him that the premises were for sale, and asked him to procure a purchaser; and he further *deposed, [*661 that in January, 1834, in a conversation respecting the sale of them, the plaintiff gave King the selling price, but desired him to keep secret his having done so.

On behalf of the defendants, it was first contended that there must be a non-suit, inasmuch as the general words used in the deed of assignment were not sufficient to pass Hawkins's interest to the assignees; in answer to which Carter v. Warne, M. & M. 479, was cited. The defendants' counsel then submitted to the jury that no sufficient evidence appeared of an occupation, or contract to occupy. The Lord Chief Justice, after observing that there was no evidence of an actual occupation, except the sending in of a shopman by Kennett for a week, left it to the jury to say whether there had been a contract by which the defendants had adopted the tenancy. He explained this by asking whether the jury thought the defendants had so conducted themselves as to lead the plaintiff reasonably to believe, and whether he did believe, that they intended to become tenants upon the terms of Hawkins's agreement; and he relied strongly upon King's evidence of the conversation in 1834, as showing that this was not really the plaintiff's own understanding of the transaction. The defendants had a verdict.

Coleridge, Serjt., in the ensuing term, moved for a new trial on the ground of misdirection. The question upon the evidence was not, whether the parties considered themselves as entering into a particular contract, but, whether, if the jury believed the evidence, the conduct of the defendants had not amounted to an actual taking *of possession: *Thomas v. Pemberton*, 7 Taunt. 206, [*662 *Hanson v. Stevenson*, 1 B. & Ald. 303, *Clark v. Hume*, Ry. & M. 207. [TAUNTON, J. The case of assignees of a bankrupt does not illustrate the present, because they are enabled by statute to elect whether they will accept a lease held by the bankrupt.] The difference is in favour of the plaintiff. A rule nisi was granted, against which

Barstow now showed cause. The direction was right. No term vested in the assignees by the deed of assignment; that made no mention of the leasehold interest, or of any thing to be done by the assignees except selling the stock. Nor was there any term, which could vest by the deed. [LITLEDALE, J. A tenancy from year to year is a term.] But, at all events, it was for the plaintiff to show that the defendants had done some act which amounted to a substitution of themselves for Hawkins. (He then commented on the facts, with reference to this point.) [PATTESON, J. Assuming that the legal interest once passed to the defendants, is there any authority to show that trustees for the benefit of creditors may elect to take or refuse a lease, like assignees of a bankrupt? Lord DENMAN, C. J., referred to the summing up of Lord Tenterden in *Carter v. Warne*, M. & M. 481, as recognizing such a right.] In the present deed the conveyance is only of stock, goods, and debts, specifically, the mention of these being followed by general words. At most it can only be said that this might or might not pass the leasehold interest. The jury were to say whether or not the assignees meant to accept: they had done no act of acceptance, and there was strong evidence that the *plaintiff did not believe them to have [*663 adopted the tenancy. The whole difficulty upon the defendants arises from their having honestly paid their rent up to Lady-day, which they were not bound to do.

Manning, contra. The defendants have decided this case against themselves, by paying the rent to Lady-day, 1833. The words of the assignment do not

materially differ from those of the deed in *Carter v. Warne, M. & M. 479*, which was held clearly sufficient to pass the leasehold property; and the case was cited to this point at the trial. But the assumption of Lord Tenterden there, that trustees to whom a term passes by such a deed have the same power of accepting or refusing the term with assignees of a bankrupt, is questionable. At common law, a term assigned, as in this case, vests in the assignee unless disclaimed. But the interest which assignees of a bankrupt take is not at common law, nor does it result from the act of an assignor. The statute law takes the property out of the bankrupt, and vests it in the assignee, *sub modo*. The object for which it vests, namely a rateable distribution for the benefit of creditors, is defined by the act itself. The assignees are not bound to accept a property not available for that object; as is clearly the case, for example, where the bankrupt is obligee of a bond for the benefit of another person: so it is also if the property would be *damnosus hæreditas*; and the assignees are allowed a reasonable time to ascertain whether it would be so or not. These are statutory rules, and do not apply to the case of trustees for the benefit of creditors. And, even if they did, *664] the trustees *in this case have taken the property to themselves. The auction in February, 1833, was not for the purpose of ascertaining whether the lease could be rendered profitable, but for that of selling the stock. The house was used then by the trustees, as a warehouse for the goods. And further, Lord Tenterden's language in *Carter v. Warne, M. & M. 482*, is that, if assignees have acted "so as to render the premises of less value to the landlord, they must be considered as having taken to them;" which means, not if the assignees have damaged the premises, but if they have done any thing by which the landlord is put in a worse situation as to the disposal of them. Here the landlord would have been in a better situation for obtaining a new tenant, if the defendants had given up the premises at Christmas, 1832, by which time they might have ascertained that it would not suit them to continue the holding. Even, therefore, if the present conveyance had stood upon the footing of an assignment in bankruptcy, the defendants would have been liable. But in this case the effect of the assignment would have been, without any act on the part of the assignees, to vest the property in them until disclaimer. And, supposing that a disclaimer might be made in the informal manner here attempted, a man cannot disclaim a property in part, and adopt it in part, as the defendants seek to do here. The property having vested in them by the deed, they have sold the goods and used the premises for the purpose of the sale. They have, then, taken to the premises; and they have rendered themselves liable in an action for use and occupation. [Lord DENMAN, C. J. Suppose Kennett had said, "I will *665] send my servant to the premises, and he will look after the *sale," and that had been done with the landlord's consent, would it have been a taking possession? What passed here is equivalent to that. A sale of goods by auction upon the premises is a proceeding well known. PATERSON, J. In *Carter v. Warne*, Lord Tenterden thought the terms of the deed sufficient to pass the lease; but still that it was a question of fact for the jury, whether the defendants had so dealt with the property as to make themselves assignees of it. According to you, the interest vested in the assignees by the mere assignment, so that covenant would have lain against them if the lease had been by deed: whether use and occupation lies is a different question.] The doctrine of Lord Tenterden in *Carter v. Warne, M. & M. 480*, was new, and contrary to the now recognized principles of law. It was not questioned, because the general effect of the summing up, and the verdict, were in favour of the party who would otherwise have taken the objection.

LITTLEDALE, J. I am of opinion that this rule must be discharged. I with Mr. Manning, agree that an assignment at common law charges the assignee with the premises unless he disclaims. But the question here is, whe-

ther an action for use and occupation lie. (a) The defendants became assignees of a yearly term in the premises, but did they actually enter and take possession? Mr. Manning contends that they did so; but it was a question for the jury, whether in fact they occupied the premises as tenants, or merely for the purpose of selling *the goods. If they took to the premises under the assign- [*666 ment, use and occupation lies; if they merely used them to sell the goods, it does not necessarily follow, in point of law, that they are liable in this form of action. Perhaps an action of debt might lie, the declaration stating that the term was assigned to the defendants; but, in an action for use and occupation, it must be shewn that the defendants in fact occupied. The question was for the jury, and was rightly left.

PATTESON, J. I am of the same opinion. It is not necessary to say whether by this deed the term became vested in the assignees unless they disclaimed; or whether the opinion of Lord Tenterden, as to the vesting of a term under such circumstances, be a wrong one; though it is a new proposition to me, that, where property is assigned by deed to a trustee, the assignee can repudiate it. But I view this as the case of an action for use and occupation. No person can be sued in that form who does not use and occupy. Perhaps an action of debt might be maintained as has been suggested by my brother Littledale; but not an action for use and occupation, unless an actual occupation were proved. That was a question for the jury. And, as to the facts (his lordship here commented on the evidence, and stated that, in his opinion, the acts of the defendants, as proved, were most reasonably attributable to the intention of making what they could of the goods.) Then, was the case properly left to the jury? I see no misdirection. My Lord Chief Justice left it to the jury to say whether the defendants had held themselves out to the plaintiff as intending to continue the tenancy on the former terms; and whether the plaintiff so understood their intention. *If possession was taken by them on such an understanding, [*667 a new tenancy was commenced, independent of the assignment; and if they occupied on such a tenancy, they could not give up the term without notice to quit. It has been urged that the question to the jury should have been, whether the conduct of the defendants did not amount to an actual taking of possession. If it mean, whether, in point of law, the result of their conduct was not, such, the question was not for a jury. If it mean, whether the parties so understood the transaction, that question was, in effect, left. On the question as to use and occupation, *Nation v. Tozer*, 1 Cro. M. & R. 172, 4 Tyr. 561, is a strong authority. There it was held that, although one executor had entered and taken possession, his co-executors was not liable in action for use and occupation, no occupation in fact being proved against him, and the act of one executor not being for this purpose the act of both.

WILLIAMS, J. I am of the same opinion. The case was submitted to the jury perhaps more favourably to the plaintiff than was necessary.

LORD DENMAN, C. J. It gives me great satisfaction that we are enabled to maintain this verdict, because otherwise the plaintiff would take an undue advantage of very honourable conduct on the part of the defendants. They took the premises only for the purpose of selling the goods. Their letter to the plaintiff, offering the rent and keys, was written under a mistake of the law; and he in his answer should have informed them of their *error. The [*668 action is brought, without any ground, for use and occupation during a period in which the defendants did not occupy. It is an unrighteous attempt. The rule must be discharged. Rule discharged.

(a) The learned Judge here referred to a case, as illustrative of the present, where an action was brought against assignees of a bankrupt, upon their continuance of a possession begun by another person; probably *Naish v. Tatlock*, 2 H. B. 319.

COPELAND *against* NEVILL. *Thursday, June 11.*

To obtain an order for entering an appearance under stat. 2 W. 4, c. 39, s. 3, it is not sufficient to state on affidavit that "diligent inquiry" has been made to find the defendant and his property; but the way in which inquiry has been made must be described, to satisfy the Court that proper means have been used to serve and execute the writ.

S. B. HARRISON moved to enter an appearance for the defendant, under stat. 2 W. 4, c. 39, s. 3. It was stated on affidavit that, a distringas having issued against the defendant to compel his appearance in the suit, an officer of the sheriff of Middlesex went to a house which he understood to be the dwelling-house of the defendant, for the purpose of executing the writ, and was informed by a man servant on the premises that the defendant and his family had recently left the house, and that there were no effects or property belonging to the defendant on the premises. The officer deposed that he had made "diligent inquiry" to find the defendant, in order to serve him with a copy of the writ; but was unable to find him, or discover his abode, or any goods or chattels belonging to him. The sheriff returned non est inventus, and nulla bona. The clerk to the plaintiff's attorney deposed that he believed, from information he had received, that the defendant had absconded to avoid proceedings at law by his creditors. No appearance had been entered in this action.

LITTLEDALE, J. (a) An affidavit of "diligent inquiry" is not sufficient; that 669*] is merely leaving it to the conscience *of the deponent. He should shew that he has inquired at the twopenny and general post offices, the butcher's, baker's, and so on.

PATTESON, J. Applications are frequently made to me on such affidavits; but I always reject them.

WILLIAMS, J. concurred.

Rule refused. (a)

MARTHA WORLEY *against* HARRISON and BLACK. *Friday, June 12.*

1. By an instrument in writing, the two defendants jointly and separately promised to pay to plaintiff, or order, 50*l.* by instalments for value received; and it was declared that it was intended, by the receivers and givers of *that note of hand*, that all instalments should cease at plaintiff's death. Plaintiff declared in assumpsit, the first count being on the instrument, and calling it, in the declaration, an agreement or instrument in writing, except where the above language of the instrument itself was set out in the declaration. Defendants pleaded that they did not make the promissory note mentioned in the first count, as there alleged: Held, that the instrument was not a promissory note, as it created only a contingent liability; that the language used in the declaration did not authorise the defendants to call it a promissory note; and, consequently, that the plea was bad on special demurrer.
2. There was a second count on an account stated. The defendants pleaded first as above, without commencing the plea by actionem non, or expressly confining it to the first count (except by the language of the traverse as above); and they also pleaded to the last count expressly. Semble, per Littledale and Patteson, Js., that the first plea was in form pleaded to the whole declaration, and was therefore bad for not answering the second count.

ASSUMPSIT. The first count stated that whereas, by a certain agreement or instrument in writing, made heretofore, to wit, 14th of May, 1832, and dated that day, the said defendants jointly and separately promised to pay unto the plaintiff or her order the sum of 50*l.*, in the parts and proportions, on the several days, and at the times, thereunder mentioned, being for value received by sundry

(a) Lord Denman, C. J. had left the Court.

(b) See *Sanderson v. Bourn*, 2 Cro. & M. 515.

household goods, &c., specified in an inventory, &c. thereunto annexed, by way of instalments, *in manner and form following, that is to say, the sum of 5*l.*, part of the said sum of 50*l.*, at or on the 11th day of October then [*670 next ensuing the day of the date thereof; the further sum of 5*l.*, other part of the like sum, at or on the 5th day of April, 1833, (and so on by half-yearly instalments of 5*l.* every 6th of April and 11th of October;) and the further sum of 5*l.*, other and remaining part of the like sum of 50*l.*, at or on the 6th day of April, 1837; "but nevertheless it was by the said agreement or instrument declared, that it was thereby considered and fully intended, both by the receiver as well as the givers of that note of hand, that all installed payments thereupon whatsoever, from and immediately after the decease of the said plaintiff, should cease and become null and void to all intents and purposes, against the executors, administrators, representatives, or relatives of the said plaintiff, in respect to her personal estate, as well as all effects named, stated, and contained in the said inventory, and that no claim should be made or had thereupon;" as, by the said agreement or instrument, reference, &c. : and the said agreement or instrument being made as aforesaid, afterwards to wit, &c. in consideration of the premises, and that the said plaintiff, at the request of the said defendant, had then promised the said defendant to perform and fulfil the said agreement or instrument in all things on her part to be performed and fulfilled (mutual promises;) breach, non-payment of the instalments which by and according to the said agreement or instrument respectively became due and were to be paid on the 6th of April and 11th of October, 1834, contrary to the tenor and effect of the said agreement or instrument, and of the said promise *of the said defendant. [*671

Second count, on an account stated.

Plea. The said defendants, by F. J. their attorney, say that the said defendants did not make the said supposed promissory note in the said first count mentioned, in manner and form as the plaintiff hath in the said first count alleged (conclusion to the country;) and as to the said last count of the said declaration, &c. (non assumpsit.)

The plaintiff demurred specially to the first plea, assigning for causes, that the said plea, not being otherwise expressed, and not being pleaded as to any particular count or part of the declaration, is to and must be deemed and taken as pleaded to the whole of the said declaration, and in bar of the whole action; whereas that plea would at the most be an answer only as to the first count of the said declaration. And also that the defendants have in that plea alleged that they did not make the said supposed promissory note in the said first count mentioned, whereas that count does not mention any promissory note, but is a count upon the agreement or instrument in writing therein mentioned, and which agreement or instrument is not, nor can it operate as, a promissory note; and also that the said plea purports to take issue upon a certain fact, but which fact is not alleged in the said first count of the said declaration. Joinder in demurrer. Issue was joined on the second plea.

Wightman in support of the demurrer. First, the first plea is pleaded to the whole declaration, but offers no answer to the second count. Secondly, it offers no answer to the first count; for it merely denies the *making of the [*672 promissory note mentioned in the first count, whereas the first count mentions no promissory note, nor is the instrument there described in effect a promissory note, because the payments are contingent upon the continuance of the life of the plaintiff; *Carlos v. Fancourt*, 5 T. R. 482, *Roberts v. Peake*, 1 Bur. 323, *Leeds v. Lancashire*, 2 Campb. 205, *Williamson v. Bennett*, 2 Campb. 417, *Kingston v. Long*, Bayley on Bills, p. 16, not. (30,) (5th ed.), *Bolton v. Dugdale*, 4 B. & Ad. 619. The principle was also admitted in the judgment in *Richards v. Richards*, 2 B. & Ad. 454. This is a mere agreement.

Miller contra. First, the rule of Hil. 4 W. 4, General Rules and Regulations, 9, 5 B. & Ad. v., does not make the first plea a plea to both counts, but to the whole cause of action contained in that count which the plea professes to

answer. Now the traverse here is expressly of the fact alleged in the first count. The only object of the rule was, that the party might know what his adversary professed to answer: that is not left in doubt here; especially as, upon looking at the whole record (which may be done to explain the meaning of an allegation,) a separate answer appears, in the second plea, to the second count. Secondly, if the instrument be not technically a promissory note, (though it may be observed that the contingency was one upon which the liability was to cease, not to arise) still the first plea sufficiently traverses the allegation in the first count. It may be admitted that the plaintiff was not bound to treat it as *673] a technical promissory note; but the plea does *not necessarily mean that it is so. In the body of the instrument itself it is called a note of hand; and it clearly contains a promise. To a reasonable intent, the plea sufficiently traverses the cause of action.

Wightman in reply. First, the rule Hil. 4 W. 4, General Rules and Regulations, 9, 5 B. & Ad. v., is express: the formal parts of the ancient introduction to a plea not being introduced, the plea must be understood, not being otherwise expressed, to be in bar of the whole action. [PATTESON, J. But, looking at the whole language of the rule, is not the sense of it that the plea shall be held to be in bar of the whole count to which it is pleaded? There was a case to that effect.(a) I can, however, conceive a case, for instance, where there might be two counts on the same policy of insurance, in which a plea, that the defendant did not make the policy in the first count mentioned, might be an answer to the whole; and from this it seems to follow, that the language of the plea here does not confine the answer to the first count.] The objection then rests, not on the new rules, but on the plea being not confined by its form or matter to the first count, yet affording an answer to the first count only. The second plea cannot be taken into consideration to explain the first. Secondly, the defendant ought to have followed the language of the declaration, unless the legal effect justified a variation from it, which is not the case here. It is not necessary to consider whether, on general demurrer, the plea might not have been supported: it is clearly informal; and, as such, bad on special demurrer.

*674] *LITTLEDALE, J.*(b) As to the first objection, I am disposed to think that the first plea, though it expressly refers to the first count, and answers that only, is pleaded to the whole declaration. But on this point I give no opinion, for I have no doubt on the second. The declaration does not call the instrument a promissory note, nor does the plaintiff say that the defendants made any promissory note. It is true that in the instrument itself the words "note of hand" are used, and it is said also that the defendants "promised to pay;" but the declaration sets the whole out, and it then appears to be on a contingency. It has been remarked that the contingency was one upon which the liability was to cease, not to arise; but that is the same thing; it is not an engagement to pay at all events. The calling it a "note of hand" is nothing: we see that it is not the instrument which is technically called a promissory note. The plea therefore denies a fact which is not in issue at all. If this be merely an agreement, the defendants had no right, by their plea, to put such a technical construction on it.

PATTESON, J. The instrument makes the instalments payable on a contingency: it might have happened that not one farthing might have become due, as if the plaintiff had died between the 14th of May, 1832, and the 11th of October following. That is clearly a contingent liability; and the instrument is therefore not a promissory note. Then is it so called in the declaration? No. That is studiously avoided, except where, from the necessity of following the language of the instrument, the words "note of hand" are used. Then the

(a) Probably *Bird v. Higginson*, 2 A. & E. 696.

(b) Lord Denman, C. J. had left the Court.

first plea *says that the defendants did not make the said promissory note in manner and form as the plaintiff hath in the first count alleged; [*675 but the first count contains no such allegation: the plea therefore tenders no issue on any allegation in the declaration. As to the other objection, I wish not to be supposed to think that it is not a good ground of special demurrer; since, if the first were the only plea on record, it could hardly be considered so necessarily confined to the first count, as that the plaintiff might sign judgment for want of a plea to the second. I can conceive, though with some difficulty, a case in which a plea, in the same form as the first plea here, would answer more counts than one.

WILLIAMS, J. As to the first objection; the language of the instrument certainly is, that the defendants jointly and separately promised to pay (which is the common form of a promissory note), and the instrument is called "a note of hand;" this expression is not given in the declaration, but in the instrument itself which is there set out. The defendants assume that they have a right to call this a promissory note. Taking the instrument altogether, the money is payable upon a contingency. The first plea follows neither the language of the instrument, nor the description of it given in the declaration. As to the other point on which my learned brothers entertain a doubt, I shall decline giving any opinion. Judgment for the plaintiff.

*HISCOCKS and Another *against* KEMP. *Saturday, June 18.* [*676

It is not necessary to revive a judgment by scire facias for the purpose of issuing execution after a year and a day, where the execution has been suspended by agreement of the parties.

Such agreement sufficiently appears, where the judgment is upon a warrant of attorney dated June, 1824, empowering the plaintiff to enter up judgment at his pleasure, but stating, in the defeasance, that the warrant of attorney is given to secure payment of a certain sum, with costs of judgment if signed, on the 5th of December, 1826.

A RULE nisi was obtained for setting aside the execution issued against the defendant upon judgment on a warrant of attorney, and for discharging him out of custody. The warrant of attorney was dated June 5th, 1824, and authorized the attorneys to appear for the defendant as of the last preceding or any subsequent term, and thereupon to receive a declaration and suffer judgment to be entered up against the defendant at the suit of the plaintiff Hiscocks and another for 900*l.* Judgment was signed, May 27th, 1825. The defendant was taken on a ca. sa. for 360*l.* on the 5th of February, 1827, and had remained in custody ever since. No scire facias had ever issued to revive the judgment. The warrant of attorney bore the following defeasance.

"The within warrant of attorney is given to secure the payment by the within named William Kemp, his executors or administrators, to the within named Thomas Phipps and John Hiscocks, their executors, administrators or assigns, of the sum of 420*l.* together with costs of judgment if signed, on the 5th day of December, 1826. And it is hereby agreed that the said T. P. and J. H. or the survivor of them, his executors or administrators, shall be at liberty to enter up judgment hereon at their pleasure, and in case of default in payment as aforesaid, to issue execution and levy for the said sum of 420*l.* or so much as shall remain unpaid, and all costs and expenses whatsoever; provided always that the within warrant of attorney and the above defeasance are given and executed, *and also accepted, without prejudice to the suit now depending in the Court of Chancery, wherein the said William Kemp is plaintiff and [*677 Luke Eville and the said T. P. and J. H. are defendants; provided also that, if any part of the said sum of 420*l.* shall be received from Sir William Mansell Baronet, who is also liable to part of the same, the money so received shall be

deducted from and allowed to the said William Kemp out of the sum hereby secured."

The ground of motion was that the judgment ought to have been revived by *sci. fa.* before execution issued. In last Easter term, (a) Sir W. W. Follett showed cause against the rule, which was supported by Sir John Campbell, Attorney-General, and Helps. The case is so fully discussed in the judgment of the Court that a report of the arguments of counsel is unnecessary.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. This was a motion to set aside the execution upon a judgment signed under a warrant of attorney; and the only question was, whether, under the circumstances, it was necessary to have revived the judgment by *scire facias* prior to the issuing of the execution. The warrant was dated 5th of June, 1824; the defeasance was upon the payment of 420*l.*, with the costs of judgment if signed, on the 5th of December, 1826. The plaintiffs were to be at liberty to enter up judgment at their pleasure, and, in case of default in payment as aforesaid, to issue execution and levy for the said sum, or so much thereof as should remain unpaid. The judgment was in fact *signed on the 27th of May, 1825, and the execution

*678] issued in February, 1827. For the plaintiffs it was contended that, whenever the execution was suspended beyond the year and day after signing the judgment by the agreement of the parties, the delay so occasioned would not compel the plaintiff to revive the judgment, and that the facts of this case brought it within that exception to the general rule. The defendant denied that any such agreement appeared in the case; and further that, if it did, it could not waive a necessity imposed expressly by statute; the authorities on which such a practice was founded were asserted not to warrant it when duly examined, and in particular it was contended that the case of *Withers v. Harris*, 7 Mod. 64, was a decision directly in point and the other way. We have looked into the facts and the authorities, and are of opinion that on neither ground is there any reason for disturbing the execution.

Upon reading the warrant of attorney and the defeasance, it appears that, although judgment might be signed at the pleasure of the plaintiffs at any time after the date of it, 5th of June, 1824, yet that they were restrained from issuing execution before the 5th of December, 1826. It was therefore in the contemplation of the parties, that the judgment might remain more than a year without execution; and that it might do so as a restraint imposed upon the plaintiffs' right by the defendant. It cannot therefore be denied that the delay of the execution in this case was by agreement with the defendant at least, if not a term imposed by him upon the plaintiffs.

*679] *With respect to the practice, it has long been clearly understood in the profession that "if the plaintiff has judgment with a *cesset executio*, or stay of execution for a year, he may after the year take out his execution without a *scire facias*, because the delay is by consent of parties, and in favour of the defendant." This is the language of Mr. Serjt. Williams in the notes on *Underhill v. Devereux*, 2 Wms. Saund. 72 *c. not.* (4), and we should be very unwilling to disturb, except on the clearest grounds, a practice, now well recognized, on which all persons have acted for a long series of years, and neither unreasonable nor inconvenient in itself.

The objections made were threefold. First, that it was contrary to the express provisions of the statute of Westminster 2, (13 Ed. 1, stat. 1,) *c.* 45. This appears to us to be a mistake; the *scire facias* in personal actions was given by that statute rather in aid of plaintiffs than in restraint of them. At the common law a presumption arose from a plaintiff's delay beyond a year, that his judgment either had been satisfied, or from some supervening cause ought not to be allowed to have its effect in execution. After such delay, therefore, he

(a) May 13th. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Jc.

was not allowed to issue execution as a matter of course, but was driven to bring a new action on the judgment. The *scire facias*, which had been in use at the common law, for the purpose of executing judgments in real action after a year and a day's delay, was therefore adopted by the statute as a less expensive and dilatory course for the plaintiff, and as equally affording protection to the defendant, if he had any reason to show why the execution should not issue. It is not then in contravention of the statute, to hold that a *scire facias*, *given [680] in lieu of the action on the judgment, is not necessary, where such action would not have been so; and what arguments could a defendant have used to induce the setting aside an execution, on the ground of delay, and the legal presumption consequent thereon, when such delay was shown to have originated, and the presumption therefore to fall to the ground, by his own act?

The second objection was, that the case of *Withers v. Harris*, 7 Mod. 64, was an authority directly opposed to the practice. The facts of that case are reported in 7 Mod. thus. "Judgment was given in *ejectment* upon terms, that there should not be execution until such a time, which was a year and a half after. The sole question was, Whether this judgment could be executed without a *scire facias*?" and the report concludes, "the execution was set aside as irregular, and restitution granted." There are seven other reports of this case referred to in the margin, one in the same volume, page 50, three in Salkeld, 1 Salk. 258, 2 Salk. 600, 3 Salk. 319, two in Holt, Holt, 77, 265, (a) and one in Lord Raymond, 2 Ld. Raym. 806: in no one of these is the fact stated that the execution was stayed on terms, nor in the report cited at the bar is it mentioned in the arguments or judgment. The point in discussion was, whether a *scire facias* either at common law or by the statute was necessary for the purpose of suing an *habere facias possessionem* in *ejectment*. It was admitted that a *scire facias* was necessary in the principal case, so far as regarded the damages to be levied by *feri facias*; whereas that point would have *been equally debateable, if [681] the question had been what was the effect of the execution having been stayed on terms. The circumstances under which the delay of execution had taken place were not even alluded to, unless Lord Holt was speaking of them, when he said, 7 Mod. 67, "The party has delayed himself by not suing execution in time," language scarcely applicable to the case of a judgment "given upon terms," which terms would have been wrongfully broken if the execution had been sued out earlier. It should be observed, too, that Lord Holt in the same judgment speaks of it as clear law, that if a plaintiff be delayed beyond the year by a writ of error, he may have execution after the year, 7 Mod. 67; an undoubted position, which in truth stands upon the same principle, though another and a wholly unsatisfactory reason is assigned for it in some of the older authorities.

The case therefore of *Withers v. Harris*, 7 Mod. 64, cannot, when it comes to be examined, be considered an authority to shew that the present execution is irregular; but it may be conceded that other dicta, and even decisions, may be found in the older books, which cannot easily be reconciled with the present practice. Some such may be seen in 1 Roll. Abr. Execution, *Scire Facias*, (N.), (O.), p. 899, and even in the commentary of Lord Coke on the statute, 2 Inst. 471. It is by no means to be wondered at that such instances should be found in the progress of the courts to the establishment of the present rule. But they will not be found on examination so satisfactory or consistent, as to form a ground for the court's retracing its steps at this time of day.

The last objection was, that the practice rested on no *sufficient authority. [682] The truth is, as it often happens in points of practice, that the written authority for it is not so much to be found in any one or more express decisions, as to be collected from the analogies of other decided points within

(a) In the latter report it is stated that the judgment was "upon conditional terms," &c., but no other notice is taken of the fact.

the same principle, and from the undisputed dicta of counsel or judges, scattered through the books. Thus, as early as the reign of Edward III., we find, that "if judgment be given in a writ of annuity, the plaintiff shall have execution within the year after every day of payment by fieri fac', or elegit, though it be many years after the judgment;" 2 Inst. 471. The same rule prevailed very early where the delay was by a writ of error. At first it was denied that a stay of execution by injunction out of Chancery should have the same effect, Booth v. Booth, 6 Mod. 288; but in Mitchell v. Cue et Ux, 2 Burr. 660, good sense determined that, being within the same reason, the same rule ought to prevail, and a rule to set aside an execution stayed by injunction and by obtaining time for payment was discharged *with costs*. In Dillon v. Browne, 6 Mod. 14, where the suggestion was, that it was agreed between the parties, at the execution of the warrant of attorney, that no execution should be taken out till a year after, the court denied neither the legality nor validity of such agreement, but reflected only "upon a gentleman at the bar, who was said to be advised with in the transaction, because the agreement was not by deed." And in Booth v. Booth, 6 Mod. 288, before cited, when the counsel for the execution argued that, if the cesset executio were for a year after the judgment, yet the *683] plaintiff, within the next year, might take out execution *without a seire facias, the reporter adds, "quod fuit concessum."

We cite these as specimens of what may be found in the books on this subject; but we pronounce our judgment, that this execution ought not to be disturbed, on the principle that it has issued in accordance with the practice of the courts, long considered as established, not inequitable or inconvenient in itself, nor at variance with any legal principle, statute, or decided authority.

Rule discharged.(a)

The KING against The LEEDS and SELBY Railway Company. *Monday, June 15.*

A railway company were empowered, by statute, to enter upon and use lands for the railway, and to purchase and hold lands; they were also bound to make such alterations as were necessary for the enjoyment of the railways then in use for a coal mine belonging to I., over the works of which the railway was to pass: the act was not to give them the mines under any land purchased by them, but the mine-owners might work them, doing no damage to the works of the company, or making good the same: the company was to compensate any party interested for any damage or inconvenience sustained by the execution of any of the works authorised by the act; such compensation to be assessed, if necessary, by a jury, which the company were required from time to time to summon, and which should assess compensation for damages already sustained, and for future, temporary, perpetual or recurring damages,

I., being owner of land over the said coal mine, and which land was leased to B., sold the land to the company, the coal mine not being taken into account. Afterwards B., in working the coal mine, damaged the railway, and was unable to work so profitably as he otherwise could, lest he should do further damage: Held, that B. was not entitled to compensation, either for the sum which it cost him to repair the damage done, or for the interruption to the working of his mine.

By stat. 11 G. 4, & 1 W. 4, (local and personal, public), c. lix., sects. 1 & 2, The Leeds and Selby Railway Company were incorporated, and empowered *684] to *hold lands, &c., and to make a railway through certain townships, &c.

(a) Sir W. W. Follett in the course of the argument, referred to Powis v. Powis, 6 B. Moore, 517, where it was held unnecessary to revive a judgment by sci. fa. after a year and a day, the defendant himself having caused the delay of execution by filing a bill for an injunction; and where the court observed, that the reviving a judgment by sci. fa. was intended to prevent a surprise on the defendant, but that, in this case, there could be no such surprise. See Heath v. Brindley, 2 A. & E. 365.

Section 8, empowers them to enter upon and use lands for the purpose, and to do all things necessary or convenient for making, maintaining, altering, and repairing the railway; "making full satisfaction in manner hereinafter mentioned to all persons interested in any lands, tenements, or hereditaments which shall be taken, used, or injured, for all damages to be by them sustained in or by the execution of all or any of the powers hereby granted."

Section 18. "And whereas the making of the said railway in, over, and through the lands of the said Sir Charles Ibbetson," "will intersect and interrupt the present communications by railways between different parts of the lands of the said Sir C. I., in which he or his lessees are now working a coal-mine or coal-mines in his said lands, near to the said railway, to the injury of the said Sir C. I., his heirs, executors," &c.; "be it therefore enacted, That the said company shall and they are hereby required, at their own expense, to make such alterations in and accommodations as may be necessary for the convenient occupation and enjoyment of the several railways now in use for the purposes of the colliery working on the lands of the said Sir C. I."

Section 30 enacts, "That nothing in this act contained shall extend to give to the said company any mines, or any coals, stone, slate, or other minerals, under any land purchased by the said company under the provisions of this act, except only so much of such coals, stone, slate, or minerals as may be necessary to be dug or carried away or used for the purposes of this act, but all such mines, coals," &c., "shall be *deemed to be excepted out of the purchase of [685 such land, and may be worked by the respective owners or lessees thereof under the said lands, or the railway or other works of the said company, as if this act had not passed, so that no damage or obstruction be thereby done or occur to or in such railway or works: Provided nevertheless, that in case any damage or obstruction shall be so done or occur to or in such railway or works, the same shall be forthwith repaired or removed (as the case may be) by and at the expense of the respective owners or lessees of such mines, coals," &c., "as aforesaid; and if the same shall not be forthwith done, it shall be lawful for the said company to repair such damage, or to remove such obstruction, and to recover the expenses attending the same," by distress or action of debt.

Section 31, enacts, that "the respective owners and occupiers of any lands, tenements, or hereditaments through, under, in, or upon which the said railway or other works hereby authorized are intended to be made, may accept and receive satisfaction for the value of such lands, tenements, and hereditaments, or the interest or interests therein by them, him, or her conveyed, and also compensation for any damage by them sustained by reason of the execution of any of the works by this act authorized, and also by reason of the severing or dividing such lands, tenements, or hereditaments, and also for and on account of any damage, loss, or inconvenience which may be sustained by such bodies or other parties by reason of the execution of any of the powers of this act, in such gross sums as shall be agreed upon" between such owners, &c., and the company; and in case they shall not so agree, the compensation shall be *settled by the verdict of a jury, if required, as is after directed.

Section 32, enacts, that if the person interested in the land should [686 not agree with the company "as to the amount of such purchase money or satisfaction or other compensation," or should refuse to accept the amount offered, the company "shall and they are hereby required from time to time to issue" their warrant to the sheriff to summon a jury, which jury shall assess the sum or sums to be paid for the purchase of such lands," &c., "except for such interest or interests therein as shall have been of right purchased by the said company from any other person or persons, and also the separate and distinct sum or sums of money to be paid by way of satisfaction or compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for the future temporary or perpetual, or for any recurring damages which shall have been so done or sustained as aforesaid, and the cause or occa-

sion of which shall have been in part only obviated, removed, or repaired by the said company, and which cannot or will not be further obviated, removed, or repaired by them."

Section 33 enacts, that the jury shall also assess the compensation for any damage sustained by owners or occupiers of, or persons interested in, lands, &c., "for or by reason of the severing or dividing the same from other lands," &c., in which such persons are interested; "and also for or on account of any injury or loss whatsoever which shall or may accrue" to any such person "by reason of the execution of any of the powers of this act."

Section 34, empowers the juries, if required, to apportion the assessed damages to persons having a particular estate or interest.

*687] At the time of the passing of the act, Sir Charles Ibbetson was owner of a coal mine, then under lease to George Bates, for a term to expire in 1852. By indenture of 9th of March, 1831, Sir Charles Ibbetson conveyed certain land in Yorkshire to the company, the surface of which was above a part of the coal mine not then reached by the workings of the colliery. No compensation was claimed on his part for the mine, nor for any present or future effect which the railroad might have upon the mine. The company afterwards carried their railroad across this land, and over the above mentioned part of the mine. About the end of May, 1834, the workings of the mine arrived at the line of the railway, and it was then first discovered that the coal, under and near the line of the railway, could not be gotten without letting down or otherwise injuring the railway; and that the part of the mine beyond the railway must also be worked in a more expensive way than would have been requisite if the railroad had not been constructed. Some damage was in fact done by the works of the colliery to the railway, which the company required Bates to repair, under sect. 30, of the act; and Bates claimed from the company compensation for the alleged injury sustained by him, in consequence of the interruption of the works of the colliery occasioned by the railway as above, and also for the expense of repairing the damage done by the colliery works. The company having refused to make compensation, or to issue a warrant for impannelling a jury, Sir F. Pollock, Attorney-General, in Hilary term last, obtained a rule nisi for a mandamus to the company to cause a jury to be impannelled for the purpose of assessing compensation to be paid by the company *688] to George Bates, for the loss, damage, injury, and inconvenience *sustained by him in consequence of the execution of the powers given to the company by the statute, and by reason of the works authorised by the said act.

Cresswell (with whom was Sir W. W. Follett) now shewed cause. The company are not bound to make any compensation for the damage complained of. If the thirtieth section had stopped at the words "as if this act had not been passed," it might have been contended that Mr. Bates was entitled to complain of not being able to carry on the mine in the line proposed; and the act would have stopped there, had it been meant that the owner of the mine should be left in the same situation as before. But, by the words following, the mine is to be worked, only on the condition that no damage be done to the railway; and the owner or lessee of the mine is to make good any damage so done. The legislature did not intend that the risk attendant upon the working of the mine should ultimately fall upon the company. Had that been meant, the provision would have simply been that the owner or lessee of the mine should not be liable for the damage which he might do to the railway; but it would be contradictory to make him liable for the injury to the company, and then to make the company liable to compensate him for his liability. The company, by section 30, cannot take the minerals, but only the land without them; the owner of the mine is therefore in the situation of a party selling the land for the railway. If a party sell land for the purpose of enabling the vendee to build on it, and then dig so near, on contiguous land of his own, as to injure the house,

he is liable for the injury. The proprietor of the mine has sustained no inconvenience contemplated by section 31. *It is not sustained "by reason of the execution of any of the works" authorised by this act. The compensation claimed is for the risk which the party may incur by an act of his own, producing damage to the company. And the risk is quite incapable of estimation, before the event happens. Supposing the ground to give way, it is impossible to say beforehand what the extent or nature of the damage will be; or whether there will be any. [*689

Sir *F. Pollock* and *Milner*, *contra*. The railway cuts in two the course of the workings of the mine. What is sought is, not indemnity against risk (though no reason can be assigned why that should not be given), but a compensation for the injury suffered by the course being interrupted. The effect of this interruption has been that the lessee of the mine will be compelled to work in a more expensive way; or, if the lessee were to build an archway under the railroad, that is also a damage to him. It is said that the thirtieth section precludes the company from buying minerals; but the true construction of this clause appears to be, that the company, when they purchase the land, are, as an advantage conferred on themselves, exempted from the necessity of buying the minerals, not prohibited from doing so. There is no inconsistency in interpreting the act to give the company the right of recovering from any mine-owner who does them damage, and yet to compel them to compensate any mine-owner whom they by their works prevent from carrying on his workings without doing such damage. As for the analogy suggested between the situation of the mine-owner, and that of a party selling land adjacent to his own to be built upon by the vendee, the answer is, that the company are in the situation of a party taking a title to the lands, with an express exception as to the mines below: and they have no right, independently of the provision in section 30, to complain of the mining going on. Then that provision gives them a right to compensation for any damage done to them by the mining: they, on the other hand, being bound by section 31 to compensate for any inconvenience produced by their exercise of this or any other of their privileges. The injury contemplated in section 31, is not merely that done at the time of purchasing the land, or constructing the railway. By section 32, the company are required "from time to time" to issue their warrant, and the jury are to assess compensation "either for the damages which shall before that time have been done or sustained as aforesaid, or for the future temporary or perpetual or for any recurring damages." That is an answer to any argument founded upon the damage to the mine-owner being merely prospective. [*690

Lord DENMAN, C. J. It appears to me, that this claim for compensation cannot be supported. The act does not contemplate a future inconvenience of the kind which is the subject of this complaint.

LITTLEDALE, J. I am of the same opinion. The extent of the colliery was capable of being known at the time of the purchase of the land; and the claim ought then to have been brought forward. It may be true that, in that case, the proprietor of the mine might have got compensation for what he did not ultimately want. That, however, cannot be helped. It would be very inconvenient *if a party could be continually claiming fresh compensation from time to time. There is nothing in the act to authorize this. [*691

[PATTESON, J. The claim has been very ingeniously supported; but it is quite contrary to the act. The thirtieth section clearly says, that the mine-owner is to do no damage to the railway; and, if he does, he is to repair it. The other parts of the act, which have been referred to in support of the claim, relate to different matters.

WILLIAMS, J., concurred.

Rule discharged.

CRITTENDEN *against* WALKER. *Tuesday, June 16.*

Parties in a cause referred all matters in difference to an arbitrator, with power to him to direct a verdict or nonsuit, and to order the defendant, although there should be a nonsuit or a verdict for him, to pay any money, or do any other act which should be just and equitable; the costs of the suit and the costs of the reference to abide and follow the event of the award. The arbitrator directed a nonsuit; but awarded that the defendant ought to pay the plaintiff 25*l.*, and ordered him to do so :
Held, that the defendant was entitled to his costs of the suit, and the plaintiff to those of the reference.

By agreement between the parties in this cause, it was ordered, by the Lord Chief Justice, that all matters in difference, as well legal as equitable, between them, should be referred to a barrister, who should say whether a verdict, and if so for what sum, should be entered for the plaintiff, or whether the plaintiff should be nonsuited, or a verdict entered for the defendant, "the said arbitrator being at liberty, although he shall find that a nonsuit or verdict ought to be entered for the defendant, to direct him the said defendant to pay any sum of *692] money, or to do any such act as he shall consider *just and equitable." And it was ordered, "that the costs of the said suit and the costs of the reference shall abide and follow the event of the said award."

The arbitrator awarded as follows :—"I do find that the said action is not maintainable, and I do award and direct that a judgment of nonsuit be entered therein; but I do also find that the said defendant ought to pay the sum of 25*l.* to the said plaintiff, and I do award and direct that the said defendant do pay to the said plaintiff, the sum of 25*l.* on or before," &c. On taxation of costs, the Master allowed the plaintiff his costs of the reference, and allowed the defendant no costs, either of the reference or of the action.

Sir *W. W. Follett* now moved, on behalf of the defendant, for a rule to show cause why the Master should not review his taxation. He contended that, upon the finding of the arbitrator, it was impossible to say that the event of the award was in favour of one party or the other, and therefore the plaintiff could not be entitled to costs; In *re Leeming and Fearnley*, 5 B. & Ad. 403; *Boodle v. Davies*, 3 A. & E. 200; and that no distinction could be drawn between the costs of the suit and of the reference, both being, by the order, dependent together upon one and the same event.

Platt showed cause in the first instance. It is erroneously assumed that there can be no award here as to any matters apart from the action. All matters in difference are referred; and here is a distinct award that the defendant ought to *693] pay, and that he do pay, 25*l.* to the plaintiff. Upon the whole, then, the plaintiff has succeeded, and ought to have costs, though the award does not give him the verdict; *Anon.* 1 Smith, 426. It is as if there were a declaration with several counts, and he has recovered upon one.

Lord DENMAN, C. J. The Master has thought that he could not divide the costs of the reference from those of the action. We think he may; and that the plaintiff ought to have the costs of the reference on which he has succeeded, and the defendant those of the action which has been found not maintainable.

LITTLEDALE, PATTESON, and WILLIAMS, Js. concurred.

Rule according.(a)

SMITH *against* SANDYS, Bart. *Tuesday, June 16.*

If a party, in custody of the marshal, at the suit of M., be charged in custody in execution at the suit of A., by a side-bar rule, without habeas corpus, such proceeding is wholly

(a) See *Hardley v. Steer*, 2 Oro. M. & R. 327; *Dawson v. Garrett*, 8 Dowl. P. O. 624.

void, and the party will be discharged out of custody at the suit of A., at any distance of time from his having been charged in that custody.

Although a commitment at the suit of A. be entered on the roll, the defendant may shew that the commitment was by a side-bar rule, and not by habeas corpus, the form of entry being the same in both cases.

And if, after the expiration of a year and a day from the judgment at the suit of A., the party be brought up by habeas corpus and charged in execution at the suit of A., before he applies for his discharge on the above objection, it lies on A. to shew that the judgment at his suit has been revived by scire facias, otherwise the objection is not answered.

THE defendant had given a warrant of attorney to the plaintiff to secure the payment of an annuity; and, in 1821, some arrears of the annuity being then due, the plaintiff entered up judgment. The defendant was at that time a prisoner in custody of the marshal of the King's Bench, at the suit of some other persons; *and the plaintiff for the purpose of charging him in execution for the arrears then due, obtained a side bar rule, requiring the marshal to acknowledge the defendant to be in his custody; the marshal indorsed upon it an acknowledgment, that the defendant was then in his custody, "but not at the suit of the said plaintiff." This the plaintiff took, together with a committitur piece, to the treasury, and procured the usual entry to be made upon the roll. *Archbold* for the defendant, in last term, obtained a rule nisi to discharge him out of custody in this action, on the ground that, as the defendant at the time of the proceeding above mentioned, was not in custody of the marshal at the plaintiff's suit, the only mode of charging him in execution was by having him brought up by habeas corpus ad satisfaciendum, and thereupon committed in execution in this action, to the custody of the marshal. That rule was afterwards discharged, for a defect in the affidavit upon which it was obtained. On the first day of this term, the plaintiff had the defendant brought up by habeas corpus ad satisfaciendum, and there charged in execution for the arrears of the annuity which had subsequently accrued. Afterwards, during the present term (27th May,) *Archbold* obtained another rule nisi to discharge the defendant out of custody, on the ground above mentioned, upon an amended affidavit. In this term (Tuesday, June 9th,)

W. H. Watson shewed cause, (a) and contended that the rule of practice was not as above alleged. A prisoner may be charged in execution, at the suit of the same plaintiff or another plaintiff, either by habeas or by *a side bar rule. The books of practice state it otherwise, but no authority is cited; nor can any reason be assigned why a prisoner may not, in one case as well as another, be charged in execution by a side bar rule. But the present rule cannot be made absolute; for the record of the committitur, now in Court, states that the defendant being in Court, was properly delivered to the custody; and this record is conclusive, until set aside, that the defendant was regularly charged in execution. The motion first should have been to set aside the entry on the roll. Moreover, after a lapse of fourteen years, this motion is too late. There is nothing substantially wrong in the proceedings; the record shews that the defendant was committed in execution, and this is, therefore mere matter of irregularity. The defendant, however, before this rule nisi was granted, was brought up by habeas corpus and charged in execution in this action. [*PATTERSON, J.* You do not shew that the judgment was revived by scire facias]. That is not necessary; for the irregularity pointed out by the defendant's affidavits is the want of a habeas corpus. The plaintiff is not bound, in answer to that, to go through all the proceedings.

Archbold, contra. The proceedings in 1821, to charge the defendant in execution, were not only irregular, but altogether defective and void. To charge a prisoner in custody of the marshal, there must be some authenticated act of the Court, by which the marshal is apprised of his responsibility. For-

(a) Before Lord Denman, C. J., Littleale, Patteson, and Williams, Js.

merly, in order to commence an action against a prisoner in such custody, a bill was first filed; then in order to apprise the marshal and the prisoner of the proceeding, the affidavit *of debt and a copy of the bill were taken *696] to the clerk of the rules, who filed the affidavit, and indorsed on the copy of the bill the amount of the debt sworn to; and, upon this copy, thus indorsed, being delivered to the marshal, he entered it against the prisoner in his books, and delivered the copy to him. The course now is to deliver a writ of detainer and copy to the marshal, (2 W. 4, c. 39, s. 8.) who enters and returns the writ, and serves the copy on the prisoner. So when the prisoner, against whom a bailable action is pending, is to be placed in the custody of the marshal, charged with that action, he must be brought before a judge, and by him committed to the custody of the marshal, and the committitur apprising the marshal of the cause of action, and the sum for which the party is to be detained. And so, if a person already in the custody of the marshal is to be charged in execution in a suit in which he is not yet detained, he must be brought up to the Court by habeas corpus ad satisfaciendum, and by the Court committed to the custody of the marshal in execution; Tidd's Practice, 364, 9th ed. (Chapter xv.) This is the practice of the Court, and essentially necessary in order to apprise the marshal of his new responsibility, and the prisoner of the proceeding had against him. If, indeed the marshal be already charged with the prisoner in the particular action by writ of detainer or commitment, in that case, as he is already aware of his responsibility, the course of proceeding to charge the defendant in execution is different, namely, by the mode adopted in the present case, which, however, is wholly inapplicable to the circumstances here stated, inasmuch as the defendant, at the time he was charged *697] in execution *in 1821, was not in the custody of the marshal at the suit of the plaintiff. As to the entry on the roll, it is always in the same form, whether the prisoner be actually brought up by the habeas and committed in execution or merely charged in execution by means of the side bar rule. The length of time since this proceeding was had is no objection: a mere irregularity must be taken advantage of promptly, and before the other party takes any further step in the cause; but where the proceeding complained of is defective and void, the objection is never deemed to be waived by lapse of time or otherwise; *Hussey v. Wilson*, 5 T. R. 254, and the cases there cited. Here the proceeding is wholly void, being unsanctioned by the practice of the Court, and inapplicable to the circumstances of the case.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

It seems in this case that, the defendant being in custody in the year 1821 at the suit of some person, but not being in custody in the action in which this application is made, the plaintiff in this action obtained a side bar rule for the marshal to acknowledge him to be in his custody, which acknowledgement was made, and the committitur entered on the roll; but the defendant was not then brought up by habeas corpus to be charged in execution. By the practice of this court, the proceeding by side bar rule does not operate to charge a prisoner in execution, unless he be at the time in custody in the particular suit; it was *698] therefore *contended that this side bar rule, and what was done under it, had no legal operation, and that the defendant, although he has been in custody ever since, as it was supposed, in this action, has not been so legally. He applied last term to be discharged, but the motion was refused, because it did not sufficiently appear that he had not been brought up by habeas corpus, nor that he was not, in 1821, in custody in this suit. Now those circumstances do appear; but, in the mean time, and before the present rule nisi to discharge him was obtained, viz. on the 27th May last, he has been brought up by habeas corpus, and charged in execution in this action, being in custody at the suit of other persons all the time. There is a record of his commitment in this action in 1821, by which it is alleged that he was then brought up and charged in execution in this action.

Three questions arise. First, whether the defendant can be heard to aver against this record; secondly, whether, if he can, he is prevented by the lapse of time; thirdly, if not, whether he was rightly charged in execution on the 27th May last.

As to the first, the form of the record appears to be the same, whether a party is charged in execution by side bar rule, or by writ of habeas corpus; we think therefore that the defendant, in explaining the mode by which it was attempted to charge him, is not, strictly speaking, averring against the record, and may be heard.

As to the second, this depends on the point, whether the proceeding by side bar rule was merely irregular, or wholly void and inoperative. We think that it was wholly void, and therefore that there is no waiver, and that the lapse of time does not hinder the defendant.

*As to the third, the case must be taken as if nothing had been done on the judgment between 1821 and the 27th of May last, when the plaintiff, finding the defendant in custody at the suit of some other person, brought him up by habeas corpus and charged him in execution. We think that he could not regularly do so without reviving his judgment by scire facias, or shewing that he took out execution within a year from the signing of the judgment. He has not done either, and, therefore, his proceedings are irregular. And the rule must be made absolute to discharge the defendant out of custody in this action. [699]

Rule absolute.

MANN against LANG, COWDEROY, and HENSHAW, Executors of PENMAN. Tuesday, June 16.

Upon issue joined on a plea by ~~an~~ executor of *plenè administravit*, the amount of the stamp upon the probate is admissible in evidence.

Per Littledale, J. It does not, of itself, furnish *primà facie* evidence of the amount of effects which have come to the executor's hands.

Per Lord Denman, C. J. If there be evidence of a long acquiescence by the executor, without re-demanding any of the duty, it is *primà facie* evidence of such amount; but it is not of itself evidence of such amount.

Per Patteson, J. It is not such *primà facie* evidence, even if a long acquiescence is shewn.

ASSUMPSIT. The defendants (besides other pleas, as to which no question arose at this stage of the proceedings) pleaded *plenè administravit*, except as to 200*l.* Replication, that the defendants had, at the commencement of the suit, effects beyond, &c. Issue thereon. On the trial before COLERIDGE, J., at the Middlesex sittings in this term, there was conflicting testimony as to the value of certain effects of the testator which the defendants admitted to have come to their hands as executors. On the part of the plaintiff, evidence was tendered of the amount of the stamp impressed upon the **probate*, which was 22*l.* (a) [*700] The defendants' counsel objected to the reception of this evidence, on the ground that it did not tend to prove the actual receipt of assets by the executors. The learned judge received the evidence; and, in summing up, he put it to the jury as evidence of what the executors thought at the time, pointing out that they must be taken as knowing that they ought to include debts owing to the testator; but that, including these, it must be taken as their opinion of the amount they ought to prove for, and that the stamp liability made it their interest not to overstate that amount. The jury gave a verdict for the plaintiff on all the issues, finding that the defendants had, at the commencement of the action, 172*l.* 9*s.* 3*d.*, beyond the 200*l.*, unaccounted for, that the gross

(a) See stat. 55 G. 3, c. 184, schedule, part iii. "Probate, of the value of 800*l.* and under the value of 1000*l.*—"Duty 22*l.*"

receipts were 586*l.* 1*l.*s., and the whole damages 498*l.* 18*s.* 4*d.* In this term, a rule nisi was obtained for a new trial, on the ground of the reception of improper evidence.

Platt now shewed cause. There was evidence, besides the stamp, that the amount of assets received was as large as that found by the jury; the rule, therefore, can be made absolute only on the assumption that the stamp duty was not admissible in evidence at all; it will not be enough to establish that, if taken alone, it would be insufficient. Any act or word of the defendants may be adduced in evidence against them. This is at least an admission that one side of the account, that of receipts, amounted to not less than 800*l.*, and the jury found receipts only to the amount of 586*l.* 1*l.*s. In *Curtis v. *Hunt*, 701] 1 C. & P. 180, Lord Tenterden treated the stamp as *prima facie* evidence that the executor had received the smallest sum for which the stamp could be required. Now here it is put only as *prima facie* evidence. It shews the expectation entertained by the executor at the time of proving the will; and, in the absence of proof that he has since applied for a remission, the jury might be warranted in presuming that the expectation had been realised. *Foster v. Blakelock*, 5 B. & C. 328, is to the same effect as *Curtis v. Hunt*, 1 C. & P. 180, and is relied on in 2 *Starkie on Evidence*, 322, 754, (ed. 2.) An executor is not bound to include bad debts in his estimate of the effects; *Moses v. Grafton*, 4 C. & P. 524. The stamp, therefore, was evidence, though it might not, by itself, have been sufficient.

Kelly contra. Perhaps this evidence could not be absolutely shut out: but it does not constitute a *prima facie* proof; for it could not shew the amount of assets actually received, which is the question upon which this issue turned. The stamp shews simply the expectations of the executor as to one side of the account. In *Stearn v. Mills*, 4 B. & Ald. 657, S. C. 1 N. & M. 436, a nonsuit was entered (instead of a new trial being granted, which is the application here,) because the inventory given in by the executors, on the occasion of proving the will, was received as evidence of the assets in the hands of one of them. There *Littledale and Parke Js.*, threw doubts upon *Foster v. Blakelock*, 5 B. & C. 328, and they pointed out that the Stamp Act made no allowance for debts due from the deceased, nor for debts due to him but not yet recovered. But, if the 702*] *stamp be not *prima facie* evidence, it proves nothing at all, even by way of corroboration, and therefore should not be admitted.

Lord DENMAN, C. J. This is a motion for a new trial, on the ground that, upon issue joined on a plea of *plene administravit*, evidence of the amount of the stamp on the probate has been improperly received. The question is, whether such evidence was admissible at all. Upon principle alone, I think it is admissible; if it is admitted, the Judge makes his remarks to the jury upon the effect; and here the remarks made are not objected to. There have been several cases on the point, and these shew a conflict of opinion. In *Curtis v. Hunt*, 1 C. & P. 180, Lord Tenterden held such evidence to be not merely admissible, but *prima facie* evidence of the amount of assets. That was decided at Nisi Prius, in 1824; but there the probate was dated in 1796; there had been twenty-eight years' acquiescence in the payment of the duty, and, after such a lapse of time, it was reasonable to say that the acquiescence of the parties interested supplied a strong proof. I think, therefore, that Lord Tenterden was right. It was matter to go to the jury, calling for an answer. The next case, in point of time, was *Foster v. Blakelock*, 5 B. & C. 328. There, there was some evidence, besides the probate, of acquiescence by the executor, and of something said by the testator. What the testator said, of course, could not prove assets. Another objection, besides that founded on the reception of evidence, was taken at the trial; and the rule was moved for on both objections and refused. Lord

703*] *Tenterden merely saying that the stamp was presumptive evidence which might have been rebutted, but that in the absence of any answer he thought it sufficient. Both Mr. Justice Bayley and Mr. Justice Holroyd concurred in refusing the rule; the former, however, is reported to have entered

only into the other point, and the latter is not reported to have expressed any reasons. Subsequently came the case of *Stearn v. Mills*, 4 B. & Ald. 657, S. C. 1 N. & M. 436. That was an action against an executor; and the question was, whether there was evidence to fix him upon a plea of plene administravit. Mills, the executor who pleaded this plea,^(a) resided away from the testator's property. An inventory given in by the executors, on occasion of proving the will, was offered in evidence, not signed by the executors; and no goods were shewn to have passed actually into Mills's hands. There the amount in the inventory, upon which probate was obtained, was held to be no evidence that Mills had received any effects. The question respecting the stamp became immaterial. It may be difficult to draw a line, so as to fix a time, before which the probate would not, and after which it would, constitute sufficient evidence. Yet, after a certain time, acquiescence would be the strongest evidence that the amount had come to the hands of the party acquiescing. It is however clear that, for some purposes, the probate is admissible evidence; it shews one side of the account, even where it might not in itself be sufficient evidence. The learned Judge therefore appears to me to have acted rightly; for the evidence was admissible, and that is enough.

*LITTLEDALE, J. The executor here is liable only to the amount of [704] the assets received by him. The question is, how the amount is to be proved? Here the stamp upon the probate was given in evidence; and it is said that it is *prima facie* evidence of the amount of assets received. I have little difficulty in saying, that it is not such evidence. The object of the act was, that wills should be proved within a certain time. A stamp duty is paid on the probate by the executor. He may be supposed to say, "I expect that, if all debts owing to the testator be paid, and the tangible property should turn out to be so much, then the amount which I receive will be so much; but, as I know that he owes money, I cannot tell whether there will be assets." That is the effect of the probate: debts will be received; some property may not be at all convertible into assets: the executor says only, "This is what I expect on one side of the account, if all be relied; but I cannot say what the balance of the whole will be." There is a provision, (Stat. 55 G. 3, c. 184, s. 40, in favour of the executor, if it turn out that a higher stamp duty has been paid than is required by the real value of the property; the executor having paid the duty with his own money, the commissioners are to make him an allowance if it appear not likely that he will receive it back from the estate. I cannot say that the probate is not admissible: but it is not *prima facie* evidence of the amount of assets. In *Curtis v. Hunt*, 1 C. & P. 180, many years had expired since the probate. In *Foster v. Blakelock*, 5 B. & C. 328, I agree with my Lord Chief Justice that the point was not much considered; and the decision there as to the stamp seems not *to have been acquiesced in, when *Stearn v. Mills*, 4 B. & Ald. 657, S. C. 1 N. & M. 436, was before this Court. According [705] to one report of that case, 4 B. & Ald. 668, I do not distinctly say there, that I do not concur in *Foster v. Blakelock*, 5 B. & C. 328, but my brother Parke does state so; according to the other report, 1 N. & M. 442, I do, but he does not. The two reports, however, may come to nearly the same thing. My opinion is, that the stamp on the probate is not *prima facie* evidence of the amount of assets.

PATERSON, J. The issue here is, whether the defendants have fully administered the assets which have come to their hands, not those which may come. To establish the negative the plaintiff must prove, not merely that the assets existed, but that they came to the hands of the defendants. Then the question arises, whether the stamp on the probate be sufficient evidence of this. With all possible respect for the authority of Lord Tenterden, and no man feels more respect for it than I do, I cannot concur with his decision in *Curtis v. Hunt*,

(a) The other executor had suffered judgment by default.

1 Carrington & Payne, 180. I do not think that the stamp is any evidence by itself, even where a long time has elapsed : but I cannot say it is inadmissible. If the executors had said what is implied by the stamp, we could not hold that evidence of their having said so was not receivable. It would not of itself, be sufficient evidence ; but it is receivable on a plea of *plenè administravit*. A plaintiff may have judgment for assets, *quando acciderint* : the means now in the executors' hands may be exhausted, but there may be other effects not yet *706] come to their hands. *I cannot see how a man's saying, that assets will come to his hands, is evidence that assets have come to his hands. I confess I think *Curtis v. Hunt*, 1 C. & P. 180, and *Foster v. Blakelock*, 5 B. & C. 328, bad law as to the present point ; and I concur in what is said upon the latter in *Stearn v. Mills*, 4 B. & Ad. 657, (S. C. 1 N. & M. 436.)

WILLIAMS, J. The question is, whether this evidence was admissible at all, as to which I feel very little doubt. The contending decisions are all beside the point which we are now to determine. The amount of weight to which such evidence is entitled is for the judge and jury ; but that is altogether ulterior to the question of admissibility. Whether it proved more or less, it was impossible to reject it. On the ground taken by the counsel for the defendants, namely, that the evidence amounts to no more than the executor saying that his present impression was that the funds would amount to so much, it is impossible to say that it was not admissible. Rule discharged.

*707] *LEES *against* REFFITT, KENDALL, RADCLIFFE, and STENSON. *Tuesday, June 16.*

L. sued K. and R. in trespass ; they severed in their defences, and appeared by different counsel and attorneys : the verdict was for L. against K., and for R. against L. : Held, that R.'s costs were to be set off against the damages and costs recovered by L. against K., and that the lien of L.'s attorney upon such damages and costs was so far defeated.

TRESPASS for assault and battery.

Reffitt appeared by attorney and pleaded, first, not guilty ; secondly, that the plaintiff was beating Kendall, and that Reffitt interfered to prevent him, to which plea the plaintiff replied excess, on which Reffitt took issue, and the plaintiff joined.

Kendall appeared by the same attorney as Reffitt, and pleaded, first, son assault demeane, to which plea the plaintiff replied excess, on which Kendall took issue, and the plaintiff joined ; secondly, a justification in respect of the defence of the possession of a house, to which plea the plaintiff replied excess, on which Kendall took issue, and the plaintiff joined.

Radcliffe appeared by another attorney, and pleaded not guilty.

Stenson appeared by a third attorney, and pleaded not guilty.

At the trial, all the four defendants appeared by separate counsel. (a)

Verdict :

For the plaintiff on the first issue against Reffitt, and for Reffitt on the second ; no damages.

*708] *For the plaintiff on both issues against Kendall, with 40s. damages.
For Radcliffe on the issue against him.

For Stenson on the issue against him.

The plaintiff's taxed costs against Kendall amounted to 72l.

(a) It was mentioned, in the Master's written statement, that the witnesses were the same for Reffitt, Kendall, and Radcliffe, and were severally subpoenaed by each : that Stenson did not appear to have subpoenaed any witness ; but that, in the course which the cause took, the witnesses for one defendant were, in effect, witnesses on behalf of all. But no stress was laid on these circumstances in the argument.

Reffitt's taxed costs against the plaintiff amounted to 19l.

Radcliffe's taxed costs against the plaintiff amounted to 32l. 10s.

Stenson's taxed costs against the plaintiff amounted to 18l. 15s.

Cresswell in this term (June 16th (a)), moved for a rule to shew cause why the costs of Reffitt, Radcliffe, and Stenson, amounting to 70l. 5s., should not be set off against the sum of 74l., the damages and costs recovered by the plaintiff against Kendall. The three successful defendants are as much entitled to the set off as a single defendant would be for whom particular issues were found. In *George v. Elston*, 1 New Ca. 513, (S. C. 1 Hodg. 63,) the plaintiff recovered in trespass against one of three defendants, but failed as against the other two; and it was held, that the two last were entitled to have their costs deducted out of the damages and costs recovered by the plaintiff against the other defendant; though, on the other side, the rule *Hil. 2 W. 4, I. s. 93, 8 B. & Ad. 388*, was referred to, which orders, that "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." It is true that it does not appear that, in *George v. Elston*, 1 New Ca. 513, (S. C. 1 Hodg. 63,) the successful defendants appeared, as here two of them do, by different attorneys from the one by whom the defendant who failed appeared, nor that the defences were severed. But the defendants are not to lose their right of set-off because they do not choose to employ the same attorney, nor because they set up different defences. [*709]

Alexander shewed cause in the first instance. First, *George v. Elston*, 1 New Ca. 513, (S. C. 1 Hodg. 63,) was decided, in the Common Pleas, on the authority of another case in the Common Pleas, *Schoole v. Noble*, 1 H. Bl. 28; but the practice in the King's Bench is different from that in the Common Pleas, and allows a much more extensive lien to the attorney. This was expressly decided in *Randle v. Fuller*, 6 T. B. 456, and *Middleton v. Hill*, 1 M. & S. 240; and *Holroyd v. Breare*, 4 B. & Ald. 43, (b) is to the same effect, where Bayley, J. said, "As to the liberty of setting off the costs against each other, that cannot be allowed, because it would destroy the lien of the plaintiff's attorney." Secondly, even supposing that this Court chose to adopt the practice of the Common Pleas, the authorities do not warrant the application. The parties sever in their pleadings; all appear by different counsel; and there are three different attorneys. It is, therefore, as if there were four distinct actions. [Lord DENMAN, C. J. The attorney who loses the lien is the same against all.] But he is not the party who is answerable for the severance of the defences. [*710] [PATTESON, J. The defendants are entitled to sever: and whose fault is it that they are all on the record?] The attorney cannot know the defences before hand. [PATTESON, J. He takes his chance.] Thirdly, the rule of *Hil. 2 W. 4, I. s. 93, 8 B. & Ad. 388*, is against the application. It is true that in *George v. Elston*, 1 New Ca. 513, (S. C. 1 Hodg. 63,) Tindal, C. J. considered that the rule applied only to separate actions. But, in the first place, these are, in effect, separate actions for the reasons given; and, secondly, it may be doubted whether the rule be so restricted. Interlocutory costs are excepted from the operation of the rule: now, as these were allowed in the same action, the protection here given to them would have been unnecessary, unless the rule had been applicable to a set-off of other costs in the same cause. The words "particular suit," are introduced merely to prevent the inference that the attorney was to have a lien in any suit except that in which the question arose. There can be no reason for protecting the attorney against the set-off from a separate action, which does not apply to the set-off claimed in the same action. [PAT-

(a) Before Lord Denman, C. J., Littledale, and Patteson, Js. Williams, J. was present in Court during part of the argument only.

(b) See p. 700 of the same volume, correcting an inaccuracy in the report at p. 43.

TREASON, J. I think *George v. Elston*, and this case have nothing to do with the rule of Hil. 2 W. 4, 1. s. 93, but that that rule contemplates only the case where the parties are the same.]

Cresswell, in support of the rule. The practice of the different courts is no longer at variance. If the actions were separate, the application certainly ought to fail: and the cases cited against it shew no more, with the exception of *Holroyd v. Breare*, 4 B. & Ald. 43, 700, where the action was the same, but where *711] the point seems to have been little considered. The lien is allowed to cover himself from loss: but, if it were allowed to the extent now contended for, the attorney, instead of being restricted by the consequences of including too many defendants, would be tempted to include as many as possible.

Cur. adv. vult.

Lord DENMAN, C. J. now said that the Court considered the authority of *George v. Elston*, 1 New Ca. 513, (S. C. 1 Hodg. 63,) to be one which they could not get over, and decisive of this case, and that the rule must be made absolute to its full extent.

Rule absolute, as a preyed.

BONE *against* DAW, JOHNS, MATHEW, and Others. Tuesday, June 16.

To a declaration in trespass for assaulting and beating plaintiff, imprisoning him for a long time, and during that time tearing his clothes, defendant pleaded the general issue, and, as to the assaulting, beating, and tearing the clothes, a justification. Plaintiff replied, that the detention was longer, and the other trespasses committed with more violence, than was necessary for the purposes alleged in the plea. Issue was joined thereupon, and on this and the general issue plaintiff had a verdict for one shilling. The Judge certified to deprive of costs under stat. 43 Eliz. c. 6, s. 2, and did not certify under stat. 22 & 23 Car. 2, c. 9, s. 136, that a battery was proved.

Held, 1. That as the action appeared to be for a battery, the Judge could not certify under stat. 43 Eliz. 2. That the battery was admitted on the record, and therefore the plaintiff was entitled to full costs without a certificate under stat. 22 & 23 Car. 2, c. 9.

TRESPASS. The declaration charged (in a single count) that the defendants assaulted the plaintiff, pulled and dragged him about, threw him down, tied him with ropes, dragged and struck him on and against the ground, imprisoned him and kept him imprisoned for a long time, and during that time beat him; that *712] they again imprisoned, and dragged, beat, bruised, and ill-treated him; and that they again imprisoned him for a long time, to wit, &c., and during the time aforesaid, to wit, on, &c. tore and damaged the clothes and wearing apparel, to wit, &c., of the plaintiff, which he then wore. Pleas, not guilty, by all the defendants. By Johns, as to the assaulting and beating in the declaration first mentioned, and as to the tearing and damaging the plaintiff's clothes therein mentioned, that the plaintiff just before the time when, &c. assaulted and would have beaten him, Johns, if he had not defended himself; wherefore he did defend himself, "and in so doing did necessarily and unavoidably a little assault and beat the plaintiff, and rend, tear, damage, and spoil the said wearing apparel in the said declaration mentioned, doing no unnecessary damage," &c. By Mathew, as to the trespasses justified in the preceding plea, that the plaintiff, just before, &c., had assaulted Johns, and at the time, &c. was beating and ill-treating him, wherefore he, Mathew, to preserve the peace, &c. gently laid his hands on the plaintiff as he lawfully, &c., whereupon the plaintiff with force, &c., assaulted the defendant Mathew, and would have beaten him if he had not immediately defended himself, wherefore, &c., as in the preceding plea. There were similar justifications of the same trespasses by Daw and the other defendants. Replication to the special plea by Johns, that Johns of his own wrong detained the plaintiff for a greater length of time, and committed the other trespasses in the introductory part of that plea mentioned to a greater degree,

and with more force and violence, than was necessary for the purpose in the said plea mentioned in manner and form, &c. There were similar replications *to the other special pleas. Rejoinder, by Johns, that he did not of his own wrong, &c., traversing the allegations of the replication, and concluding to the country. Similar rejoinders by the other defendants. On the trial before Gurney, B. at the Launceston Spring assizes, 1835, the plaintiff obtained a verdict for 1s. damages. The learned Judge afterwards certified under stat. 43 Eliz. c. 6, s. 2, (a) in the common form, that the damages did not amount to 40s., or above. The Master, on taxation, allowed the plaintiff no more for costs than the amount of the damages.

In the ensuing term, *Crowder* moved for a rule to show cause why the Master should not tax full costs to the plaintiff, notwithstanding the certificate. He contended that the learned judge had no authority to certify under the statute of Elizabeth, the action being for a battery; and that the plaintiff was not deprived of his costs by the want of a certificate, under the stat. 22 and 23 Car. 2, c. 9, s. 136; (b) for that, although decisions were *contradictory on the question, whether an imprisonment necessarily included a battery (*Oxley v. Flower*, 2 Selw. N. P. Imprisonment, I. p. 906, III. p. 925, 8th ed.), *Emmett v. Lyne*, 1 New R. 255, *Wiffin v. Kincaid*, 2 N. R. 471, yet here the special pleas of justification admitted a battery, and such admission was equivalent to a certificate, under the latter act, of a battery having been proved. A rule nisi was granted.

Erle and *Rowe* now showed cause. The clear intent of the statute of Charles II. was, that if, in the cases there pointed out, the Judge thought the action frivolous, and did not certify, the plaintiff should not have his full costs. And, in the absence of a certificate, if there have been special pleas, it does not necessarily follow that the costs shall be allowed. In *Washer v. Smith*, 2 Barnard, K. B. 180, 277, though the Court was of opinion that a plea of son assault demesne (c) would entitle a plaintiff to *full costs, *Lee*, J. said, "that the rule is not, that the plaintiff shall be entitled to full costs in all these actions of trespass, where there is special pleading; and he cited an instance to the contrary in *Philpot v. Jones*, Hil. 1, G. 1. In the present case, the plea of son assault demesne is not traversed: the plaintiff admits the justification, and relies merely

(a) Stat. 43 Eliz. c. 6, s. 2. And be it further enacted, "if upon any action personal to be brought in any her Majesty's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges for the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court, shall not amount to the sum of 40s. or above, that in every such case the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

(b) Stat. 22 & 23 Car. 2, c. 9, s. 136, enacts as follows:—"And for prevention of trivial and vexatious suits in law, whereby many good subjects of this realm have been and are daily undone, contrary to the intention of an act made in the three and fortieth year of Queen Elizabeth, for avoiding of infinite numbers of small and trifling suits commenced in the courts at Westminster; be it further enacted, for making the said law effectual, that from and after the 1st of May aforesaid, in all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial of the cause shall not find and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of 40s., shall not recover or obtain more costs of suit than the damages so found shall amount unto."

(c) The plea in the case then before the court was, *molliter manus*, &c. by reason of the plaintiff having entered the defendant's garden. It is not expressly said how that case ended. In *Philpot v. Jones*, the plea was a justification under process, to an action of trespass *quare clausum fregit*; and the case appears to have been cited in answer to two Anonymous cases (2 Ventr. 180, 195,) mentioned at the bar, where, in actions of trespass *quare clausum fregit* (and for other trespasses, not specified in the report), justifications had been pleaded.

on an alleged excess. That excess is not specially pleaded to, but simply denied. Any effect, then, which might result from the admission of a battery on the pleading is done away, and the want of a certificate under stat. 2 & 23 Car. 2, c. 9, is not supplied. As to every thing but the battery, the certificate under 48 Eliz. operates. The case is like *Within v. Kincard*, 2 New R. 471, which is recognized in *Briggs v. Bowgin*, 2 Bing. 383, and where the action was for an assault, battery, and false imprisonment. The jury found a verdict for 1s. damages, and the judge certified under the statute of Elizabeth. The court held that the certificate deprived the plaintiff of his full costs as to the imprisonment, and that he could not recover full costs for the assault and battery for want of a certificate under the statute of Charles. [PATTERSON, J. It does not appear that there was any special plea in that case; where there is such a plea it has always been held equivalent to a certificate since I can remember.] In *Stead v. Gamble*, 7 East, 325, there was a special plea (upon which the defendant had a verdict); and, notwithstanding that plea, the Court held, in the absence of a certificate, that the plaintiff should recover no more damages than costs. [PATTERSON, J. No question arose upon the special plea in that case. The Court *716] refused full costs, upon the ground that the title to the freehold might have come into dispute upon the general issue, and therefore that a certificate under stat. 22 & 23 Car. 2, c. 9, was necessary to entitle the plaintiff to full costs.] The ground upon which a special plea removes the necessity of a certificate is, that the record then shows what should otherwise be certified by the judge, viz. that a battery was in fact committed, or that the title to freehold was in question. (a) Here the record does not show that such an issue was raised. The assault and battery are justified; the justification is admitted, but it is alleged that there was an excess; and as to that excess there is no special plea; it is, therefore, as if nothing but the general issue had been pleaded. Where the finding of a plea of justification is against the defendant, the plea is equivalent to a certificate; but not so where the justification is found for him, or is admitted on the record. In *Smith v. Edge*, 6 T. R. 562, which may be relied upon on the other side, the issue on the plea of justification was found against the defendants. As to the tearing of the clothes, the plaintiff would lose his costs by the certificate under the statute of Elizabeth, which is not interfered with in this respect by the statute of Charles, as appears from *Broadbent v. Woodhead*, 2 Tidd. 953, 9th ed. (b) [LITLEDALE, J. Tearing the clothes would not be considered as separate from the battery, if the whole ap- *717] peared *to be one transaction; *Mears v. Greenaway*, 1 H. Bl. 291; *Lockwood v. Stannard*, 5 T. R. 482; though a different rule prevailed before those cases; *Coterill v. Tolly*, 1 T. R. 655.] It may be questioned, whether the excess, which is here alleged by way of new assignment, amounts to such a battery as is excepted in stat. 43 Eliz. c. 6, s. 2. The intention, at least, of that statute was to exclude complaints of such a trifling kind from the superior courts. [Lord DENMAN, C. J. Is it possible to say that where an action is brought for beating the plaintiff, and a justification is pleaded, and excess replied, that is not an action "for any battery" within the statute?] *Crowder*, contra, was stopped by the Court.

Lord DENMAN, C. J. It is clear that the learned Judge had not power to grant this certificate. The action was for a battery. It is hard to reconcile almost any set of cases on the subject of costs; but it seems clear that the statute of Elizabeth includes this case in the exception, and not in the rule.

LITLEDALE, J. The statute of Elizabeth excludes from the provisions of the second section cases in which the action is for any battery. Then, by the statute of Charles, in all actions of trespass, assault, and battery, where the

(a) See note [f] to *Green v. Jones*, 1 Wms. Saund. 300.

(b) Where *Walker v. Robinson*, 1 Wils. 93, is also cited. It does not appear that there was any battery in either case.

Judge at the trial shall not certify that a battery was sufficiently proved, and the jury shall not find 40*s.* damages, the plaintiff shall not recover more costs than damages. Here, therefore, the plaintiff was **prima facie* debarred from recovering his full costs. But then it has been held that the admission of a battery by a special plea supersedes the necessity of a certificate under the statute of Charles. Here the plea is special, and in the first instance admits the battery, but justifies it. The reply is, excess, which is simply traversed. Still, a battery is admitted by the plea, and, where that is so, the plaintiff, if he obtains a verdict, is entitled to his full costs, although there be no certificate. [718]

PARRISON, J. I do not mean at this time to go into all the cases on the present subject. In *Wiffin v. Kincard*, 2 New R. 471, there was no special plea, and there were two causes of action, an imprisonment and a battery. The imprisonment was not within the exception in the statute of Elizabeth, and as to that the Judge certified; and he did not certify under the statute of Charles that the battery was sufficiently proved. By the certificate in one case, and the want of it in the other, the plaintiff was completely shut out from recovering his full costs. Here, the case, as it ultimately stands on the pleadings, has been put upon the footing of a new assignment; but it is not like that. To new assign would be to say, "You have mistaken the assault, upon which I sue, for a different assault;" and if, to the trespass so newly assigned, the defendant had pleaded the general issue, or something equivalent, it might have been said that the damages were given for that trespass only, and that the plaintiff could not recover full costs without a certificate under the statute of Charles. But here the *replication is, in effect, that the assault and battery justified [719] are those complained of, but that they were more violent than the defendant admits them to be. Under these circumstances no certificate was necessary by the statute of Charles, and the Judge could not certify under that of Elizabeth.

WILLIAMS, J., concurred.

Rule absolute.

Ex parte SMYTH. Tuesday, June 16th.

Where a cause has been brought before the Judicial Committee of the Privy Council on appeal from the Court of Arches, and the Judicial Committee has decided in favour of the appeal, at the same time retaining the principal cause, and ordering the unsuccessful party to appear absolutely, subject to the approbation of the King in Council, which approbation has been afterwards given, this court cannot, on a suggestion of error in the decision, issue a mandamus to the Privy Council to receive a petition for a rehearing of the appeal.

Nor will the court issue a prohibition to the Committee, on a complaint that they have exceeded their jurisdiction in ordering the party to appear absolutely; it not being shewn that they have either transgressed the general law of the land, or interfered in any matter not of ecclesiastical cognisance.

THE wife of the above party instituted a suit against him in the Consistory Court. He appeared, and made a protest, which was overruled; but the Judge refused to direct that he should appear absolutely, or to admit the wife's libel. The wife appealed to the Arches Court, where it was decreed that the appeal was not in due time and place. She then appealed to the Court of Delegates, which (in June, 1862) decided against the appeal, and remitted the cause to the Arches Court. It was ultimately brought again into the Consistory Court, the Judge of which Court decreed to proceed as if there had been no appeal. The wife then tendered her libel with additional articles, and proposed amendments. The Court rejected these; and she appealed to the Court of Arches, which pronounced in favour of the appeal, and retained the principal cause.

*720] Mr. Smyth then *appealed to the King in Privy Council, and his Majesty referred the subject-matter of appeal to the Judicial Committee of the Privy Council. The appeal was heard there on the 12th of last February; and the committee announced in open court its intention to report to the king in favour of the appeal, and to submit also, as part of their report, that the principal cause should be retained before the Judicial Committee, and that Smyth should appear absolutely; and they ordered him so to appear on a certain day, if his Majesty should confirm the report. Mr. Smyth then prayed to be heard on his petition against his being ordered to appear absolutely, but this was refused. On a subsequent day, he stated to the Judicial Committee that he intended to petition the King in Council not to confirm the decision, and requested them not to transmit their report to the king till the expiration of fifteen days, the usual time for appeal from an inferior to a superior ecclesiastical court (stat. 24 H. 8, c. 12;) but this was refused. On the 17th, he sent a petition to the Secretary of State, praying that his Majesty would not decide on the report till the expiration of the fifteen days. In answer, he was informed that the Privy Council never received petitions as to any case which had been argued and decided upon in open court. The report of the Judicial Committee was confirmed by the King in Council, February 28d; after which Mr. Smyth transmitted another petition to the Lord President of the Council, praying relief, and shewing that the report was (as he conceived) unjust and erroneous. The Lord President declined to interfere, for reasons similar to those given in the answer to the preceding application; and another petition, to the same effect with the last, being sent to the Lords of the Council, with a *721] prayer *that it might be laid before the King in Council, a like answer was returned.

Kennedy, in the last term (April 15th), moved for a rule to shew cause why a mandamus should not issue to the Lords of the Privy Council to receive the petition of Mr. Smyth, and forthwith to lay it before his Majesty in council. This court could have exercised such an authority over the Court of Delegates, if the proceeding complained of in the petition had taken place there; it may therefore issue a mandamus to the Judicial Committee, which is substituted for the delegates, under stats. 2 & 3 W. 4, c. 92, s. 3, and 8 & 4 W. 4, c. 41, s. 3. It is the right of any subject to lay a petition before the king in council, especially where the complaint is of injustice in the proceedings of a court; and the application here is only that the Privy Council may be directed to receive the petition, not that they should be ordered to rehear the case. The motion is not like that in *Ex parte Morgan*, 2 Chit. Rep. 250, where a mandamus was asked for to compel a court to grant a new trial. Here the only object is to obtain a hearing on the question, whether or not the cause should be reheard. [LITTLEDALE, J. If this had been a case before the Delegates, the course would have been to apply for a commission of review; and that, if granted, would have gone, not to the same delegates, but to others.] The proceeding by commission of review was abolished by stat. 2 & 3 W. 4, c. 92, s. 3, which transferred the powers of the Court of Delegates to the King in Council; but that statute enacted that every judgment and decree there made should have *such and *722] the like force and effect in all respects as if made and pronounced by the High Court of Delegates; and, therefore, in a case like the present, some ulterior remedy ought to be given.

LORD DENMAN, C. J. On the very statement in support of this motion we have no power. A court of competent jurisdiction has decided in this case. If we were to interfere in the manner suggested, we might as well call upon the Lord Chancellor to revise any decision he makes, or upon any other court to reconsider its judgments. The rule cannot be granted.

LITTLEDALE, J. When cases of this kind were referred to the court of Delegates, a party dissatisfied with their judgments might have applied for a

commission of review; but I have no notion that this Court can now accomplish the object of such a commission by a mandamus.

PATTESON, J. This Court will undoubtedly take care that other courts shall do justice; but I never heard that we could compel any court to rehear a case already decided, which is, in effect, the object of this motion.

COLERIDGE, J. concurred.

Rule refused.

In the same term Mr. Smyth, having been served with a monition from the Judicial Committee to appear and attend the proceedings on the appeal, made another motion, (a) in person, the nature and grounds of which will *be sufficiently explained by the judgment. With respect to the authority [723 and practice of the ecclesiastical courts, he cited Wood's Inst. Book. 4, c. 1.

Cur. adv. vult.

LITTTLEDALE, J. now delivered the judgment of the Court. In this case Mr. William Henry Carmichael Smyth has moved for a rule nisi, prohibiting the Judicial Committee of the Privy Council from proceeding in a suit originally instituted in the Consistory Court of London, against Mr. Smyth by his wife, and which was brought before the Court of Arches by an appeal on her part, and afterwards before the King in Council, by an appeal on the part of Mr. Smyth, and referred by his Majesty to the Judicial Committee.

The ground of appeal by Mrs. Smyth was the refusal of the judge of the Consistory Court "to admit additional articles to her libel, and to assign to hear on admission of the said libel so altered, and of the additional articles, the by-day." The Court of Arches decided in favour of Mrs. Smyth. The Judicial Committee, on appeal, have reversed that decision, but have gone no further to retain the principal cause, and to direct Mr. Smyth to appear absolutely.

This last part of their decree forms the ground of the present application. It is admitted that the suit is solely ecclesiastical cognizance, and no matter has arisen in the progress of the suit which interferes with that cognizance; but it is alleged that the Judicial Committee have exceeded their jurisdiction in decreeing Mr. Smyth to appear absolutely, the question of such appearance not being in any way the subject of appeal. It appears that this question had been the subject of a *former appeal to the Court of Delegates, and had been decided in favour of Mr. Smyth, on the ground that that appeal was not [724 brought in due time.

In the present appeal the prayer of both parties is, that the principal cause should be retained. (b) The Judicial Committee have retained it, and have decreed Mr. Smyth to appear absolutely.

Whether they are right in so decreeing or not is a question of practice, not of jurisdiction. The temporal courts cannot take notice of the practice of the ecclesiastical courts or entertain a question whether, in any particular cause admitted to be of ecclesiastical cognizance, the practice has been regular. The only instance in which the temporal courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court. The proceeding here complained of comes within neither of these heads, and therefore we are of opinion, that the rule prayed for ought not to be granted.

Rule refused. (c)

(a) May 12th. Before Littledale, Patteson, and Coleridge, Js.

(b) Mr. Smyth, in his appeal laid before the Judicial Committee, prayed them to pronounce for the appeal, to reverse the decree made below, to retain the principal cause, and therein to dismiss the appellant from all further observance of justice. Mrs. Smyth, in the statement of her case laid before the Committee, prayed them to affirm the decree, to retain the principal cause, &c.

(c) See Ex parte Smyth, 2 Cro. M. & R. 748; S. C. 1 Tyrwh. & Gr. 222, where, upon the same motion being made in the Court of Exchequer by Mr. Smyth, the same point was decided.

*The KING against HEWES. Tuesday, June 16.

This court will not issue a mandamus to a court of criminal jurisdiction, to alter the minutes of a verdict according to the fact, or to cancel an alteration in such minutes, or a representation that the verdict was erroneously entered at the trial.

As where a jury at sessions, on an indictment for poisoning horses, found a verdict of "Guilty by mischance," and were then told by the chairman that they must say either guilty or not guilty, whereupon they brought the defendant in guilty, and recommended him to mercy on the ground that he had no malicious intent but administered the material to benefit the condition of the horses; upon which finding and explanation a verdict of guilty was entered.

BYLES, in the last term, obtained a rule calling on the justices and clerk of the peace of the county of Suffolk to shew cause why a mandamus should not issue, commanding them to cancel the alteration made by the said clerk of the peace in the minute of the verdict given by the jury upon the trial of Robert Hewes before the said justices of Bury St. Edmond's, on, &c., or to alter the minutes of the verdict so given, according to the fact. By the affidavits in support of the rule it appeared that Hewes was indicted at the Bury sessions for feloniously, unlawfully, and maliciously killing three mares of the value, &c., of the goods of, &c., by mixing a deadly poison called bryony root (another count gave a different name to the material) with chaff, bran, and bean meal, of which the said mares ate, and became poisoned and died. The jury returned a verdict of "Guilty by mischance," which the clerk of the peace entered in his minute book. The defendant's counsel submitted that the verdict was a special one, and amounted in law to an acquittal. After some observation from the counsel for the Crown, the chairman told the jury that they must find the defendant either guilty or not guilty, and requested them to reconsider their verdict. They retired, and afterwards brought in a verdict of "Guilty, but recommended to mercy." The chairman asked them on what grounds they made the recommendation, and they said, "We recommend to mercy on the ground *726] *that he did not do it with a malicious intent, but did it to benefit the condition of the horses." The defendant was then sentenced to two years' imprisonment. One of the jurymen now made affidavit that the jury recommended to mercy because they believed that the prisoner's intent was as stated by them to the chairman. The clerk of the peace, in an affidavit filed in opposition to the rule, stated that he did not record the verdict first offered by the jury, but entered a note of its having been offered in his minute book, (see *Rex v. Smith*, 8 B. & C. 341; *Rex v. Bellamy*, Ry. & M. 171,) as a memorandum of the proceedings, and not as a record; and that he recorded the second verdict, with the recommendation to mercy, on the indictment, in the usual manner, after which the chairman conferred with the other justices, and then asked the jury the reason of their recommendation. The present motion was first made in the Bail Court before WILLIAMS, J., who referred it to the full Court.

B. Andrews (with whom was *S. Taylor*) now shewed cause; and after the facts of the case had been stated, the Court called upon *Byles* to support his rule.

Byles, contra. It is true that, where a record is returned to this Court by writ of error, the Court cannot amend it. But this motion is made on the ground of the authority which the Court possesses, as the supreme criminal tribunal, to correct inferior courts in matters of practice; as, for example, to direct the sessions to enter continuances and hear an appeal, or to allow costs of *727] maintenance to the appellant against *an order of removal, where the appeal is decided in his favour. In *Rex v. The Justices of the West Riding*, 5 B. & Ad. 671. Lord DENMAN, C. J., said: "I have always understood that this Court had authority to interfere for the purpose of seeing that

no illegal practice prevailed at the sessions to prevent the hearing of an appeal." A similar authority must exist in the case of a criminal proceeding. [PATTERSON, J. The Court will compel justices by mandamus to hear, where they have improperly refused to do so; and will oblige them, incidentally, to do whatever is necessary to such hearing. WILLIAMS, J. But the Court will not prescribe to them the mode in which they shall hear and determine.] If, in the present case, the verdict had been Not Guilty, and the chairman had told the jury that they must find a verdict of Guilty, would not this Court have interfered? [LITLEDALE, J. There is no such power. If we are to exercise it, the legislature must give it to us.] The Court has a general visitatorial power over the practice of justices; *Rex v. The Justices of Wiltshire*, 10 East, 404. Suppose, here, the case had been one of an offence more directly against the State, and in which the Crown was the real as well as nominal prosecutor; very great injustice might be done if the chairman could act as in this case, and the Court of King's Bench were precluded from interfering. [WILLIAMS, J. In a case of larceny, or a case of sedition, if the chairman at sessions were alleged to have misdirected the jury by giving the wildest misdescription of the offence, how could we interfere?] A misdirection would be before verdict, and therefore different from the proceeding in question. Here a sufficient verdict had been given, viz. "Guilty by mischance,"* and the question was, how it ought to be entered up. The entering it was a ministerial act, with [*728 which the chairman had no right to interfere. It ought to have been entered according to the legal effect of the finding, without regard to any particular expression at variance with that effect. In *Foster v. Jackson*, Heb. 58, it is said, "But whosoever a jury doth begin with a special matter, and after makes a general conclusion upon it, contrary to that which the law and the Court do judge upon the special matter, found by them, or on the other side, when they begin with a direct verdict, and yet after deduce a special matter, which is contrary to their direct verdict, or in law proves the truth contrary to their general verdict premised, and closed them up, with submitting the whole to the judgment of the Court, as in this case it is; in both these cases the special matter makes the verdict and overrules the general." And this is consistent with what is said, upon the third point as to the verdict, in *Priddle and Napper's case*, 11 Rep. 13 a. Here the finding of "Guilty" was a conclusion inconsistent with the special matter found at the same time, and should have been overruled by it. [PATTERSON, J. It is not uncommon for a jury to add something to their verdict, as was done here: the usual course then is, not to treat the finding as a special verdict, but explain its effect to the jury, and take a general verdict. Here the first verdict should have been Not Guilty.] The explanation finally given by the jury was consistent with the finding of Not Guilty. [WILLIAMS, J. My difficulty when the motion was made was that, if this application were granted, it would lead to a motion for a new trial in every criminal *case where any thing had been against law in the court below.] Greater in- [*729 convenience would follow from the refusal. Besides, in this case, the first verdict had been minuted by the clerk of the peace, and was therefore, in effect, recorded. Lord Tenterden says, in *Rex v. Carlile*, 2 B. & Ad. 364, "We also gave our opinion," &c., "as well because it is impossible that a verdict should be recorded at the time it is given, the record of it being necessarily an act subsequent to the delivery of the verdict by a jury, as because there is no time fixed by law for the recording of a verdict; the practice being, that a minute of the verdict should be entered forthwith by the officer of the Court, and entered of record with the other proceedings at some subsequent time, when a formal record of the whole may be required. And the minute so entered is considered by the Court in which the proceeding takes place as evidence of the verdict, although the record may not have been regularly drawn up in form." The minuting, therefore, of the first verdict, in this case, was as if a verdict of Not Guilty had been recorded. The jury was functus officio. [PATTERSON, J.

Supposing that the court of quarter sessions had even made up their record, is there any decision which shows that they could not alter it? And have you any authority for saying that this Court can direct the alteration you apply for? The proceedings already mentioned as to appeals shew it. [PATTERSON, J. I do not consider them any instance.] *Mellish v. Richardson*, 9 Bing. 125, *Salter v. Slade*, 1 A. & E. 608, and *France v. Parry*, 1 A. & E. 615, seem to be unfavourable to an interference with the record in the manner prayed for; *780] but those cases came before the courts on writs of error, and not on applications for a mandamus. In *Rex v. Carlile*, 2 B. & Ad. 971, it is not clear that the Court would not have granted a mandamus to amend the record, if a different course had not been adapted by consent of the Attorney-General. [LITLEDALE, J. I do not know that they would.] In *Com. Dig. Mandamus* (A,) it is laid down that "the Court of B. R. has power to amend all extrajudicial errors, which tend to the breach of the peace, oppression of the subject, or other misgovernance." [LITLEDALE, J. The reference there is to *James Bagg's Case*, 11 Rep. 98 a, which had nothing to do with the jurisdiction over criminal courts. And Lord Ellesmere's observation, (cited in *Fraser's* edition of *Co. Rep.* part 11. Vol. 6, 98 a, note B,) on the passage referred to in that case appears to me very correct.] In *Rex v. The Justices of Middlesex*, *In re Bowman*, 5 B. & Ad. 1113, this Court directed the Court at Clerkenwell to make up a record of conviction, for the purpose of enabling a defendant to plead *auterfois convict*.

LITLEDALE, J.(a) I am of opinion that we have no power to do what is asked in this case. It is true this Court has a general superintendence over courts of criminal jurisdiction; but we must see that that is exercised in the manner in which we may exercise it by law. As to the example which has been given of a mandamus to enter continuances and hear an appeal, that is granted merely to put the inferior court in motion for the purpose of decided a case: and so the *mandamus in *Rex v. The Justices of Middlesex*, 5 B. & Ad. 1113, was only to make up a record for the purpose of enabling a party to plead *auterfois convict*. Here the object of the application is, to oblige the court of quarter sessions to do a particular thing; namely, to cancel the alteration made in the verdict by the clerk of the peace, or to alter the minutes of the verdict according to the fact. But, in the latter case, how is it to be ascertained what the alteration ought to be? Must the Court below be applied to to determine whether the verdict is to be considered a special one, or a verdict of acquittal? And, if the alteration said to have been made by the clerk of the peace were cancelled, what would remain? I rest my judgment, however, upon the broad ground that we have no right to interfere in this respect with the practice of the court below. It constantly happens at the assizes, where a verdict is given in the manner in which the jury here found their first verdict, that the Judge directs how it shall be entered: if a motion for a mandamus were entertained in such a case as this, parties would come from every court of criminal jurisdiction in the kingdom, to have records altered. If any injustice has been suffered in the particular case, application must be made to the Secretary of State. To comply with this motion would exceed any thing that has yet been done by the Court. Nothing has been adduced in support of it but analogies, which I think fail.

PATTERSON, J. No authority or real analogy has been cited in support of this *732] motion, and we cannot extend our jurisdiction. The case of a mandamus to enter continuances and hear is not like this. There the justices are ordered merely to hear an appeal, and to enter continuances, because those are necessary to enable them to hear. So, in the present case, if it were necessary for the defendant to have a record made up, and the officer refused to do it, the party having a right to avail himself of the record might apply for a

(a) Lord Denman, C. J., having been absent while the case was argued gave no judgment.

mandamus, as in *Rex v. The Justices of Middlesex*, 5 B. & Ad. 1118. I have always understood that this Court might send a mandamus to an inferior court to do its duty, in general terms; but not to do a particular thing, as to make an alteration here or there in the Clerk of the peace's minutes. If the jury in this case really meant to acquit, the proper course is to apply to the Secretary of State.

WILLIAMS, J. This Court will grant a mandamus to the sessions to hear, where they have declined to hear at all; but not for the purposes of prescribing to them in what manner they shall direct their inquiry. So a mandamus may be granted to make a rate, but not to make an equal rate. The writ is only to set parties in motion where they have refused to act. The application here is not for that purpose, but to interfere with the exercise of jurisdiction by the sessions, in a manner which there is no authority to warrant.

Rule discharged.

*NORRISH against RICHARDS. Tuesday, June 16.

[*733]

In actions commenced in any of the superior courts, the plaintiff may, since the rule, Hil. 2 W. 4, l. 35, declare at any time before the end of a year from the return of the writ, unless the defendant shall have signed judgment of non-pros for want of the plaintiff's declaring before the end of the second term; and this, whether the action be commenced by serviceable or bailable process. This applies also to causes removed by the defendant from inferior courts by habeas corpus, (though the cause was commenced below, and removed before the rule came into operation,) except that, as judgment of non-pros cannot be signed in such causes, the plaintiff cannot be out of court till the expiration of the year.

And, consequently, an action for malicious arrest cannot be commenced in any of the above cases, till a year has elapsed from the return of the writ.

Quere, whether such action lies, where the suit alleged to have determined has been removed by habeas corpus at the instance of the defendant.

CASE for a malicious arrest. The first count of the declaration stated that the now defendant, after holding the plaintiff to bail, did not declare, or prosecute his suit, but voluntarily permitted the same to be discontinued, and that for want of prosecution the same was ended and determined. The second count stated generally, that the suit was determined. Plea, the general issue. On the trial before Bosanquet, J., at the Devon Spring assizes, 1834, it appeared that the action was commenced by Richards against Norrish by plaint in the borough court of Tiverton, in August, 1831; that Norrish removed it into this court by habeas corpus in February, 1832, and in that month put in bail above; that search was made on his behalf, at the proper office, for a declaration, and was continued till the end of Trinity term, 1832, at which time the now defendant had not declared; but that after that time there had been no further search. It was contended that this evidence did not show a determination of the suit, and the learned Judge gave leave to move to enter a nonsuit upon the objection, if the verdict should be for the now plaintiff. The jury having found for him, Follett, in the ensuing term, moved according to the leave reserved; and he contended that, in an action of this kind, a year was the period after which a plaintiff not declaring was *to be considered out of court; *Pierce v. Street*, 3 B. & Ad. 397; which period, in the present case, had not yet elapsed; and that although, according to *Hutton v. Stroubridge*, 1 Str. 631, where a defendant had removed a cause by habeas corpus, he was not bound to accept a declaration after the lapse of a second term, yet a plaintiff omitting to declare within that time, and having taken no step except compelling the defendant to put in bail above, was not liable to be non-prosessed; *Clack v. Dixon*, 3 M. & S. 93; and could not, for the purpose of an action like the present, be considered out of court in the former suit, a year not having elapsed from its commencement. He also contended that even if, upon this evidence, the suit

appeared to be terminated, the termination was not such as *prima facie* showed it to have been without foundation, and therefore the present action was not supported; *Wilkinson v. Howel*, M. & M. 495. And he stated other grounds for setting aside the verdict, which it is not material to notice, as the Court passed them by in its judgment. A rule nisi was granted.

Sir John Campbell, Attorney-General, and Erle, on a former day of the term, (a) showed cause. It was settled, by the authorities referred to in *Tidd's* and Archbold's Practice, that the plaintiff in ordinary cases ought to declare in the second term from the return of the writ, and, if he fails to do so, may be non-prossed; but if the defendant omits to sign judgment of non-pros, the declaration may be delivered at any time within a year; (1 *Tidd*, 421, 9th ed. 3 1 Archb. 230, 231, Chitty's 8d ed. 1836.) And where the defendant has removed the cause by

*735] *habeas corpus*, the plaintiff must declare, if at all, before the end of the second term after putting in bail; if he omit doing so, the defendant is not bound to accept a declaration afterwards, but he cannot non-pros; (1 *Tidd*, 413, 9th ed. 2 Archb. 846, Chitty's 8d ed. 1836.) Now, in *Pierce v. Street*, 3 B. & Ad. 397, where the cause had not been removed, and the defendant had not declared within a year after the return of the writ, it was held, in an action for malicious arrest, that the omission to declare was sufficient proof of the suit having determined, though there had been no judgment of non-pros, or rule of Court determining the suit. That case is in point, only substituting the period of two terms for that of a year, because in this instance there has been a removal by *habeas corpus*. At the end of the two terms, or year, as the case may be, the suit is at an end or not, at the option of the defendant, and he declares that option by commencing his suit for a malicious arrest. If it were held that he could not so proceed, a defendant would be without remedy where he has removed the cause, and no declaration is delivered; for he cannot non-pros the plaintiff. The rule, that before an action of this kind is commenced the original suit must be determined, is intended to prevent the inconvenience which would ensue if both actions could go on at the same time. That cannot be in a case like the present; the now plaintiff could not, after bringing this action, accept a declaration in the other. The dictum of Lord Tenterden in *Wilkinson v. Howel*, M. & M. 496, must be taken with reference to the state of facts in that cause. Lord Tenterden said that, to ground an action for a malicious arrest, the termination of the first suit "must be such as to furnish *prima facie* *736] evidence that the action was without foundation." There the parties had agreed to a *stet processus* in the original action, on account of the plaintiff's bankruptcy: it did not, therefore, appear that, when the action was commenced, there might not have been a probability of the plaintiff's succeeding; and it would have been a fraud upon him, if the defendant had accepted a proposal for a *stet processus*, and then been allowed to bring an action for a malicious arrest.

Follett and Bere, contra. First, there was no evidence that the former suit was determined. Secondly, assuming that there was, the termination of the suit, as proved, did not afford *prima facie* evidence that the suit was unfounded; and, according to the dictum of Lord Tenterden in *Wilkinson v. Howel*, M. & M. 496, and the judgment of Mansfield, C. J., in *Sinclair v. Eldred*, 4 Taunt. 10, the mere termination of the suit, unless it afford such evidence, is not sufficient. As to the first point; although the plaintiff did not declare within two terms, the cause was not therefore out of court. The defendant was not bound to accept a declaration, but he might have done so. The cause would have been out of court at the expiration of a year, and not before, both by the rule of Court, Hil. 2 W. 4, I. 35, 3 B. & Ad. 379. See it in the judgment, (p. 739, post), and by the previous practice. In the former practice, there was no real ground of distinction in this respect between causes removed by *habeas corpus*

(a) June 13th. Before Lord Denman, C. J., Littledale, Patteson, and Williams, Js.
VOL. XXX.—22

and others. When *Hutton v. Stroubridge*, 1 Stra. 631, was decided; where the Court held that, in a cause removed, the defendant need not *accept a declaration after the lapse of a second term from the putting in of bail, it was thought to be the general law of the courts that a declaration need not be accepted when two terms had elapsed from the return of the writ. There was no authority after that time, introducing any distinction between causes so removed and others; and, with respect to causes in general, it was settled in the Court of King's Bench, subsequently to the decision in *Hutton v. Stroubridge*, 1 Stra. 631, that the plaintiff might declare at any time within a year, if judgment of non-pros had not been signed; *Worley v. Lee*, 2 T. R. 112. The practice is more completely established by the late rule of Court. Secondly, this evidence, even if it shewed the action to have been determined, would not amount to even a prima facie proof of want of foundation for it. Where the defendant removes the action by habeas corpus, the plaintiff is not bound to follow it, and there cannot be a non-pros; *Clack v. Dixon*, 3 M. & S. 93. His not following up the suit in such a case does not show a want of foundation for it. But, according to *Wilkinson v. Howel*, M. & M. 495, to support an action for a malicious arrest, it must appear from the mode in which the first suit terminated that it had no foundation. [PATTESON, J. You cannot contend that that may not be shown by other evidence: there could else be no action for a malicious arrest, where the cause had been removed. A stet processus, by which the suit was ended in *Wilkinson v. Howel*, M. & M. 495, would not only be no evidence that the suit was without foundation, but would be prima facie evidence the other way, the suit being thus concluded by consent of the parties.]

Cur. adv. vult.

*Lord DENMAN, C. J. now delivered the judgment of the Court.

The question is, whether there ought to have been a nonsuit in this action for a malicious arrest, for want of proving that the former suit was determined. It had been commenced August 1st, 1831, in the borough Court of Tiverton, and removed into this Court by habeas corpus in the February following. Search was made for a declaration till the end of Trinity term, which did not extend to twelve months beyond the commencement of the original suit. The termination alleged was the plaintiff's default in declaring. No search for a declaration was made after Trinity term; therefore, consistently with all the proof, the then plaintiff may have declared within the year from the return of the habeas corpus, and even from the commencement in the court below. Doubts may be raised whether an action for malicious arrest will lie, where the defendant has removed the cause by habeas corpus. The point, however, is, whether the cause was out of court for want of a declaration before the end of Trinity term.

Previous to the case of *Worley v. Lee*, 2 T. R. 112, the practice both of K. B. and C. B. as to declaring was this. The plaintiff was bound to declare before the end of the second term after the return of the writ: if he did not, the defendant (having ruled him to declare in C. B., but without such rule in K. B.) might sign judgment of non-pros. But if the defendant did not do so, still the plaintiff, after the vacation of the second term at any rate, could not declare: the defendant was not bound to accept a declaration, nor could he rule the plaintiff to *declare, nor sign judgment of non-pros, because the case was out of court; *Tidd*, 422.

By the case of *Worley v. Lee*, 2 T. R. 112, and subsequent cases, the practice of this Court in actions by bill was altered, and if the defendant did not sign judgment of non-pros, the plaintiff was held at liberty to declare at any time within a year, and the cause was not considered out of court till the end of the year from the return of process; *Cooper v. Nias*, 3 B. & Ald. 272.

The old practice, however, remained in C. B., *Wynne v. Clarke*, 5 Taunt. 649, and in this Court, as it should seem, in actions by original and in actions removed hither by writ of habeas corpus. Not that there ever was any thing

peculiar in the practice of this Court in actions removed by habeas corpus, but it was always necessary that the plaintiff should declare in these, as in all other cases prior to *Worley v. Lee*, before the end of the second term; with this difference, that the defendant could not ever sign judgment of non-pros in cases of removal by habeas corpus, because the plaintiff was not nor is bound to follow the defendant into this Court. None of the cases which shew what the practice as to declaring after a habeas corpus was, are later in date than the alteration which commenced by *Worley v. Lee*; but, if there were any later cases, they would not be material for they would only shew that the practice continued after *Worley v. Lee* in regard to all cases except actions by bill. By the rule I. 35, of Hilary term, 2 W. 4, 3 B. & Ad. 379, it is provided that a plaintiff shall be deemed out of court unless he declares within one year after the process is re-
 *740] turnable. There is no exception in this rule, *and we think that it applies to all cases; so that now in all the courts, whether the action be commenced by serviceable or bailable process, or removed thither by habeas corpus, the plaintiff may declare at any time before the end of a year from the return of the writ, unless the defendant sign judgment of non-pros for want of the plaintiff declaring before the end of the second term. But in the case of a habeas corpus the defendant cannot sign any such judgment for the reasons above given. It follows that in such case the cause cannot be out of Court till the end of the year, and that, in this case, as no search was made for a declaration after the second term, there was no proof that the action was determined.

The rule of Hilary term commenced on the first day of the following Easter term, and, as this cause was removed in February, 1832, it is plainly within that rule.

Under these circumstances we are of opinion that the rule for a nonsuit must be made absolute. Rule absolute.

*741] *VIVIAN *against* JENKIN and OATES. *Wednesday, June 17.*

The first count of a declaration in trespass was for breaking plaintiff's close, and damaging certain chattels, on divers days, &c. The second was for damaging certain chattels, and destroying others, on one day.

The first plea to both counts, gave colour to plaintiff, and made title in defendant under a demise from the owner of the fee, as to the close mentioned in the first count, and justified his entry, and the trespass to the chattels as encumbering the close, not averring identity of the chattels in the two counts. The second plea, to the second count, alleged possession by defendant of a close, and justified the trespass to the chattels as encumbering it.

The replication to the first plea, so far as it related to the first count, traversed the demise; and, so far as the plea related to certain of the chattels mentioned in the second count, replied *de injuriâ*; and, so far as it related to other of them, replied excess. The replication to the second plea, so far as it related to certain of the chattels mentioned in the second count, replied *de injuriâ*; and, so far as it related to certain other of them, replied excess. There were separate formal conclusions to all the distinct parts of the replication.

1. Held, on demurrer to the replication to each plea for putting several matters in issue, that the plaintiff might treat the first plea, with respect to the chattels, as pleaded separately to each count.
2. That the plaintiff was entitled to divide each plea, and to reply severally as to the different parts of each, and as to different chattels covered by each.
3. But that *de injuriâ* could not be replied, as to any chattels, to the first plea, which alleged title in the close.
4. That *de injuriâ* might be replied, as to the chattels, to the second plea, which alleged only possession of a close.
5. The replication was dated before the first day of Easter term, 1834, when the rules Hil. 4 W. 4, came into effect; the replication to the first plea, and that to the second plea, each commenced in form as a replication to the whole plea; in each, the part replying excess contained no prayer of judgment, but only a verification followed by *an &c.*: Held bad on special demurrer.

6. Semble, that it would not have been bad, if the replication had been subsequent to the taking effect of the rules, Hil. 4 W. 4.
7. But held, that the above faults did not make the replication bad as to the whole; and judgment was given for the plaintiff as to such parts of the replication as were good, and for the defendant as to the rest.

TRESPASS. The first count of the declaration (of 10th December, 1833,) charged that the defendants heretofore, to wit, 23d July, 1833, and at divers other days and times between that day and the commencement, &c., broke and entered a close of the plaintiff, situate, &c., and broke to pieces, damaged, &c., divers, to wit, ten windlasses, and other articles of machinery enumerated, &c. Second count, that the defendants on said 23d July, damaged and destroyed certain goods, &c., to wit, ten windlasses, &c., and seized, took, and carried away certain other goods, &c., to wit, *ten other windlasses, &c., and converted and disposed of them to the defendants' use. Third count, that the defendants [742 on 1st July, and on divers other days and times between, &c., broke and entered four other closes of the plaintiff, and other wrongs, &c.

The defendants pleaded five pleas (of 3d February, 1834). The first, second, and fifth, and to issues of fact.

Third plea. As to breaking and entering the close in the first count mentioned, and as to breaking and entering the four closes in the last count mentioned, and as to breaking to pieces, &c., the windlasses, &c., in the first count mentioned, and as to damaging and destroying the goods, &c., in the second count mentioned, and seizing, &c., and converting, &c., as in that count mentioned, actionem non; because they say, that the close in the first count mentioned in which, &c., and the four closes in the last count mentioned, in which, &c., are and at the several times when, &c., were the same close, &c.; and that before any of the said times when, &c., the late King George IV., (being then Prince of Wales and Duke of Cornwall,) was seised in his demesne as of fee in right of his said dukedom, of and in the said close in which, &c., and before any of the said times when, &c., to wit, on, &c., by his certain indenture, sealed with his seal of the said Duchy of Cornwall, between the said late king and one Edward Smith, and in due manner enrolled, &c., and now shown, &c., the date whereof, &c., demised, granted, and to farm let under the said Edward Smith, his executors, administrators, and assigns, the said close in which, &c., habendum to Edward Smith, his executors, &c., from 15th August, 1810, for a term whereof divers, to wit, seventy years are unexpired; by virtue, *&c., (entry by Smith); and the said E. S. being so, &c., afterwards and [743 before any of the said times when, &c., to wit, &c., died, having first published his last will and testament in writing, whereby he bequeathed to his daughter Mary (then and still wife of Henry Crease) the said term, and appointed her executrix, and died without revoking: and afterwards and before any of the said times when, &c., to wit, &c., the said Mary (proof of the will and execution taken upon herself by Mary, her assent to the bequest and election to take the term; and entry by her and her husband H. C.): and the said Henry and Mary being so possessed, the plaintiff claiming title to the said close in which, &c., under colour of a charter of demise pretended to be made by the late king for his natural life before the demise to Edward Smith, whereas nothing of and in the said close. &c., passed by virtue of that charter, afterwards, and before any of the said times when, &c., and during the continuance of the term, &c., (entry by plaintiff, and possession); and thereupon the defendants, as servants of the said Henry and Mary (justification of the entry into the close as being the close of Henry and Mary Crease, as their servants and by their command; and of the trespass as to the windlasses, &c., in order to remove them from the close, which they were incumbering): verification.

Replication (of 11th March, 1834). And the said plaintiff, as to the said plea of the said defendants by them thirdly above pleaded, says (præcludi non); because, protesting (that the late king was not seized), yet for replication to

so much of the plea as relates to the said trespass in the first and third counts of the said declaration mentioned, the said plaintiff says that his said late Majesty (traversing the demise); and this *the said plaintiff prays may be
 *744] inquired of by the country, &c. : and the said plaintiff for replication to so much of that plea as relates to the trespasses to a certain part of the said goods and chattels in the said second count of the said declaration and in that plea mentioned, to wit, one windlass, &c., says that the said defendants at the said times when, &c., (de injuriâ); and this the said plaintiff prays may be inquired of by the country, &c. : and the said plaintiff for replication to so much of that plea as relates to the trespasses to a certain other part of the said goods and chattels in the said second count and in that plea mentioned, to wit, forty pieces of timber, &c., says that the said defendants at the said times when, &c., (excess or force); "and this the said plaintiff is ready to verify, &c.," (no prayer of judgment in the replication to the third plea).

Demurrer (of 14th April, 1834), assigning for causes, that the replication tenders no single or material issue on any of the matters in the third plea; that it is double, and offers issue on several distinct and issuable propositions, namely, the demise by his late Majesty, and the traverse de injuriâ (which puts in issue the seisin of his late Majesty, the demise to E. Smith, his will, his death, that Mary Crease was his executrix, that she proved, that she elected to take the bequest as devisee, that Henry and Mary Crease became possessed, and that the defendants did the acts as their servants): and that the replication to so much of the plea as relates to the forty pieces of timber, &c., alleges excess, and also does not conclude with a proper prayer of judgment. Joinder.

Fourth plea. As to breaking to pieces, &c., (all the trespasses in the second
 *745] count), the said defendants *(actionem non); because they say that before and at the said time when, &c., the said defendant Jenkin was lawfully possessed of a certain close, &c., and because the said goods (justification by Jenkin in his own right, and by Oates as his servant, for removing the goods as incumbering the close); verification.

Replication. And the said plaintiff as to the said plea of the said defendants fourthly above pleaded, says (præcludi non); because he says that, as to a certain part of the said goods, &c., to wit, one windlass, &c. (de injuriâ,) and this the said plaintiff prays may be inquired of by the country, &c. : and the said plaintiff, for replication to so much of that plea as relates to a certain other part of the said goods, &c., to wit, forty pieces of timber, &c. (excess,) "and this the said plaintiff is ready to verify, &c." (no prayer of judgment in the replication to the fourth plea.)

Demurrer, assigning for causes, that the replication is double, and offers to put in issue several distinct and issuable propositions; namely, as to part of the goods, the issue de injuriâ, as to the other part, the fact of excess; and that the replication puts in issue the fact that Oates acted as the servant of Jenkin; and that, as to the last-mentioned goods, the replication does not conclude with a proper prayer of judgment; and that the replication does not tender or take any material issue in respect of the matters alleged in the fourth plea. Joinder.

The case was argued in Hilary term last. (a)

*746] *Butt, for the defendants. The objections to the replications to the third and fourth pleas rest on the same principles.

First. The plaintiff has no right to offer distinct replications to different parts of the plea. No instance of such a method of pleading can be found. If the replication to the third plea be considered as one replication, then it is bad as putting in issue the several matters specified in the demurrer.

The replication de injuriâ is bad by itself, according to the second resolution in Crogate's case, 8 Rep. 67, a., since an interest in the land is claimed by the

(a) Friday, January 23d. Before Lord Denman, C. J., Littledale, and Williams, Js.

plea; *Hooker v. Nye*, 1 C. M. & R. 258. (S. C. 4 Tyrwh. 777,) where the plea de injuriâ was held, in such a case, to be bad on general demurrer; *White v. Stubbs*, 2 Saund. 294; *Cockerill v. Armstrong*, Willea, 99. It is true that, where an interest is not claimed by the plea, the replication de injuriâ is not bad for multifariousness; *Selby v. Bardons*.(a) In that case the authorities were very fully reviewed, and the case was held not to come within the second resolution in *Crogate's case*, 8 Rep. 67, a., on the ground that no interest was claimed by the plea. But that resolution was recognised as good law: the case, therefore, is no authority for the plaintiff here.

But, besides the replication de injuriâ, there is also a replication of excess to the same third plea. This new assignment cannot be added to the previous replication; *Cheasley v. Barnes*, 10 East, 73; *Franks v. Morris*, 10 East, 81, not. (a). The plaintiff, *if he succeeded on either of the previous [*747 issues raised by the replication, would be entitled to judgment on the whole plea; the replication, therefore, which precedes the new assignment, goes to the whole action; and, consequently, the new assignment is bad, upon the authority of the two cases last mentioned. The excess, again, is pleaded to so much of the plea as relates to the second count only, which is for trespass to personal chattels; it is clear, therefore, that the new assignment cannot be joined with the replication de injuriâ which is also replied to the plea to the same second count; 1 Wms. Saund. 299, a., note (6) to *Greene v. Jones*. The form in which the excess is replied is immaterial here: a replication of excess is always in the nature of a new assignment. The replication is therefore bad, treating it as a single replication.

But it is not in form so pleaded, which would be less objectionable: it replies separately to separate parts of the plea. Now the plea is not divisible. Had any part of it been bad, then, on demurrer, the whole would have been bad. Or, if the plaintiff succeeded on any issue of fact, the whole plea would be answered; for how could different judgments be entered up on the different issues which this replication offers, supposing the plaintiff to succeed on some, and the defendants on others? The only instance of a divisible plea is that of set-off, which is always considered an excepted case; *Dowland v. Thompson*, 2 W. Bl. 910; Notes (2) and (d) to *The Earl of Manchester v. Vale*, 1 Wms. Saund. 27, 5th ed.

Secondly. The introduction of the new matter, the excess, should have concluded with a prayer of judgment. *The demurrer is of a day preceding the first day of Easter term, 1834, on which the rules of Hil. 4 W. [*748 4, came into operation.(b) But, moreover, as this part is professedly a reply to part only of the second plea, the case does not fall within section 9, of the General Rules and Regulations, R. Hil. 4 W. 4, 5 B. & Ad. v. This fault, though aided by st. 27 Eliz. c. 5, s. 1, and 4 Ann. c. 16, s. 1, on general demurrer, is fatal if specially pointed out. It is said by Mr. Chitty, 1 Chit. Pl. 460, (6th ed.), and by Serjeant Stephen, Steph. Pl. 404, (3d ed.) that a simple prayer of judgment, without pointing out what judgment, is sufficient: but here there is no prayer of judgment at all. In *Bonner v. Hall*, 1 Ld. Raym. 338, it seems to have been allowed that a replication, praying for a judgment which the Court could not give, was a discontinuance. Want of prayer of debt and damage, at the end of a replication, was held bad on error in *Pendred v. Chambers*, Cro. Eliz. 256, Mich. 33 & 34 Eliz.: though an informal prayer of judgment was held not to be ground of special demurrer, in *Barnes v. Gladman*, 2 Lev. 19; and in *Pitt v. Knight*, 1 Saund. 98, a replication in debt,

(a) 3 B. & Ad. 2. Affirmed on error in the Exchequer Chamber, *Bardons v. Selby*, 1 C. & M. 500. 3 Tyrwh. 430.

(b) 5 B. & Ad. i. The rule, General Rules and Regulations, s. 9, p. v., dispensing with prayer of judgment in a plea, or subsequent pleading, going to the whole action is not expressly comprised in the rules which, by the proviso, p. x., are not applicable to cases where the declaration is dated before the first day of Easter term, 1834.

praying for the debt, but not the damages, was held to be aided by st. 27 Eliz. c. 5, s. 1, upon error. Several cases on the subject are collected in Com. Dig. Pleader, (F 5.); but there is no authority for supporting a want of any prayer of judgment, if specially demurred to.

*749] **Dampier*, contrâ. First, as to the want of a prayer of judgment. It is at least questionable, on the principle of *Freeman v. Moyes*, 1 A. & E. 338, whether the rules will not take effect in the case of pleadings pleaded before the first day of Easter term, 1834, but decided upon afterwards. In *Short v. Coffin*, 5 Burr. 2780, the Court amended a judgment against an executor de bonis propriis, by making it de bonis testatoris, si, &c., et de bonis propriis si non, &c., in conformity with the rest of the record, after error brought. But it is enough that the declaration demands damages, and that the replication denies the plea which denies the action. Supposing there were no plea, the plaintiff would have judgment though there would be no formal prayer in the declaration. So, again, where the plea tenders an issue of fact, and the plaintiff simply adds a similiter, he will have judgment if he succeed on the issue, though there will then be no prayer of judgment on the record. The omission, therefore, is merely in a matter of unnecessary form. And a special demurrer does not affect it, unless it was bad without being specially assigned, before the statutes 27 Eliz. c. 5, s. 1, and 4 Ann. c. 16, s. 1. Now it was held in 4 Ed. 6. in *Dive v. Maningham*, Plowd. 66, (a) that, where a plea disclosed facts making void a bond on which an action was brought, but concluded with an improper prayer of judgment, the Court still would, on general demurrer to the plea, give the judgment for the defendant. It is true that in *Pitt v. Knight*, 1 Saund. 98, it was said *750] that the omission to pray damages, in a replication in *debt, was aided by st. 27 Eliz. c. 5, s. 1.: but afterwards, in *Barnes v. Gladman*, 2 Lev. 19, the omission to pray for the debt, in a replication in debt, was held not to be specially demurrable, as being "but unnecessary form." Necessary forms are those which once were matter of substance, as giving the Court jurisdiction: such are, "against the peace," "in the custody of the marshal," &c.: or, again, as tendering a trial, or giving the opposite party his due advantage. But a prayer of judgment is not necessary: for the Court will give the proper judgment, though not prayed for, or though an improper one be prayed for; *Rex v. Taylor*, 3 B. & C. 512, *Gardner v. Jessop*, 2 Wils. 45. If, indeed, the conclusion be matter of necessary form, as where an answer to a plea in abatement improperly demands judgment of debt and damages, then the objection is good; and this explains *Bowen v. Shapcott*, 1 East, 542, and *Bonner v. Hall*, 1 Ld. Raym. 338, and all cases in which the fault in the prayer of judgment would have prejudiced the opposite party. Even if the prayer were necessary, it is contained in the &c., as the similiter was held to be in *Sayer v. Pocock*, 1 Cowp. 408. (b) *Pendred v. Chambers*, Cro. Eliz. 256, which was cited on the other side, was error on a judgment in a piepowder court; and there was no verification in the replication, as well as no demand of debt and damages: now the want of a verification was error at common law, for the opposite party is not told what he *751] is to do: and, besides, the Court above cannot *take on themselves to supply the proper judgment for a piepowder court.

Secondly. As to the alleged duplicity of the replication. The pleadings may be considered as if the declaration had contained two counts only, one for a trespass to realty, the other for a trespass to personality.

It does not follow, from a plea containing a fact upon which an issue may be taken affecting the whole, that the plaintiff is obliged to take such an issue. He is precluded only from taking two issues, of which either would meet the whole plea. The replication here is like a replication to pleas pleaded, at com-

(a) But quære, whether the bond did not appear on the record to be void, independently of the facts disclosed by the plea?

(b) See notes (6) and (a) to *Bennet v. Holbech*, 2 Wms. Saund. 319 a. *Swain v. Lewis*, 3 Dowl. P. O. 700. *Stockdale v. Chapman*, Hil. T. 1836, post.

mon law, severally to several parts of a count. There the replication must have answered each plea, or there would be a discontinuance; Com. Dig. Pleader, (F. 4.) In *Fish v. Broket*, 2 Dyer, 182 a. pl. 54, defendant in formedon pleaded one fine as to some tenements, and another as to others; and the plaintiff replied generally that the several fines were not proclaimed according to the form, &c. On demurrer, it was objected that the replication "does not divide it into two parts, s. to answer to the matter in each bar, but has confounded them together with one answer: and it was the opinion of the Court that this would be better pleading," though the replication was held good enough. There may, therefore, well be taken different issues on the replication here: and there may be different, but not conflicting, judgments on each. From *Trueman v. Hurst*, 1 T. R. 40, and *Webber v. Tivill*, 2 Saund. 127 b, it appears that the replication must answer the plea so as to maintain each of the several matters in the declaration, or it will be wholly bad; so that, in some cases, *it is necessary to divide the replication, and reply "to so much of the [752 said plea as attempts to answer the first count," &c., or "to the plea so far as it answers the first count," &c. [LITTLEDALE, J. To a general plea of the statute of limitations, the plaintiff may reply, as to so much, one thing, and as to so much, another.] In *Swinburne v. Ogle*, 1 Lutw. 239, the replication divided the goods mentioned in the declaration and covered by the plea; and it was not considered bad for that reason. In *Solomons v. Lyon*, 1 East, 370, a plea of set-off alleged a debt from the plaintiff to the defendant in two sums, one on a recognisance of record in another court, the other upon an order for payment of money; and the replication, protesting the recognisance, took issue on the whole debt, and concluded to the country; and it was held that the replication was bad, as drawing matter of record to the cognisance of a jury: there it is clear that the replication could have been properly framed only by dividing the plea. [LITTLEDALE, J. The rule, as laid down in Com. Dig. Pleader, (F. 16), from *Humphreys v. Churchman*, Ca. K. B. temp. Hard. 289, is this: "If defendant pleads one entire qualification, and plaintiff has several excuses which he cannot plead entire, he may plead them severally; but if he has one matter which goes to the whole, he must plead it entire, and rely upon it." If the plea do not go to the whole of the trespasses, the plaintiff can new assign.] The defendant has a right to unite all the trespasses in one justification: and so the plaintiff has a right to sever them in his reply; otherwise he would lose the right which he would have enjoyed had he brought two actions, for the *trespass to realty, and for the trespass to personalty. The plea, there- [753 fore, is here distinguished in the replication according to the subject. As regards the real trespass, possession is no answer, for the plaintiff has the possession; Com. Dig. Pleader, (E. 21): the title pleaded applies to the real trespass only; and the replication denies that title specifically, not generally. As regards the personal trespass, title without possession is no answer; but possession without title is enough. It is superfluous to allege both. The plaintiff replies generally to the possession. If that produce also a general traverse of the title, it is the defendant's fault, for superfluously pleading title in answer to a personal trespass. But, as the title is surplusage, it seems that it is not put in issue by this traverse.

Then, as to the replication *de injuriâ*. The arguments just urged answer the complaint that the defendant is prejudiced by the tender of this issue. Suppose the plaintiff had brought two actions, one for the real trespass, the other for the personal one. The defendant, to the former, must have pleaded his title, and the replication would have taken issue on the demise. If, to the declaration on the personal trespass, the defendant had pleaded possession, the plaintiff might have replied *de injuriâ*; and the defendant cannot deprive the plaintiff of the right so to reply by superfluously pleading title. The defendant is, therefore, not prejudiced by this reply. And indeed it seems that the title is not traversable, as to the personalty. For possession is not a sufficient answer

where a title is not mere inducement: Com. Dig. Pleader, (E. 21): now, here, as to the personalty, possession is a sufficient answer: therefore the title is mere inducement, and, consequently, not *traversable. As to this the judgment of Lawrence, J. in *Taylor v. Eastwood*, 1 East, 218, is in point. The injury to the goods is collateral to the title; *Searl v. Bunion*, 2 Mod. 70, *Langford v. Webber*, 3 Mod. 182. The cases cited on the other side, to show that de injuriâ cannot be replied where title is pleaded, may be distinguished if the principle be taken to be, that *where title is necessarily pleaded it shall not be generally traversed*; and this qualification of the rule appears to reconcile many, if not all, of the apparently conflicting cases. *White v. Stubbs*, 2 Saund. 294; *Cooper v. Monke, Willes*, 52; *Hooker v. Nye*, 1 C. M. & R. 258, S. C. 4 Tyrwh. 777, were all cases of trespass to the reality; and there title was necessarily pleaded, for possession would have been no plea. And title is necessarily pleaded, and, therefore, a replication de injuriâ is bad, in cases of personal trespass, where the defendant necessarily pleads "in destruction" (as was expressed in *Taylor v. Markham*, Yelv. 157, of the plaintiff's title, and therefore, necessarily shows his own. And this applies wherever, from the nature of a defence to a personal trespass, title and not possession must necessarily be pleaded; as in *Crogate's case*, 8 Rep. 66 b., where the justification was on a right of common; for, "in a plea justifying under a right of common, the defendant must set out his title to the common specially;" Note (2) to *Mellor v. Spateman*, 1 Wms. Saund. 346. But, where the title is mere inducement, the replication de injuriâ is allowed, as in the case in *Rastell's Entries*, 620 b, *Trespass on justification concernant Closure*, 1. The title being therefore, here unnecessarily pleaded as to the personalty, the general reply is *good. *Cockerill v. Armstrong, Willes*, 99, is relied upon by the plaintiff, as showing that the application de injuriâ is wrong. That case, however, has been in many points much shaken. Thus, one ground of the decision, multiplicity, has been negatived, as in *Selby v. Bardons*, 3 B. & Ad. 2.(a) So, from the argument of the plaintiff's counsel, and the acquiescence of *Littledale, J.*, then counsel for the defendant, in *Taylor v. Eastwood*, 1 East, 214, 216, it appears that a replication de injuriâ would have been good in that case; and, if so, it would have been good in *Cockerill v. Armstrong, Willes*, 99, and is so here.

Next, as to the adding a new assignment to the other part of the replication as to the personal trespass. The goods mentioned in the second count are not identified, by the plea, with those in the third count. Where the plaintiff specifies, in his declaration, the several goods, and the defendant apparently covers all by his justification, the plaintiff is entitled to reply separately as above. Thus, if trespass were brought for ill-using a horse and a mare, and the plea were damage feasant, the plaintiff might reply it was a trespass ab initio to the horse, and excess as to the mare. *Barnes v. Hunt*, 11 East, 451, (which appears to be adverse to this view) was a peculiar case of license pleaded to trespass to real property committed on divers days, and does not apply to the case supposed. The plaintiff would be entitled to answer the plea as to both the acts complained of, and to insist that both were trespasses; but *he would have one answer as to one of the acts, and another as to the other act. If he were to rely upon the excess alone, he would lose his damages in respect of the horse: if he were to rely on the trespass ab initio only, he would lose his damages in respect of the excess as to the mare. The same argument would hold good if the declaration instead of specifying the horse and the mare had complained generally of the defendant ill-using the plaintiff's cattle. Here the plaintiff claims redress, both for the goods which the defendant had no right to take and for those which the defendant had a right to take, but not to injure.

(a) See pp. 8, 11, 14. Affirmed on error in the Exchequer Chamber, *Bardons v. Selby*, 1 C. & M. 500. 3 Tyrwh. 430.

Cheasley v. Barnes, 10 East, 78, was an action for one trespass to realty; *Franks v. Morris*, 10 East, 81, not. (a), was for one assault. Here, the second count is for trespass done to goods on one day; but, as several parcels of goods may be injured in one day, at several places, for different causes, and under different circumstances, these cases are inapplicable. A unity of day does not make a unity of trespass.

Butt, in reply. First, as to the question of duplicity. The cases cited on the other side do not authorize this mode of pleading. The replications, though divided into parts, must be taken as one replication to each plea; and then an objection to any part is an objection to the whole. The plaintiff endeavours to treat the plea as divisible, like the plea of set-off, which is, however, an exception to the general rule, on the ground that the several items are in the nature of several counts; *Dowland v. Thompson*, 2 W. Bl. 910, Notes (2) and (b) to the *Earl of Manchester v. Vale*, 1 Wms. Saund. 27, 5th ed. There is no hardship in confining *the plaintiff to a single replication; for the defendants, by justifying as they have done, subject [*757 themselves to an issue on any part of their plea; and, if issue upon any part be found against them, the plea will fail altogether. Thus, if the plaintiff had admitted the title, and had replied *de injuria absque residuo causæ*, the defendants would have been bound to prove that all the goods were on the close, encumbering it, &c.; and, if part of them appeared in fact to have been elsewhere, the plaintiff would have had judgment generally. And this shows the reason of the rule against such a double reply; it is not necessary, because the whole action may be sustained by an issue on a single fact.

Secondly. As to the omission of the prayer of judgment. The cases cited on the other side show only that if an informal prayer be made, the Court will give a right judgment, *Le Bret v. Papillon*, 4 East, 502; but, if there be no prayer at all, the objection is fatal on special demurrer. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court. After having stated the pleadings, his lordship proceeded as follows:

The third plea is well pleaded to the whole declaration; and, according to the usual course of pleading, the plaintiff might by a single replication furnish a sufficient answer to the whole plea: but this he has not done; and, on the contrary, he has divided his replication into three parts. For, though he begins by making one entire replication to the whole plea, he afterwards *splits [*758 and divides it into parts: the first as to the trespasses in the first and last counts; the second as to part of the trespasses in the second count; and the third as to the residue of the trespasses in the second count. And the first question is, can he do so?

With the view of considering this, we may leave the third count as to the four closes out of the question, these four closes being identified with the close in the first count.

The first count charges the breaking and entering the close, and destroying machinery; then the second count is for destroying and carrying away goods and chattels. The defendants, by way of answer, say that the late King George IV., when Prince of Wales and Duke of Cornwall, was seized in fee, and demised the close to a person under whom the defendants claim, and because the goods were incumbering the close they removed them. The plaintiff has alleged several and distinct trespasses in the first and second counts; and the defendants, though they plead one entire plea that covers the whole, do not aver identity between the windlasses and other things in the first count, and the goods and chattels in the second count; and the defendants not having done so, the plaintiff has a right to treat the plea as if they were separate pleas to the first count and the second count; and he has therefore a right to treat the plea, as far as relates to the first count, as a separate and distinct thing by itself. And, having that right, he has, as to the plea to the trespasses in the first count, denied the demise by the late King to Edward Smith, and which is what he

would have done if the defendants had pleaded that plea alone to the first count.

*759] *Then, as to the plea as far as relates to the second count, the plaintiff there also may treat the plea as a plea which was pleaded over again to the trespasses in the second count. But here the plaintiff has not only divided the plea applicable to the second count from the plea as to the first count, but he has split this part of the plea into two parts; and, as to one part, he replies *de injuriâ suâ propriâ*, and, as to the other, he replies *excess*. We see no objection in point of law to his doing so, because the goods on which the defendants have trespassed may some of them not have been on the close at all; and such of them as were, they may have treated with more force and violence than was necessary for the removal of them; and, if such was the state of things, the plaintiff ought to be permitted to present the facts in his answer to the defendants' plea; and, though this kind of pleading be very uncommon, we see no objection to it in point of law.

Then, as we are of opinion that this kind of replication is sufficient, it is next to be considered whether these several replications are correct in point of form.

To the first replication, viz., that to the first count, there is no objection; it puts in issue the demise alleged in the plea, and concludes to the country.

As to the replication of *de injuriâ suâ propriâ*, we have very great difficulty. The general rules as to that are very well understood. If there be several allegations in a plea, there are many cases where a general replication of *de injuriâ suâ propriâ* is sufficient; but there are others again where it is not. It is quite unnecessary to allude to all the cases that were cited at the bar, because to one class of pleas, where any interest is claimed out of land, there it is clear the general replication is not sufficient. *They are mainly illustrative of the rule

*760] in *Crogate's Case*, 8 Rep. 66 b, where the second resolution is, that, where the defendant in his own right or as servant to another claims any interest in the land, or any common or rent going out of the land, or any way or passage on the land, there *de injuriâ suâ propriâ* generally is no plea; and, in the present case, the defendants justify under persons who claim an interest in the close in question; and, if there was nothing more in the case than that, it is quite clear that this general replication could not be supported. But then it is contended that, if the title be only inducement, there the general replication is sufficient: that is certainly so in some cases. In *Taylor v. Markham*, Yelv. 157, in Trin. 7 Jac. B. R., in assault and battery, the defendant pleaded that, at the time, &c., he was seized of the rectory of D. in fee, and that corn was severed from the nine parts, and the plaintiff came into the ground to carry away the corn, and, in defence thereof, and to hinder the plaintiff from taking, he stood there to defend it, and the hurt which he had was of his own wrong: the plaintiff replied *de injuriâ suâ propriâ absque tali causâ*: and, upon demurrer, the plaintiff had judgment, because by his declaration he did not claim any thing in the soil or in the corn, but only damages for the battery, &c., which is collateral. Where the plaintiff makes title in his count, and the defendant pleads any matter in destruction of such title, or of the plaintiff's cause of action, there the plaintiff must reply specially and shall not say *absque tali causâ*; Yelv. 157. The same case is also reported in *Cro. Jac.* (*Cro. Jac.* 224), and *Brownlow, Brownl. & Gold.* 215: and *Hale*

*761] **v. Gerrard*, Latch. 221, is to the same effect. This is an action for taking goods. The case of *Cockerill v. Armstrong*, 2 Com. Rep. 582, S. C. more fully, Willes, 99, was an action for seizing and impounding cattle. The defendants pleaded that the bailiffs and burgesses of Scarborough were seized in fee of the place where the cattle were taken, and the defendants justified, as their servants, taking the cattle damage feassants: there was a general replication *de injuriâ suâ propriâ*, and held bad, because title was put in issue contrary to the rule in *Crogate's case*, 8 Rep. 66 b. In that case there was an allegation of seisin in fee; and, in the present case, there is a protestation

against the seisin in fee of the King, and then there is a deduction of title ending in possession; but that seems to make no difference in principle. In the case of *Cockerill v. Armstrong*, 2 Comm. Rep. 582, S. C. more fully, Willes 99, the before mentioned case of *Taylor v. Markham*, Yelv. 157, S. C. Cro. Jac. 224; Brownl. & Gold. 215, was urged on behalf of the plaintiff; but the Court distinguished between the case of a battery and other cases. The Court says, "there is a plain difference between the present case and the case of an action of assault and battery; because there if the party be possessed, even though the plaintiff should have a title to the house or place it will signify nothing, for his bare possession will justify him even turning the right owner out of the house: whereas here if the plaintiff has a right to the place where &c. for right of common, &c., it may quite destroy the defendant's plea." The Court in that case also referred to the case of *Whitnel v. Cook*, Cro. Eliz. 812: but we do not so much rely on that, nor on *Horne v. Lewin*, reported *in Lord Raymond, 1 Ld. Raym. 639, and in several other books, nor on the case [*762 of *Jones v. Kitchin*, 1 Bos. & Pul. 76, as these were cases of replevin, and possibly in some cases, an avowry may be distinguished from a plea in trespass, though in the late case of *Selby v. Bardons*, 3 B. & Ad. 2, (a) they were put upon much the same footing. There are many cases of *quare clausum fregit*, where the same rule has been held; but these are plainly distinguishable from trespass for taking goods, and therefore we do not rely on them. The defendants might have pleaded that the persons under whom they claimed were possessed of the close: but, instead of that, they have pleaded title, giving colour to the plaintiff, as to the close where the goods were taken. Upon such a plea, the plaintiff might have traversed any allegation of the title, and which in that case the defendants would have been bound to prove, and then, if they would have been bound to prove any single fact upon a traverse of that fact, they would have to prove the whole of the allegations, if the present replication should be allowed. We think, therefore, that the general replication is informal and cannot be supported.

Then it may be said that, if this part of the replication be bad, the replication is bad for the whole, according to the case of *Webber v. Tivill*, 2 Saund. 127, b, and the cases in the notes of *The Earl of Manchester v. Vale*, 1 Wms. Saund. 27, 5th ed.; for the beginning of the replication goes to the whole of the plea, though it is afterwards split into parts. But, on the whole, we think that, as the replication may be divided into parts, each part may be taken as a separate *replication, and that therefore the first part of the replication, which is [*763 as to the plea as far as it replies to the first and third counts, is good, notwithstanding the defect in that part which we have had under consideration as to the *de injuriâ suâ propriâ*.

Then next comes the replication as to the excess. There is one ground of special demurrer, that it does not pray judgment. Now, according to the old law, the not praying judgment on the replication was a cause of special demurrer. No case seems to have doubted but there must be a prayer of judgment in some form, though many cases have occurred as to distinctions in what form it is to be; many of these cases will be found referred to in *Pitt v. Knight*, 1 Saund. 97, and the notes there. But the rules of Hilary term, 4 W. 4; 5 B. & Ad. v., (General Rules and Regulations, 9,) have said, in rule nine, "that in a plea, or subsequent pleading, intended to be pleaded in bar to the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; nor shall it be necessary, in any replication or subsequent pleading, intended to be pleaded in maintenance of the whole action, to use any allegation of '*precludi non*', or to the like effect, of any prayer of judgment." It may be a question, whether, as this part of the

(a) Affirmed on error in the Exchequer Chamber, *Bardons v. Selby*, 1 C. & M. 500. 3 Tyrwh. 430.

replication goes only to part of the plea, it would fall within the above rule; the inclination of our opinion is that it would; and that no judgment would be necessary. But then these new rules only took effect on the first day of Easter term, 1834; whereas this replication is dated 11th of March 1834, and consequently the rule above mentioned would not apply to it; *and then, *764] that being so, the replication is informal; and, as this is pointed out as a cause of special demurrer, it cannot be supported.

The question on the fourth plea, and the replication, are in effect decided by what we have already said. The fourth plea states that one of the defendants was possessed of a close, and that the goods were encumbering the close, and he in his own right, and the other defendant as his servant, removed them. The replication splits this plea; and, as to part, replies *de injuriâ suâ propriâ*: and, as to the residue, excess. We have already said that the plaintiff may so split the plea. Then, as to the form, there is no doubt but in this case, where the defendants only plead possession of the close, the plaintiff may reply *de injuriâ suâ propriâ*, and that part of it is good.

But, as to the replication which replies excess there, as there is no prayer of judgment, that replication is bad for the reasons assigned as to the corresponding replication to the third plea.

Judgment to be entered for the plaintiff, on the first replication to the third plea, which concludes to the country; and also on the first replication to the fourth plea, which also concludes to the country: and for the defendant, on the second replication to the third plea, which concludes to the country; and also on the third replication to the third plea, which replies excess; and likewise on the second replication to the fourth plea, which also replies excess.

*765] *HODGSON and Another *against* MEE. *Wednesday, June 17.*

Where the defendant has been arrested and given bail to the sheriff, the plaintiff may declare *de bene esse*, at the expiration of eight days from the arrest, or at any time after before special bail is perfected; and, therefore, if, without declaring, he take an assignment of the bail bond, and proceed upon it, and such proceedings be stayed upon special bail justifying, the bail bond will not be ordered to stand as a security.

If a defendant, on being arrested, give a bail bond to the sheriff, he cannot afterwards, by surrendering to the sheriff, vacate the bond; but after such surrender, and after the expiration of the eight days from the arrest, if special bail be not put in, proceedings may be had upon the bail bond.

On the 3d of January the defendant was arrested, and on the 5th he executed a bail bond, conditioned to put in special bail within eight days after the execution of the writ, inclusive of the day of execution. He did not put in special bail; but on the 10th of January, the day upon which the time for putting in bail expired, went back into the custody of the sheriff of Middlesex. The plaintiffs did not declare *de bene esse*; but, on the 14th of January, applied to the sheriff for an assignment of the bail bond, when notice was given to them that the defendant had returned into custody. The sheriff, however, at their request, assigned the bail bond to them, having made a memorandum on the margin that the defendant had returned into the custody of the sheriff on the 10th of January. On 16th of January the bail bond was put in suit: on 21st of January the defendant justified special bail, and took out a summons to stay proceedings upon the bail bond on payment of costs. The summons was attended upon 26th of January, when Patteson, J. ordered that the proceedings should be discharged on payment of costs, the bail bond standing as a security. On 31st of January, *Butt* obtained a rule to shew cause

why so much of this order as related to the bail bond standing as a security should not be rescinded, because the plaintiffs had not declared *de bene esse* in the terms of the Rule V. Hil. 2 W. 4, (3 B. & Ad. 392); *and, upon a subsequent application at chambers to rescind that part of the order [766 which applied to the payment of costs, upon the ground that the assignment of the bail bond was irregular after the defendant had returned into custody, it was arranged that both parties should come before the Court as if a rule had been obtained to set aside the proceedings upon the bail bond for irregularity.

John Jervis, on a former day in this term (June 5th(a)), shewed cause. The first question is, whether the bond was properly put in suit: the second, whether, if properly put in suit, it should stand as a security, and this depends on the question, whether the plaintiffs could have declared *de bene esse*; for, if they were prevented from complying with the rule of Court (Rule V. Hil. 2 W. 4, 3 B. & Ad. 392,) by the defendant's default they could not be thereby deprived of their security. [PER CURIAM. The latter point had been argued in a case now pending in the Court of Exchequer, and has been considered by the Judges of all the Courts; and they are unanimously of opinion that a plaintiff may declare *de bene esse*, although the defendant does not put in special bail. The rule Mich. 3 W. 4, (4 B. & Ad. 3, 4,) applies to all cases where bail are not *perfected*, whether put in or not.(b)] Then as to the first point, the assignment was regular, and the bond regularly put in suit. By the old practice, writs were returnable upon a day certain, and the defendants had a certain number of days *after the return day for the writ, according to the nature of the process, and the place at which the writ was executed, to put in special bail. Between the arrest and the return day, the defendant might go back into custody, if the sheriff chose to receive him; but this could not be done after the return day of the writ, even though the time for putting in special bail had not expired. By the new practice the *capias* is returnable immediately after it is executed; for by st. 2 W. 4, c. 39, sched. No. 4, the sheriff is commanded to return the writ immediately after the execution thereof. There is, therefore, no time intervening, as formerly, between the arrest and the return day; but the eight days, within which the defendant is to put in special bail, are days of grace, the same as those which are allowed after the return day for the purpose of putting in special bail, and within which the defendant cannot now, nor could he formerly, return into the custody of the sheriff. The sheriff may be ruled to return the writ immediately after the arrest, and in practice is so constantly. In five days afterwards, he may be ruled to bring in the body, which, in effect, compels him to perfect special bail; and how can he do so, if the defendant may in the interval go back to custody, and thus vacate the bail bond? Again, by the terms of the condition the defendant undertakes, not merely to appear, as formerly, but to put in special bail; and by the writ he is warned that, in default of his so doing, the plaintiff may proceed against the sheriff or on the bail bond: and the statute itself, 2 W. 4, c. 39, s. 16, enacts "that all such proceedings as are mentioned in any writ, notice, or warning issued under this act, shall and may be had and taken in default of a defendant's *appearance, or putting in special bail, as the [768 case may be."

Butt, contra. No question remains as to one part of the rule, which must, at all events, be made absolute upon payment of costs. But further, the proceedings on the bail bond are irregular, and consequently the rule as to these must be made absolute, with costs to be paid by the plaintiffs. The defendant returned into the sheriff's custody within the eight days mentioned in the condition of the bond. By the new practice, the defendant has those eight days

(a) Before Littledale, Patteson, and Williams, Js.

(b) And see *Call v. Thelwell*, 1 Cr. M. & R. 780, S. C. 5 Tyrwh. 231; and, as to the old practice, *Wendover v. Cooper*, 10 B. & C. 614.

for putting in bail; and that time, for the present purpose, may be likened to the return day of the writ under the old practice. Formerly it was competent for a defendant, who had given a bail bond, to surrender himself to the sheriff, if the sheriff chose to receive him, before or on the return day of the writ, upon which the bail bond might have been given up to be cancelled, and the plaintiff could not afterwards take an assignment of it, nor rule the sheriff, or maintain an action against him for not assigning the bond: *Tidd's Practice*, ch. 11, page 226, 9th ed.; *Jones v. Lander*, 6 T. R. 753. In *Plimpton v. Howell*, 10 East, 100, which was an action on a bail bond against the bail, the principal surrendered himself to the gaoler of the county gaol before twelve o'clock on the first day of Easter term, being the return day of the writ, which surrender was not in point of fact accepted by the under sheriff (who lived seventeen miles off) until the next day, by a letter by the post; and this was held to discharge the bail bond, and *proceedings thereon were set aside for irregularity.

*769] Since the alteration in the practice, *Patteson, J.* decided in the Bail Court, in *Turner v. Brown*, 2 Dowl. P. C. 547, that, although a bail bond is given, a render may be accepted at any time within eight days from the arrest. [*PATTESON, J.* That case was actually decided on another ground. I cannot say that my attention was fully called to the point now under consideration. Afterwards it struck me that much might be urged against what I said there on this point. The present question is very important, as it will lead to the settlement of the rules of practice on the point before the Court.] The Uniformity of Process Act contains no express provision on the present point. The old practice was founded in good sense and convenience, and should govern the present so far as is consistent with the act of parliament. Now it will be consistent with the statute to hold that, as a surrender of the person before the return day of the writ was formerly considered to be equivalent to putting in and perfecting bail,^(a) and therefore prevented any forfeiture of the bail bond, so, under the new practice, where a bail bond is given, a surrender within the eight days shall prevent any forfeiture of the bond, and be deemed a satisfaction of the condition. A contrary decision will amount to this, that, when a bail bond is given upon an arrest, the principal cannot, under any circumstances, surrender to the sheriff within the eight days, so as to discharge the bail, but that bail above *must in all cases be put in. This would be inconvenient, as bail who enter into a bond, instead of at once obtaining a surrender of the defendant, would be obliged to incur the expense of putting in bail above, and then rendering the principal, which would increase expense to the bail for no beneficial object, and without furthering the ends of justice. The better course, then, will be to consider, for the present purpose, the return of the writ of *capias* to be the eight days after the execution of the process; and this has hitherto been the understanding in the profession. *Price's Practice*, 138, *Chapman's Practice* (Third Addenda, 4—6.).

Cur. adv. vult.

LITTLEDALE, J., now delivered the judgment of the Court. After stating the facts, his lordship proceeded as follows. Before the Uniformity of Process Act, the sheriff, after taking bail, might receive the defendant into his custody at any time before the return of the writ. But now the writ of *capias* is returnable immediately after the execution, and the sheriff may be ruled to return it on the arrest, although such arrest take place in vacation. Had the sheriff been so ruled in this case, he must have returned that the defendant had given bail.^(b) He was not justified in receiving the defendant into his custody afterwards, the condition of the bond being that the defendant shall put in special bail accord-

(a) Lord Ellenborough, in *Chadwick v. Battye* (3 M. & S. 284), said that rendering was going one step further than perfecting bail. Perhaps a render was, more strictly, equivalent to the defendant having always remained in custody, as being a compliance, not with the condition of the bail bond, but with the exigency of the writ.

(b) In form, *cepi corpus*.

ing to the exigency of the writ; that is within eight days after the arrest. And the third warning appended to the writ, is, that if bail be not so put in, the plaintiff shall be at liberty to proceed against the sheriff or on the bail bond.

*We have consulted the Judges of the other Courts, who all agree [*771 with us in opinion.

Rule absolute that the proceedings be stayed on payment of costs.(a)

The KING against ROBERTS. Wednesday, June 17.

By the charter of the borough of Caernarvon, the constable of the castle of C. for the time being was to be mayor of the borough, sworn to the king and the burgesses, and who, having first taken oath to preserve the king's rights, should swear to the burgesses to preserve their liberties, and faithfully do the things appertaining to the office of mayoralty.

Before stat. 57 G. 3, c. 45, (for continuing civil and military offices, held of the crown during pleasure, after the death of George III. at the pleasure of his successor), the king granted to A., by letters patent, the office of constable, to be exercised by himself or deputy, during the king's pleasure. A. took the oaths, and held the office till the death of George IV., and during the six months granted by st. 6 Ann. c. 7, s. 8, and also till a second grant by letters patent of the king, made after the expiration of those six months, but before the expiration of the additional six months given by stat. 1 W. 4, c. 6. The second grant recited the former grant, and that the king was pleased to renew the appointment, and continue A. in the office, and then granted as before; and A. took the oaths again.

After the first grant, and before the second, A. appointed the defendant his deputy; and after the second grant, but before A. had taken the oaths a second time, A. again appointed and continued him as his deputy:

Held, that A. could not exercise the office of constable till he was sworn; that the second grant to A. was not a confirmation, but a new appointment; and that, consequently, it was necessary that A. should be sworn again, before he could exercise the office; and that (supposing A. to have the power of appointing a deputy at all,) the defendant, not having been re-appointed deputy after A. had taken the oath a second time, was not entitled to hold that office.

THIS was an information in the nature of a quo warranto, calling upon the defendant to show by what authority he claimed to use, &c., the office of mayor of the borough of Caernarvon, on the 29th of September, 2 W. 4, and thence to the filing of this information.

First plea. That by letters patent under the Great Seal, bearing date at Flynt, 8th of September, 12 Ed. 1, the said King Edward(b) did, for himself and his heirs, *will and grant that his town of Caernarvon should be [*772 thenceforth a free borough, and that his men of the said town should be free burgesses, and that the constable of his castle of Caernarvon, who should be for the time, should be the mayor of that borough, sworn, as well to his said Majesty, as to the said burgesses, who (oath for preserving his said Majesty's rights being first taken) should swear to the same burgesses upon the Gospels of God, that he would preserve the liberties of the same burgesses granted by his said Majesty, and faithfully do those things which to the office of mayoralty belong in the same borough. The plea then alleged the acceptance of the letters

(a) See *Balsley v. Newbold*, 2 C. M. & R. 325; S. C., and *Gosling v. Dukes*, 4 Dowl. Pr. C. 177, 178.

(b) The words of the original charter, which were referred to in argument were as follows:—*Sciatis quòd volumus et concedimus pro nobis et hæredibus nostris, quòd villa nostra de Kaernarvon de cætero liber burgus sit, et homines nostri ejusdem villæ liberi sint burgenses; et quòd constabularius castri nostri de Kaernarvon, qui pro tempore fuerit, sit major burgi illius juratus tam nobis quam eisdem burgensibus, qui prius præstito sacramento de juribus nostris conservandis eisdem burgensibus juret, super Dei evangelia, quòd ipse libertates ejusdem [eisdem?] burgensibus a nobis concessas conservabit, et faciet fideliter ea quæ ad officium majoris pertinent in eodem burgo.*"

patent, and that they were still in force : and that afterwards, to wit, 28th of April 52 G. III., by other letters-patent of that date, his late Majesty George III., did give and grant unto Henry William, now Marquis of Anglesey, and then Earl of Uxbridge, the office or offices of constable or keeper of his said Majesty's castle of Caernarvon, and him, the said Henry William, constable or keeper of the castle of Caernarvon aforesaid did ordain, make, depute, and constitute, by those letters-patent, to have, enjoy, exercise, and occupy the office aforesaid, with all its rights, liberties, privileges, and appurtenances, unto the said Henry Williams, by himself or by his sufficient deputy or deputies, during his said Majesty's pleasure : and *that, after *773] the granting of the said last mentioned letters-patent, to wit, 22d of July, 1812, at a certain court of the said borough of Caernarvon, duly holden in and for the said borough, the said Henry William became and was sworn, as well to our said sovereign lord the King, as to the burgesses of the said borough of Caernarvon ; and, oath being first taken to preserve the rights of his said Majesty, did then and there swear to the said burgesses, upon the Gospels of God, that he would preserve the liberties of the said burgesses, so granted to them the said burgesses as aforesaid, and faithfully do those things which to the office of mayoralty belong, in the same borough, and did then and there take all other oaths in that behalf requisite and usually administered and taken : and afterwards, to wit, 29th of January 1820, George III. died, and George IV. succeeded him ; that the Marquis of Anglesey, from the 28th of April, 52 G. 3, until and at the demise of George III., by virtue of the letters-patent granted to him by George III., and of the statute in such case made and provided, held the office of constable under the Crown during pleasure, and was, by virtue thereof, mayor : that, by virtue of the said letters patent granted to him by George III., and of the statute in such case &c., notwithstanding the demise of George III., he continued and was entitled to hold the office of constable during the pleasure of George IV., and by virtue thereof continued to be mayor : that afterwards, to wit, 26th of June 1830, George IV. died, and William IV. succeeded him : that the Marquis of Anglesey, from the death of George III. until and at the death of George IV., by virtue of the letters-patent granted to him by George III. and the statute in such case, &c., *774] held the office of constable under the Crown during pleasure, *and was by virtue thereof mayor : that, by virtue of the letters-patent, so to him &c., and of the statutes in such case &c., notwithstanding the demise of George IV., he continued and was entitled to hold the office of constable during the pleasure of William IV., for the space of six months next after the demise of George IV., unless sooner removed or discharged by William IV., and by virtue thereof to be mayor : that, by virtue of the letters-patent granted to him by George III., he continued constable and mayor until, afterwards, and before the expiration of six months from and after the passing of a certain act of parliament, made in the first year of the reign of the now king (1 W. 4, c. 6,) to wit, on the 10th of January 1 W. 4, by certain other letters-patent, dated the day and year last aforesaid, reciting the said grant of George III., his present Majesty, declaring himself graciously pleased to *renew the said appointment*, and to *continue* the said Henry William *in the said office*, did give and grant unto the said Henry William (setting out the grant, which was to the same effect as the grant of George III.): and that afterwards, and before the filing of this information, to wit, on the day and year last aforesaid, at a certain court (allegation, in the same terms as before, that the Marquis was again sworn :) and that, from the making of the last-mentioned letters-patent hitherto, the Marquis of Anglesey hath held, used, and exercised, and been entitled to, and still doth hold, &c., and is entitled to the said office or offices of constable and mayor : That, after the making of the letters-patent to George III., and whilst the Marquis was such constable and such mayor, viz., 21st of July 1828, the Marquis, by deed of that date, did duly appoint the defendant his deputy, to

exercise the said office or offices of constable of the said castle, and mayor of the *said borough: and that, after the execution of that deed, viz., 28th of July 1829, at a certain court of the said borough, duly held in and for [775] the said borough, the defendant, as such deputy, became and was sworn (allegation, that the defendant was sworn, in the same terms as in the allegations respecting the oaths of the Marquis:) and that, after the making of the letters patent to the 10th of January 1831, to wit, on the day and year last aforesaid, the Marquis again duly appointed *and continued* the said defendant deputy of him the said Marquis, so being such constable &c., and as such mayor &c., as aforesaid, to exercise the said office or offices of constable &c., and mayor &c. By virtue whereof he the said defendant, continually, from the time of his being first appointed, hath been and still is entitled to use and exercise the said office of mayor of the said borough of Caernarvon as such deputy &c.; and thereupon, and by virtue of the premises, he the said defendant, on the said 29th of September 2 W. 4., &c., and by that warrant, &c.

Fourth replication to first plea. That the defendant did use, &c., on the said 29th of September, after the expiration of six calendar months next after the passing of an act of parliament made in 1 W. 4., and entitled, &c., (1 W. 4, c. 6;) and that the Marquis was not sworn, and did not take the oath required by the charter, at any time after the granting of the letters-patent by his present Majesty to the Marquis and before the defendant so used, &c., though a reasonable time in that behalf, after the granting of the letters-patent, and before the defendant so used, &c., had elapsed.

Demurrer and joinder. (a)

*The case was argued in last Hilary term. (b)

John Jervis in support of the demurrer. First, it is not essential to [776] the title of the defendant that the Marquis of Anglesey should have been sworn at all. The office of the Marquis is a military office, and not strictly analogous to common corporate offices: *the corporation itself is, in fact, a military [777] corporation, founded for the protection of the English interest in Wales. The distinction between oaths of sanction and oaths of qualification has often

(a) There were three pleas, and several replications to each. The point argued and decided in the text was raised, in different forms, on the record; and the following points were also argued, but not decided:—

1. It was contended for the crown, that the Marquis of Anglesey, supposing him entitled to act as mayor, had no power to appoint a deputy, under this charter.

On this point the following authorities were referred to:—Com. Dig. Officer (D 1,) (D 2); Bac. Abr. Offices and Officers (L.); *Rex v. The Mayor of St. Alban's*, 12 East, 559; *Rex v. The Mayor of Gravesend*, 2 B. & C. 602; 16 Vin. Abr. Officer and Officers (L.), p. 115, (L 2,) p. 116; *Phelps v. Winchcomb*, 3 Bulst. 77; *Midhurst v. Waite*, 3 Bur. 1259; *Mollins v. Werby*, 1 Lev. 76.

2. It was contended for the crown, that, if the marquis, had such a power, he could appoint only by deed.

On this point the following authorities were referred to: Bac. Abr. Offices and Officers (L.); *Oa. Law & Eq.* (10 Mod., *Regina v. Sutton*,) 74; *Konnycott v. Bogen*, 2 Bulst. 250; *Rex v. Lenthal*, 3 Mod. 143; *The Earl of Shrewsbury's Case*, 9 Rep. 46 b; *Owen v. Saunders*, 1 Ld. Raym. 158; *Rex v. Harris*, 1 B. & Ad. 936; 16 Vin. Abr. Officer and Officers (I 3.), p. 117; *Clecott v. Denny*, Cro. Eliz. 67; *Midhurst v. Waite*, 3 Bur. 1259.

3. It was contended, for the crown, that the defendant had not any right to exercise the office of deputy mayor, or to act as mayor, without having been sworn into office after the last grant of the office of constable to the Marquis of Anglesey. The defendant contended that no oath was necessary to be taken by the deputy upon his acting; for that, first, the oath was one of sanction, and not of qualification; and that, secondly, the principal was answerable for the deputy's acts. The defendant also contended that, if an oath by the deputy was necessary, the oath taken on his first appointment was sufficient to entitle him to act after the second appointment.

On this last point the following authorities were referred to:—*Rex v. Clapham*, 1 Vent. 110; *Rex v. The President and Council of the Marches*, 1 Lev. 306; stat. 3 G. 1, c. 15, s. 19; stat. 1 W. & M. c. 21, s. 9.

(b) Saturday, January 24th, and Wednesday, January 28th, before Lord Denman, C. J., Little Dale and Williams, Js.

been recognized. The latter shews the acceptance of the office, and must be taken before the officer can act. The oath of sanction is merely for the security of the parties interested in the due execution of the office; and this sort of oath is not essential to the officer acting. A borough magistrate who becomes so, ipso facto, by having held a particular office, as the mayoralty, may act before he is sworn; so may constables, churchwardens, tithing-men, and many others; Anonymous case in Ventris, 1 Ventr. 267, *Rex v. Corfe Mullen* (judgment of the Court) 1 B. & Ad. 218; though in ordinary cases a mandamus will go to compel them to take the oath of sanction. Now here the charter expressly directs that the constable shall be ipso facto mayor; and no intervention of the burgesses is necessary. The intention was to add to the civil power of the mayoralty to the military power of the constablenesship. The clause as to the oath prescribes that the oath for preserving the king's rights shall be taken before the oath is taken to the burgesses. But the charter does not make either oath essential to the office; nor does it even prescribe the exact form of the oath, nor direct before whom it shall be taken. This is an office lying in the king's grant. If it could not be held till the oath was taken, it would be derelict whenever the king granted it to an officer not on the spot.

Secondly, the Marquis has in fact been duly sworn. He was appointed in
 *778] 1812, and then took the oath. *By stat. 57 G. 3, c. 45,(a) (1817,) the office was continued till the death of George IV., which took place, 26th June, 1830. Then, by stat. 6 Ann. c. 7, s. 8,(b) the office continued for six months longer: and stat. 1 W. 4, c. 6,(c) continued it for six months after the passing of the act, 23d of December, 1830. Therefore, independently of the appointment of the 10th of January, 1831, the Marquis would have held his office on till the 23d of June, 1831, subject to the pleasure of the Crown.

*779] That appointment, therefore, was merely in the nature of *a confirmation of a defeasible office; and the office was held on without interruption; so that no fresh oath was necessary. This agrees with the language of the appointment, as set out in the plea, which professes to be a renewal and continuation of the former appointment.

Sir W. W. Follett, Solicitor-General, contra. First, as to the question whether it was requisite that Lord Anglesey should be sworn at all. The distinction attempted on the other side has never been applied to the case of the mayor of

(a) Which enacts that all persons who, on the day of the demise of George III., "shall hold any office, civil or military, under the crown during pleasure, shall under and by virtue of this act, and without any new or other patent, commission, warrant or authority, continue and be intitled in all respects, notwithstanding the demise of his majesty, to hold and enjoy the same; but nevertheless the same shall be held or enjoyed only during the pleasure of the king or queen who shall succeed to the crown upon the demise of his present majesty, and the right and title to hold and enjoy the same under the authority of this act shall be determinable in such and the like manner by the king or queen who upon the demise of his present majesty shall succeed to the crown, as the right or title to any office, place or employment, granted by such succeeding king or queen during pleasure, would by law be determinable."

(b) "Nor shall any office, place, or employment, civil or military, within the kingdoms of Great Britain or Ireland, dominion of Wales, &c., "become void by reason of the demise or death of her present majesty, her heirs or successors, queens or kings of this realm;" but every "person and persons in any of the offices, places, and employments, aforesaid, shall continue in their respective offices, places, and employments, for the space of six months next after such death or demise, unless sooner removed and discharged by the next in succession as aforesaid."

(c) Which enacts, "That all and every commissions, appointments, patents, and grants, and commission, appointment, patent, and grant, of any office or employment, civil or military, which at the time of the death or demise of his late majesty King George IV. were or was in force, and effect, and which have not been or shall not be superseded, determined, or made void by his present majesty at any time before the passing of this act, shall be and continue and remain in full force and virtue for the space of six calendar months next after the passing of this act, unless the same shall be respectively in the mean time superseded, determined, or made void," by the then king, or any successor.

a corporation. The words of the charter are express. In *Rex v. Pindar*, 8 Mod. 234, it was found that the defendant had been duly elected mayor, but not duly sworn; and there was judgment of ouster. *Rex v. Swyer*, 10 B. & C. 486, is to the same effect. In *Rex v. Ellis*, reported in a note to *Rex v. Courtenay*, 9 East, 252, not. (a), (S. C. 2 Str. 994), the same decision was given; and *Rex v. Jordan*, reported in another note to the same case, 9 East, 263, not. (a) (S. C. Ca. K. B. temp. Hardw. 255,) establishes a similar principle in the case of a capital burgess. And in *Rex v. Courtenay*, 9 East, 246, it appears that the same objection would have prevailed in the case of a free burgess. Where the incorporator has an inchoate right, he may be compelled to take the oath by mandamus, or he may obtain a mandamus to swear him in; but, till that is done, he has not a right which can be supported on a warrant. There is nothing to prevent a mayor from obtaining such a mandamus under the present charter. A charter, granting a court in civil suits, was held to be obligatory on the steward and suitors of a lordship, in *Rex v. Havering Atte Bower*, 5 B. & Ald. 691, and a mandamus was *granted to compel them to hold it. Neither of the [*780 authorities cited on the other side was a decision on quo warranto; nor do they relate to corporate offices, and in *Rex v. Corfe Mullen*, 1 B. & Ad. 211, the judgment of the Court seems to have been in some measure determined by the circumstance that a month was allowed to the party for taking the oath.

Secondly, as to the question whether the marquis has in fact been duly sworn in. On the death of George IV., he would have ceased to be in office, Com. Dig. Officer (K. 10), except for the operation of stat. 6 Ann. c. 7, s. 8. Then stat. 1 W. 4, c. 6, merely continues the privilege granted by the former statute, for six months. But, before the six months granted by the latter statute had expired, the Marquis took a new appointment. This is not a confirmation, any more than a grant of a term of twenty years to a party holding a term for six months would be a confirmation of the previous term. It is only under the appointment by his present Majesty that the defendant can make title.

John Jervis in reply.

First. Where a charter makes an oath requisite to the office, it is certainly a condition precedent to the exercise of the office. This was probably the case in *Rex v. Pindar*, 8 Mod. 234, which is reported as *The Case of the Mayor of Penryn*, in *Strange*, 1 Str. 582, and is referred to in *Rex v. Reeks*, 2 Ld. Raym. 1447; from which last case it appears that Pindar pleaded the constitution of the corporation. In *Rex v. Ellis*, 9 East, 252, not. (a), (S. C. 2 Str. 994, the argument turned upon the construction of the charter, and upon the distinction between beings sworn "before the mayor," and "by the mayor." [*781 Lord Hardwicke certainly said that the title was grounded on both the election and the being sworn; but that was explained by what was said by him in *Rex v. Jordan*, 9 East, 263, not. (a), (S. C. Ca. K. B. temp. Hardw. 255,) that the omission to be sworn for so long a time as had there elapsed was a renunciation of the office. In *Rex v. Swyer*, 10 B. & C. 486, the charter expressly required that the mayor should be sworn before he should "be admitted to execute that office." But, even admitting the necessity of an oath in ordinary cases, it is not necessary here. In ordinary corporations, an officer may be elected without his consent: he is usually chosen for a year; he must usually be sworn, semel et simul, before the late mayor: and the object of the oath is to secure the parties who are to be governed by him, and who choose him, and to show his acceptance. Here the constable is appointed by patent; the grant is revocable and renewable at pleasure; he cannot be sworn before his predecessor, because the predecessor's office ceases by the new grant; and the king has the security of being able to revoke the grant, in case of unsatisfactory conduct. And the office of constable is military. The oath is not taken by him in the character of constable: so that, if he cannot act as mayor till he has taken the oath, the corporation must remain without any mayor at all till he does take it; for his not taking it will not avoid or suspend his office of constable. There could be no mandamus here to elect

and swear in a mayor, in such a case. The oath, therefore, is clearly one of sanction, not of qualification.

*782] *Secondly. No answer has been given to the argument, that the appointment of January, 1831, being made to a party already possessing the office defeasibly, is a mere confirmation. Suppose the custom of a manor required a termor to take an oath, could it be necessary to take a fresh oath on the enlargement of a term, which would only be by way of confirmation? The fallacy lies in calling the appointment a new grant. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

After reading the first plea, and the fourth replication to it, his lordship proceeded as follows:—

This replication is demurred to.

Several other points were raised on the pleadings, some relating to the peculiar nature of the office of constable of the estate of Caernarvon, and the constitution of Welch boroughs: and some arising as to the general doctrine of swearing in as a qualification or sanction for particular offices, as well as the general privilege of appointing a deputy. But we are not called upon to enter into these inquiries, as we find, in the replication above said to have been demurred to, a defect in the noble Marquis's title at the period of his last appointing the defendant deputy mayor of Caernarvon, which appears to us to invalidate his title.

The charter of King Edward I., in the clause referred to, has clearly made it necessary that the constable of the borough shall take the oath of office before he can be a good mayor of the borough, and of course before he can appoint a deputy; and the Marquis was duly sworn in the first instance, before he appointed the *defendant. By st. 57 G. 3, c. 45, (the object of which was *783] to give to the appointments of the Prince Regent the same duration as if he had made them when king), the office was continued during pleasure, during the life of King George IV. But, on his death, the office was continued by st. 6 Ann. c. 7, s. 8, for six months only; just before the expiration of which period the act of the 1st of his present Majesty passed. It enacts (his lordship here read st. 1 W. 4, c. 6).

This act continued the Marquis in his former office for six months, at the pleasure of the Crown; and if, while in the enjoyment of such office, he had duly appointed the defendant deputy mayor, that appointment would have been good for the same term. But the grant of the office of constable in January, 1831 was not the continuance of this former office: it was manifestly a new appointment, extending to the life of his Majesty and the Marquis, if his Majesty should so please. This new appointment required, by the words of the charter, a new swearing in to complete the title; and as the demurrer admits that no swearing in had taken place after the new grant, and before the appointment of the deputy, that appointment is invalid.

The same fact is replied in the fourth replication to each of the defendant's pleas, and all of those replications are demurred to; one essential part of the defendant's title is therefore wanting; and our judgment must be for the Crown. Judgment for the Crown.

*784] *TAYLOR and PARKER, Assignees of WALSH, a Bankrupt, against WILKINSON and GREGORY. . Wednesday, June 17.

A declaration in *scire facias* on a recognizance of bail set forth the condition, which referred to a plea depending at the suit of the plaintiffs against the principal for 1200*l.* lent, 1200*l.* paid, 1200*l.* had and received, and 1200*l.* due on an account stated; and which condition was, in case the principal should not pay the damages and costs in the said plea, or render himself. The declaration then alleged that the plaintiffs declared in the said plea on the four causes of action above stated, but had leave afterwards, by order of a judge, to amend, and did amend by substituting counts for 3000*l.* lent; the

same paid; the same had and received; 500*l.* work and labour; 1000*l.* for interest; and 3000*l.* on an account stated: that the general issue and statute of limitations were pleaded, and the plaintiffs had a verdict for 2104*l.* in the whole; but for 1*s.* on the first and third counts, and for 1001*l.* on the second. That they obtained judgment for their damages, and 40*s.* costs, and 211*l.* costs of increase. That the sums of 1*s.* and that of 1001*l.* were recovered on the promises mentioned in the recognizance; and that no part of these, or of the costs, had been paid, nor the principal rendered.

The defendants pleaded, in substance, that the recognizance was entered into in an action commenced by original, different from that action in which the recovery was had. That the plaintiffs had paid a fine to the king upon an original writ for 1200*l.*, but not upon any writ for 3000*l.* That the order for amending was not consented to by the bail, nor made a rule of court. That, after the trial of the cause, upon argument of a case reserved, the court, without consent of the bail, gave leave to the plaintiffs to amend their continuance roll, so as to prevent their suit from being barred by the statute of limitations. That by the amendment, additional costs were incurred, and the bail were subjected to an undivided sum for costs of increase on all the counts.

Held, that the declaration in *scire facias* was good; that the recovery was had in the plea in which the original was sued out, notwithstanding the amendment: that costs of increase form no integral part of the subject-matter of a suit, being awarded separately by the court; and, therefore, that the addition to the responsibility of the bail, in respect of these costs, was no ground of discharge for them; their remedy, if aggrieved, being by application to the court: and that the other objections raised by the pleas were not maintainable.

SCIRE facias on recognizance of bail, of Michaelmas term, 8 G. 4. The condition of the recognizance, stated in the declaration was,—in case Gregory, who had survived Hipkins, should be convicted in a plea in a certain action theretofore commenced at the suit of Taylor and Parker, as assignees of Walsh, against Gregory and Hipkins (the latter of whom had died since the commencement of the suit), and which action was then depending on K. B. against Gregory; to wit, in a plea, for that whereas Hipkins and Gregory, theretofore, to wit, &c., were indebted to Walsh, before he became a bankrupt, in the sum of 1200*l.*, for money lent before he became a bankrupt, and, being so indebted, they, in consideration *thereof, undertook and promised Walsh, before, &c., to pay, [*785 &c.; and whereas also, &c., the like for 1200*l.* paid; also the like for 1200*l.* had and received; and the like for 1200*l.* due on account stated:—and in case Gregory should not pay the plaintiffs such damages and costs as should be adjudged to them in the plea aforesaid, or render himself into the custody of the marshal, &c. The declaration in *scire facias* then alleged that Taylor and Parker, as assignees, afterwards (in Michaelmas term, 8 G. 4), declared against Gregory in the said plea; and it set out the declaration therein, containing four counts in assumpsit, on the several causes of action above mentioned.

The declaration in *scire facias* then stated, that, on the 19th of November, 1827, Sir John Bayley, Knight, then being one of the justices, &c., made an order that, upon payment of costs, Taylor and Parker should be at liberty to amend their declaration: that they did pay costs and amend; and that they did by their amended declaration complain, &c. The amended declaration was then set out, containing six counts on promises before the bankruptcy, viz; 1. to pay 3000*l.* for money lent; 2. the same, for money paid; 3. the same for money had and received; 4. to pay 500*l.* for work and labour as an agent, and for commission and reward in respect thereof; 5. 1000*l.* for interest of moneys lent, moneys paid, and other moneys; 6. 3000*l.* on an account stated.

The declaration in *scire facias* went on to state that Gregory pleaded the general issue and statute of limitations, on which issues were joined (setting out the pleadings); that the cause was tried February 14th, 1828, and that the jury found for the plaintiffs on both issues, and gave damages as follows:—on the first and *third counts, 1*s.*; on the second 1001*l.* 11*s.* 2*d.*; on the fourth 77*l.* 5*s.*; on the fifth 1026*l.*: the whole amounting to 2104*l.* 17*s.* [*786 2*d.*, and 40*s.* costs; and that the plaintiffs remitted the damages on the last count. That judgment was given against Gregory for the damages and costs

found as above, and 211*l.* 12*s.* 10*d.* costs of increase (prout patet). And that, although the sum of 1*s.*, recovered on the first and third counts, "was recovered in the said plea in the said recognizance mentioned, and for the non-performance of the said promises and undertakings in the said recognizance firstly and thirdly mentioned;" and, although the sum of 1001*l.* 11*s.* 2*d.*, recovered on the second count, was recovered in the plea in the said recognizance mentioned, and for non-performance of the promise and undertaking therein secondly mentioned; yet Gregory did not pay the said sums, or any part thereof, or the said costs and charges, or any part thereof, or render himself according to the said recognizance, which, as well as the judgment, was still in force. Conclusion, in the usual form, with prayer of remedy, and *scire facias* to the bail to appear on, &c., and show why the plaintiffs should not have execution against them according to the force, form, and effect of the said recognizance, &c.

Pleas. 1. That the plaintiffs ought not to have execution against the defendants by virtue of the said recognizance in form aforesaid, because no judgment was given in the said plea and action against Gregory, by and at the suit of Taylor and Parker as assignees, in the condition of the said recognizance mentioned. Verification.

2. That Gregory was not convicted in the said plea in the said action in the said recognizance mentioned, commenced, &c., and depending in K. B. at the time of *making the said recognizance, "to wit, in a plea to the same *787] purport and effect as is contained and set forth in the condition of the said recognizance" in declaration mentioned. Verification.

3. This plea led to an issue in fact.

4. That the plea and action in the declaration mentioned against, &c., in the condition of the recognizance specified, and in which the recognizance was made, was commenced and prosecuted by and upon an original writ, set forth in the preceding plea, (which stated it as a writ whereby the sheriffs of London were commanded to take Gregory and Hipkins, and them safely keep, &c., to answer, &c., specifying the four causes of action as first set out in the declaration in *scire facias*;) and that the plaintiffs, "in declaring in the said plea and action so commenced and prosecuted as last aforesaid, were bound by law to set forth and allege in the declaration the same and identical causes of action as those set forth and alleged in the original writ by and upon which the said plea and action was commenced and prosecuted as last aforesaid, and could not in and by their declaration set forth or allege causes of action in substance and effect at variance with, and differing from, the causes of action set forth and alleged in the original writ last aforesaid." Yet that the recovery, in the declaration in this action mentioned, by the plaintiffs against Gregory, was had in the plea and action wherein the plaintiffs declared against him to the purport set forth in the amended declaration, in the declaration in this action mentioned, and set out in the third plea above (which contained the declaration, as amended;) and that the causes of action set forth in the amended declaration "are not the, *788] same or identical causes *of action as those set forth and alleged in the original writ," but different in substance and effect. Verification.

5. This plea led to an issue in fact.

6. That a fine is payable to the King upon every original writ, the amount being regulated by the amount of damages laid in such writ; that the plaintiffs paid the fine only upon the amount of damages laid in the original writ sued out by them, which was less than the amount laid in their amended declaration, and less than should and would have been paid if the damages laid in the writ had equalled in amount those laid in the declaration as amended. Verification.

7. That Sir J. Bayley did not with the consent of the now defendants make any order in the said cause that, &c. (as in the declaration in *scire facias*.) Verification.

8. That the said order was not, before the writ of scire facias issued, made a rule of Court. Verification.

9. That, upon the trial of the said two issues, joined in a plea and action wherein Taylor and Parker as assignees, &c., were plaintiffs, and Gregory was defendant, as in the declaration in this action mentioned, the plaintiffs, for the purpose of proving that the causes of action accrued within six years, gave in evidence an office copy of a continuance roll, in a plea wherein Taylor and Parker as assignees, &c., were plaintiffs, and Gregory, who had survived Hipkins, was defendant. The plea then set out the roll, stating the continuances from Michaelmas term, 1812, to the morrow of the Holy Trinity, 1827, and concluding with a *vicecomes non misit breve*. That the plaintiffs also produced for the same purpose an office copy of a writ of testatum special **capias* [789 *ad respondendum* (which the plea set out) against Gregory, at the suit of Taylor and Parker, for the causes of action first mentioned in the declaration in scire facias, bearing date July 4th, 1827; and that no other evidence was offered for the purpose above-mentioned. That a verdict was found for the plaintiffs in the said suit, on the second issue, subject to the opinion of this Court on a special case. The plea then set out the case, which is stated, in substance, in the report of *Taylor v. Gregory*, 2 B. & Ad. 257; and it went on to allege that, upon the facts stated in the case, the Court of K. B., by a rule, made without the consent of the now defendants, ordered Gregory, upon, &c., to shew cause why the plaintiffs should not be at liberty to amend the roll by adding a continuance from the first to the last return of Trinity term, 1827, or to alter the teste of the writ of testatum special **capias*. That, on the 16th of April, 1831, the Court, by another rule, without the consent of the now defendants, ordered that the plaintiffs should be at liberty to amend the roll by adding a continuance as above, which was accordingly done; and, by a rule of Court afterwards made (May 7th, 1831,) it was ordered that judgment should be entered for the plaintiffs in that suit. And the plea averred that the recovery mentioned in the declaration in scire facias was not had by Taylor and Parker upon the facts stated in the special case, and upon which the opinion of the Court was taken, but upon another and a new state of facts, not found by the jury at the trial. Verification.

10. The defendants "say for further plea, that" the plaintiffs ought not to have execution for the costs and charges in the declaration in this action mentioned, by virtue of the said recognizance, because, &c., (the plea then [790 stated the nature of the original writ, and the declaration as at first framed, and then proceeded to allege that) by the insertion of additional counts, under the order of Sir J. Bayley, additional issues were joined, and additional costs incurred: and by the recovery had as stated in the declaration in scire facias, the plaintiffs recovered an undivided sum of 40s. for costs, and an undivided sum of 211l. 12s. 10d. for costs of increase; and, therefore, the now defendants ought not to be charged on the said recognizance for the said costs or any part thereof, &c. Verification.

Replication. 1. That judgment was given in the said court, &c., in the said plea and action against, &c., by and at the suit, &c., in the condition of the said recognizance mentioned, in manner and form as Taylor and Parker have in their said writ of scire facias and declaration above alleged, "as by the record of the said judgment described and set forth in the said writ of scire facias and declaration, and now remaining in the said court of our said lord the King, before the King himself at Westminster, will appear: and this the said John Thomas Taylor and John Parker, as such assignees as aforesaid, are ready to verify by the said record of the said judgment in the said writ of scire facias and declaration mentioned, when and in such manner as the said Court here shall order," &c.

2. That Gregory was convicted "in the said plea in the said action, in the said recognizance mentioned, commenced at the said suit" of Taylor and Parker

against Gregory and Hopkins, in manner and form as in the writ of *scire facias* and declaration thereon is alleged; as by the record, &c. (as before.)

*791] 4. That the causes of action set forth in the amended *declaration, in respect of which 1*s.* was recovered, were the same and identical with those alleged in the original writ, so far as the said writ relates to the non-performance of the promises and undertakings therein firstly and thirdly mentioned; and that the cause of action alleged in the said amended declaration, in respect of which 100*l.* 1*s.* 2*d.* was recovered, was and is the same and identical with that stated in the original writ, so far as that writ relates to the non-performance of the promise and undertaking therein secondly mentioned. Verification.

6. That the damages laid in the said original writ, and in respect of which the said fine was paid, included the said sums of 1*s.* and 100*l.* 1*s.* 2*d.* respectively so recovered as in the declaration in this action mentioned. Verification.

7, 8, 9, 10. General demurrers to the last four pleas.

Rejoinder. As to the replications 1 and 2, demurrer, assigning for cause that the same are argumentative and double, and do not, nor does either of them, allege that there is any record of any judgment or recognizance, or that there is or has been any judgment or recognizance, by reason whereof the defendants are or ought to be made liable to the payment of any debt or sum of money; and that they do not, nor does either of them, contain any averment of any record, except by reference to the declaration in the cause; and that they are in other respects, &c. To the replications 4 and 6, general demurrer. On the last four, joinder in demurrer. The defendants stated, on their paper book, that they should contend that the declaration was bad.

On the demurrers to the replications 1, 2, 4, and 6, the plaintiffs joined: and *792] it was stated on their paper *book that they should contend that pleas 1, 2, 4, and 6, were bad.(a)

Sir W. W. Follett, on a former day in this term,(b) was heard in support of the demurrers to pleas 7, 8, 9, and 10, and of the replications to pleas 1, 2, 4, and 6. After stating the history of the case from the reports of Gregory v. Hurrill, 5 B. & C. 341, and Taylor v. Gregory, 2 B. & Ad. 257, 264, (and see 2 B. & Ad. 774,) he continued. The main question here is, whether the bail are discharged by an amendment made without their consent in the declaration, in consequence of which it varies from the original writ. That, as a general proposition, is negatived by the second decision in the former case of Taylor v. Gregory, 2 B. & Ad. 264, which shews that the bail are still liable to the extent of such damages as the plaintiff may recover on *the counts con- *793] tained in the original writ: though it is true that they are not liable on the added counts. As to the 7th plea, there is no authority for saying, as that plea suggests, that counts may not be added by a Judge's order, without the

(a) The declaration in *scire facias*, as originally framed, stated the condition of the recognizance (as above), and proceeded to set out only the amended declaration in assumption, taking no notice of the former one; it then alleged a recovery by the plaintiffs, and judgment given for them, prout patet, with an averment of the identity of part of the causes of action. The defendants pleaded nul tiel record; and the record was inspected before the master, when it was contended that the declaration varied from the original writ, and therefore that the judgment was not a judgment in the plea mentioned in the recognizance. The master decided against the objection. A rule was afterwards obtained calling on the plaintiffs to shew cause why judgment should not be entered for the defendants on the issue of nul tiel record; and, cause being shewn (Nov. 7th, 1833), the court, without giving any decision as to the sufficiency of the declaration in *scire facias*, advised that it should be amended, by stating the facts specially, so as to account for the difference between the declaration in assumption ultimately proceeded upon, and the original writ as recited in the recognizance. The declaration in the *scire facias* was then altered to its present form.

(b) June, 9th. Before Lord Denman, C. J., Littledale, Patteson, and Williams, Js. The argument was adjourned, and concluded, June 12th, before the same judges.

consent of the bail. Nor is there any authority for the objection taken by the 8th plea. A Judge's order for amending was sufficient. To the 9th plea it is a complete answer, that the judgment remains unreversed. The 10th plea is pleaded as an answer to the whole declaration, and therefore bad. Admitting the plea to be true, there is still a forfeiture of the recognizance.

Then, as to the matters pleaded in reply. The 1st replication is properly pleaded, and brings the record on which the plaintiffs rely, fully before the Court. The plaintiffs tie themselves down to the proof of a particular record. So, in the second replication, the judgment relied upon is distinctly pointed out, and a verification of that judgment offered, by the record. The demurrers to the 4th and 6th replications raise the point which was decided in *Taylor v. Gregory*, 2 B. & Ad. 264. If it is said that the plaintiffs did not, in point of fact, ultimately recover upon causes of action which were stated in the original writ: that might be so; but the question was for a jury. If however, the defendants mean to contend (as they probably do, on demurrer) that after amendment the causes could not be the same, that question is disposed of by *Taylor v. Gregory*, 2 B. & Ad. 264. And there is no authority for contending that, because the declaration was amended, the action could not be the same. It is true that, formerly at least, where an action was commenced* by original, the writ was supposed to contain the whole of the declaration, and, [*794 if the declaration were amended, it would be presumed that the original would receive a corresponding amendment, if necessary. And, at one time, a variance between the declaration and the original might have been taken advantage of by the defendant; but that was subsequently prevented, after verdict, by express statutory provision; 18 Eliz. c. 14, s. 1; 21 Ja. 1, c. 13, s. 2; 5 G. 1, c. 13, s. 1; and before verdict, by the refusal of the Courts to grantoyer of original writs. In 1 Wms. Saunders 318, (note (3) to *Redman v. Edolph*.) Mr. Serjt. Williams, after discussing the subject of variance between the original writ and declaration, says, "From hence it seems to follow, that no advantage whatever can now be had, either of a defective original, or of a variance between it and the declaration." If the defendant himself could not take this advantage, the bail cannot.

The real question then is, whether the former decision of this Court, as to the liability of bail after amendment of the declaration, be a correct one or not. It is stated, in 2 Wms. Saund. 71 d, e, note 4 to *Underhill v. Devereux*, that bail are discharged if the plaintiff declares for a different cause of action from that mentioned in the writ, and instances are referred to. The rule furnished by the authorities appears to be, that if the form of action be different, whether the suit was commenced by original or not, the bail are entitled to relief (and this is illustrated by *Mayfield v. Davidson*, 10 B. & C. 223, and *Green v. Elgie*, 3 B. & Ad. 437:) if the form of action be the same, the plaintiff may recover* for a cause of action in respect of which the bail became bound, or for [*795 a new cause of action; in the latter case the bail are discharged; *Wheelright v. Jutting*, 7 Taunt. 304; in the former not. The rule upon the subject is, that the alteration shall not operate to prejudice the bail. A rule of K. B. of Easter T. 5 G. 2, cited in *Jacob v. Bowes*, 6 East, 313, (Rules and Orders of K. B. p. 2, ed. 1822,) directs that where the plaintiff recovers a greater sum than is expressed in the process on which he declares, the bail shall be liable for the sum sworn to, and indorsed on the said process, or for any lesser sum which the plaintiff shall recover. The principle of that rule is relied upon by the plaintiffs here. They have recovered partly for the causes of action mentioned in the recognizance; and they have recovered upon those causes of action, and claim against the bail, less than the sum for which the bail became bound. In *Gray v. Harvey*, 1 Dowl. P. C. 114, the defendant was arrested for an alleged debt for goods sold and delivered, and money lent. The declaration contained no account for goods. *LITTLEDALE, J.*, held, nevertheless, that the bail were

not entitled to an exoneretur, because the plaintiff might recover on the count for money lent, as far as he could prove.

Sir *John Campbell*, Attorney-General, contra. The first question is, whether the declaration is not bad, as not shewing any breach of the contract entered into by the bail. What is the contract? It is contained in a recognizance entered into in an action by original, to be answerable in case the defendant shall be convicted "in the plea aforesaid," referring to the original writ, which contains *a minute detail of the cause of action. Where the suit is commenced by bill of Middlesex, there is no such minute statement to which reference could be made in the recognizance of bail. The recognizance, therefore, in the one case, is much more definite than in the other. And here the recognizance, as stated in the declaration, recites the causes of action as set out in the original writ, with great particularity: and the condition is, in case Gregory should be convicted, &c., "in the plea aforesaid." Then, has there been judgment in the plea aforesaid? or does not the addition of new causes of action destroy the identity of the plea? The bail are supposed to have the original writ read over to them, and to consider of the causes of action, before they bind themselves. If the present defendants had known that new causes of action and new counts might be added, and the amount of damages increased, as was done here, it may be presumed that they would not have entered into the recognizance. The costs at least might be indefinitely increased by such additions. The declaration in *scire facias* does not expressly state what amendment was permitted by the order of Bayley, J. No count of the amended declaration in *assumpsit* corresponds with any one of the causes of action in the original writ, or any count of the first declaration, as stated in the declaration in *scire facias*. The costs are entire; and, if the defendants are liable for them at all by the condition of the recognizance, they are liable if any portion of them is unpaid. The question is not, whether the Court has or has not power, as between the parties, to allow additional counts; but whether, as regards the bail, the suit, when such counts are added, and promises alleged to the amount of 3000*l.* instead of 1200*l.*, is the same suit as that described in the recognizance. In this view of the case, the sum actually recovered is immaterial. But the plaintiffs did in fact recover by the verdict a much larger sum than 1200*l.* and costs, which cannot be divided, upon the new as well as the old counts: and the condition of the recognizance is, if Gregory shall not pay the plaintiffs "all such damages, costs, and charges," as shall be adjudged against him in the plea aforesaid. If the plea upon which judgment has been given, as stated in the declaration, is identical with the plea mentioned in the recognizance, and the judgment is good, the execution mentioned at the end of the declaration should issue for the whole sum awarded by the judgment. But the judgment, as stated, is not warranted by the writ.

It has been said that this objection cannot prevail, because it is now held that no advantage can be taken of a defective original, or of a variance between the original and declaration; and it is true that, since the statutes which were cited, this cannot be done after verdict, and that, in earlier stages of a cause, the Court will not grantoyer of the original writ, for the purpose of raising an objection. But it does not follow that the original writ set out in this declaration in *scire facias* must be considered as supporting the judgment, also set out in it; and that the defendants are precluded from saying that the writ and judgment are not in the same plea. *Edwards v. Watkin*, Cro. Eliz. 185, *Berkenhead v. Nuttall*, Cro. Eliz. 198, *Norton v. Palmer*, Cro. Eliz. 829, show that where the writ and count have been brought before the Court, a substantial variance, (after stat. 18 Eliz. c. 14), between them has been held good ground *of error, or for arresting judgment; the verdict being no bar to such an objection at the time when those cases were decided. In *Yates v. Plaxton*, Levin's Entries, 170, on *scire facias* against bail, it appeared on the pleadings that the original writ against the principal was sued out in the county of York, and the recovery

against him was in the county of the city of York, and judgment was had thereon: the plaintiff pleaded that in such a case the bail were liable, which allegation the defendants traversed; and, the plaintiff having demurred specially, because a traverse was taken on matter of law, the defendants had judgment. That shows that an objection like the present may be taken by bail, where it can be made apparent to the Court that the writ is not in the same plea as the judgment. [LITLEDALE, J. Suppose the amendment under the order of Bayley, J., had been made by stating that Gregory was indebted in the sum of 1200*l.* on the 1st of January, and 1800*l.* on the 1st of February, thus keeping the two claims perfectly distinct, could your objection have prevailed then?] It would. The plea would not have been that mentioned in the writ. The liability to costs might have been increased indefinitely, and the bail are answerable for the whole. And the risk would still have been enhanced, because it might probably happen, if the demand of the plaintiffs became greater than the principal could satisfy, that he would go away without paying any part of it.

Then, as to the particular pleas. Plea 1, is substantially good, though it might perhaps have been objected to on special demurrer as an informal plea of nul tiel record. Plea 2, pursues (as it ought) the very words of the recognizance. Plea 4, gives a complete *answer to the action. If the causes of action stated in the declaration were not the same as those stated in [*799 the original writ, there has been no recovery according to the condition of the recognizance, and it is not forfeited. Plea 6, also gives a valid answer. The fine is paid on the supposition that the plaintiff can recover no more than 1200*l.*; he afterwards proceeds for 3000*l.*, and no fine is paid for the difference. The only proper mode of making the alteration would have been to obtain the leave of the Master of the Rolls to amend the original, and the consent of the bail to raise the amount of the recognizance. [PATTERSON, J. That would have been in effect commencing a new action.] The Court would not have allowed the recognizance to be altered unless the bail had agreed; neither will they allow them to be fixed in the altered amount, without such agreement. As to pleas 7, and 8, the order of Bayley, J. for amending is relied upon as answering the objection which arises from the want of consent by the bail. But it ought to be shewn, in strict legal form, that the amendment was made by authority of the Court. The order of a single Judge is not, till it is made a rule of Court, equivalent to that authority, unless where a peculiar effect is given to the order by act of parliament, as in the case of a habeas corpus. Plea 9, raises the question whether bail are to be affected by that which is at least a stretch of the authority of this Court, the ordering continuances to be entered after the proper time. As a question of practice, and as between plaintiff and defendant, it has been held that this may be done; but it is now for the first time to be decided how such entry, appearing on the record, shall operate on the liabilities of bail. As to plea 10, it must be admitted that the plea, as framed, should not have *been to the whole declaration, because the defendants are liable unless they can shew that the condition has in no respect been broken. [*800 But that supports the argument before urged on behalf of the defendants. By the condition of the recognizance all the damages and costs in the plea, to which it refers, must be satisfied, or the defendant in that plea rendered. Now, if the damages and costs so provided for are those recoverable in the plea relied upon by the plaintiffs, and if the defendants cannot discharge themselves without shewing that the condition has been in all respects complied with, their liability has been unjustly extended by the change made in the declaration. To say that the whole damages and costs are not claimed in the declaration, is no answer, since, according to the argument for the plaintiffs, they were claimable, and the defendants were bound to show a complete fulfilment of their recognizance.

Sir W. W. Follett in reply. The whole case turns upon the question already decided in *Taylor v. Gregory*, 2 B. & Ad. 264, namely, whether the recovery

was in that plea in which the bail bound themselves. As to the effect of the Judge's order for amendment, that order was made on payments of costs. [PATTESON, J. The costs were received under the order; and now the bail say that it was not valid, because not made a rule of Court.] The practice as to amending shews that the addition of counts does not affect the identity of the suit. In actions to recover penalties for usury, such amendments are continually made after the time for commencing an action has elapsed. In *Wood v. Grimwood*, 10 B. & C. 679, 689, (but not stating this fact,) count after count was *801] so added. If any advantage can be *taken of the difference between the writ and amended declaration, as an objection to the writ, that is open to the defendants; but the action is the same; and, if the same as to the original defendant, it is so as to the bail. When this case was before the Court, on the motion to enter a verdict for the defendants, the facts were not stated on the declaration in *scire facias* so as to connect the declaration in *assumpsit* on which the plaintiffs recovered, with the original writ; and the Court gave leave to amend, saying that, if the plaintiffs were right in their action, they could not be wrong in setting out the facts specially. The facts are now set out, and the judgment connected by averment with the writ. As to the cases referred to on the other side, *Berkenhead v. Nuthall*, Cro. Eliz. 198, was decided on stat. 18 Eliz. c. 14, s. 1; that act cured the want of an original writ, but not a substantial variance. The writ there was for 1667. 18s. 4d., the declaration for 1711. 10s.; that was held fatal, as a variance, the action continuing the same. If the action had been a different one, by reason of the change from 1667. to 1711, the objection would have been that, in the new action, there was no original; and that would have been cured by the statute. The same argument applies to *Edwards v. Watkin*, Cro. Eliz. 185. So, it was said by the Court in *Norton v. Palmer*, Cro. Eliz. 829, that the statute 18 Eliz. c. 14, "helps only, where there is not any writ, but not where the writ and declaration varies in substance." In *Johns v. Staynar*, Cro. Car. 272, 281, the writ which was certified on diminution alleged, appeared to be sued out before the cause of action accrued as stated in the declaration; and, as there was a continuance wanting, the counsel for *802] the plaintiff suggested that another original might have been sued out, which was missing, or that the action proceeded in had been commenced without an original; and he cited *Calthorp v. Culpepper*, Cro. Jac. 654, and *Reynel v. Kelsey*, Cro. Jac. 675: but the Court held that as the writ here was certified as an original in this action, and as it was taken out before the cause of action, it was a vicious and an ill original, not aided by any statute. That illustrates *Yates v. Plaxton*, Levinz's Entries, 170, where, according to the principle of the cases to which it was attempted to assimilate *Johns v. Staynar*, Cro. Car. 272, 281, a recovery in the county of the city of York was considered to be no recovery in an action commenced in the county; and the bail in that action were held to be discharged. Subsequently to these cases, by stat. 5 G. 1, c. 13, it was enacted that no judgment could be reversed after verdict, for any defect in form or substance, in any writ or for any variance in such writs from the declaration or other proceedings. The alteration complained of in the present case would have been such a variance as might have been objected to under stat. 18 Eliz. c. 14, but is cured by stat. 5 G. 1, c. 13.

If the bail were subject to any hardship in this case, it may be a ground for the equitable interference of the Court, but is no answer to a proceeding on the recognizance. In *Taylor v. Gregory*, 2 B. & Ad. 264, the Court held that the bail were not exonerated by the introducing new causes of action; but they suggested that the new demands might be separated from the former ones. That *803] has been done: this declaration relates to the former demands *only. The case of the bail was a second time under the consideration of the Court in *Taylor v. Gregory*, 2 B. & Ad. 774, and the rule then made absolute was modified for their protection, but nothing was said of exempting them from liability. The plaintiffs only seek to hold the bail responsible for the amount

in which they were so originally. [PATTESON, J. There might be counts for causes of action not bailable. LITLEDALE, J. The recognizance would be entered on the roll as to the bailable counts only.] Even in such a case the same objection might be raised as the defendants have suggested here; that the costs could not be separated.

As to the pleadings; the defendants ought to have answered the replication to the first plea by traversing the fact of the judgment there alleged; and so, as to the replication to the second plea, if they meant to deny that the causes of action upon which the principal was convicted were the same as those contained in the original, they should have pleaded that as a matter of fact. Such a question is clearly the subject of an issue in fact; *Seddon v. Tutop*, 6 T. R. 607; *Lord Bagot v. Williams*, 3 B. & C. 235; and the defendants here have so treated it in their fourth plea. As to the want of a proper fine, that, if a valid objection, would have been available in former stages of this case, but it has never weighed with the Court. [LITLEDALE, J. The want of a fine, if an attempt were made to evade it, would be matter for the attention of the filacer.] With respect to the seventh and eighth pleas, no authority has been shewn for saying that the consent of the bail was necessary to an order for amendment. When bail are to be discharged, the question is, whether they are prejudiced *by the proceeding (as in *Stevenson v. Roche*, 9 B. & C. 707,) not whether they have consented to it. As to the Judge's order, it has never [*804 been questioned that an order at chambers is as binding on parties as a rule made in Court; though it is not sufficient for the purpose of bringing a person into contempt. The doctrine of amendments at chambers is stated by Lord Mansfield in *Rex v. Wilkes*, 4 Burr. 2566. The objections to the ninth and tenth pleas are not answered.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the principal facts as alleged in the declaration in *scire facias*, his lordship proceeded:—The defendants pleaded various pleas, stating their defence in various ways, but all, in effect, amounting to this, that, by the changes made by virtue of the above mentioned order of the learned Judge, the suit was no longer that in which the recognizance of bail was entered into, and that they were, thereby, discharged. It is not necessary to allude more particularly to the form of those pleas, because, as has been observed already, the declaration in *scire facias* states all the facts whereon those pleas rest; and is, therefore (as was contended), upon the face of it, bad in law, if the defence be available.

The question, arising out of the objection presented to our notice in different shapes, is resolved into the single point, already shortly adverted to, whether the recovery against the defendant in the original action was in the same suit as that wherein the defendants entered into the recognizance. To enforce these objections, it has been contended that the liability of the *bail has been [*805 increased, by enlarging the plaintiffs' means of recovering damages against their principal, and also by increasing the amount of costs. It is observable, however, that, admitting the justice of the observations which have been pressed upon us, they are not precisely directed to, and fall short of, the proposition to be established by the defendants, that the suit had, by the alterations already noticed, changed its character, and no longer remained the same. And, in our opinion, they do not establish that proposition. The suit, as regards the parties engaged in it, and the manner of commencing it, remained unchanged and the same. The alteration in the declaration, by the order alluded to, is, we think, strictly within the control ordinarily exercised by the Court over the proceedings of the parties, upon terms imposed in each case: it is an amendment, at the discretion of the Court, of the part of the proceedings which is supposed to require it; but it does not destroy the identity of the suit.

In support of the objection to the plaintiffs' recovering, we have been referred to several cases. Upon considering them, however, they do not seem to

bear upon the point before us. At the time when they were decided (previous to the several statutes referred to in the argument, and particularly stat. 5 G. 1, c. 13), a departure from the original writ in the declaration was a fatal objection. That, however, was by no means founded upon the supposition that there was any change of suit, but the contrary. The suit remaining *the same*, *806] the error was entirely in departure. In the case of *Berkenhead v. Nuttal*, Cro. Eliz. 198, (upon error) the variance was *between the amount of debt claimed in the writ, and in the declaration; in the latter, a larger sum having been claimed; and, *therefore*, the judgment was reversed. In the next case cited, of *Edwards v. Watkin*, Cro. Eliz. 185, in trespass, the error was in the excess in the declaration beyond the writ, *clausa fregit* instead of *clausum*. The third, and last to be noticed, is the case of *Norton v. Palmer*, Cro. Eliz. 829, which was also decided on the excess of the declaration beyond the writ.

The cases cited, therefore, are clearly distinguishable from the present, and proceed upon a principle wholly independent of the present objection, which is, that the variance from the original writ makes the suit other and different.

But we have been further pressed with the consideration, that the costs are entire, and that, because the declaration has been enlarged, and the costs thereby increased, and therefore the responsibility of the bail increased, they are thereby discharged. But, upon this point also, we are of opinion against the defendants. We think that the costs of increase form no integral part of the suit. They are awarded *by the Court* in consequence of the damages recovered by the plaintiffs in this case, and form the subject of a distinct and separate adjudication upon the recovery of the plaintiffs in the suit. If, therefore, the bail have been, in this respect, aggrieved, the Court, upon application, may relieve them; but they are not, for the reason suggested, discharged upon the whole. Therefore, we are of opinion that judgment must be for the plaintiffs.

*807] The former consideration of this case has not been *adverted to, though our present decision seems to be in conformity to the view then taken by the Court. Judgment for the plaintiffs.

CLAY *against* STEPHENSON and Others. *Wednesday, June 17.*

A commission having issued to examine witnesses at Hamburg, certain witnesses there refused to appear. On motion in this court, it was shewn that the Court of Commerce at Hamburg would compel the attendance of the witnesses before themselves, upon request made by this court, and would conduct the examination, allowing commissioners named by this court to be present, and to make suggestions; but that the members of the Court of Commerce would not take a special oath as commissioners of this court; and that they would not compel the attendance of witnesses before any but themselves; and that there were no means of compelling such attendance.

This court ordered a commission to issue for the examination of the witnesses, directed to the members of the Court of Commerce, without the usual clause requiring the commissioners to be sworn: LITLEDALE, J., dubitante.

SIR JOHN CAMPBELL, Attorney-General, had obtained a rule in this term (June 3d) calling upon the defendants to shew cause why the plaintiff should not be at liberty to issue a commission for the examination of witnesses necessary for his case, residing at Hamburg, and why in such commission the usual clause rendering the commissioner's oath necessary should not be omitted; or, otherwise, why the commissioners to be named in the said commission should not, if necessary, and in their capacity of commissioners appointed by this Court, and in the name of this Court, be authorised to apply to the Court of Commerce, or the proper tribunal, at Hamburg, to render the said commission effectual by compelling the attendance of the witnesses, and obliging them to submit to be examined upon oath; and also why, if necessary, a clause authorising such application should not be inserted in the commission.

The affidavits in support of the rule stated, that a commission had issued, directed to certain individuals, to examine the witnesses at Hamburg; that two witnesses had refused to appear voluntarily before this commission; that the senate of Hamburg, upon being applied to by the British consul and otherwise, had refused "to enforce their attendance; that the Court of Commerce had also declined enforcing their attendance, and that there were [*808 no means of enforcing it: that it had been ascertained that the commission might be made available, if this Court would direct it to the Court of Commerce (Handelsgericht) at Hamburg, without a clause calling on the latter Court, as commissioners, to take the usual commissioners' oath, and framed as a commission addressed to a court of judicature to whose acts full faith was due; or if this Court would, by its rule, request the Court of Commerce, to give effect to the commission; or if the commissioners to be therein named were authorised by the rules or commission, to call upon the Court of Commerce in the name of this Court to give effect to the commission by compelling the attendance of witnesses. Depositions were also made of belief that the witnesses at Hamburg were adverse to the plaintiff, and that he would be prevented, by want of their testimony, from proceeding safely to trial. It appeared, by the affidavits of two civilians at Hamburg, that in Hamburg, and in Germany generally, the practice is for courts, requiring the testimony of witnesses out of their jurisdiction, to address a request to a competent Court within whose jurisdiction the witnesses are domiciled; that German Courts are in the habit of complying with such requests: and that the Court of Commerce would undoubtedly comply with such a request from this Court, and would themselves conduct the examination, allowing the attendance of the commissioners to suggest questions, in case of an attempt to give evasive answers: but that the Court of Commerce would not delegate its duties to others, and that the members of it would not take a special oath.

* *Wightman* now shewed cause. It is proposed that a court over which this Court has no control, should be requested to attend to a suit within [*809 its own jurisdiction. The refusal of persons abroad to submit to examination is not a new case; but this method of meeting the difficulty has never been adopted. The proposal to dispense with an oath is unwarranted; and the precedent would be mischievous. Nor is the application sanctioned by st. 1 W. 4, c. 22. That act (sect. 1.) extends the power which the Court possessed as to the examination of witnesses in India, under st. 13 G. 3, c. 63, s. 44, to all colonies and places under the dominion of his Majesty in foreign parts, and also to the Judges of the several Courts therein. The second section gives to such Judges the power which they would have in causes depending in their own courts; but it applies only to courts in places under the dominion of his Majesty. The fourth section empowers the Courts here to order a commission for the examination of witnesses upon oath, at any place out of the jurisdiction of these Courts; and, by the same, or any subsequent order, to give such directions touching the time, place, and manner, of the examination, within or without such jurisdiction, and all other matters and circumstances connected with such examinations, as may appear reasonable and just. This section may be relied on in support of the rule. But the present application is not for a commission, in the sense in which the word is used in the act: it is really an application that a foreign court should be requested to exercise its own compulsory power, and that, for that purpose, the commissioners' oath should be dispensed with. It is not like the case of a mandamus to a functionary within his Majesty's dominions, where it is assumed *that [*810 reliance may be placed on the officer to whom the mandamus is directed

Sir *John Campbell*, Attorney-General, contra. All that is asked for is a commission to individuals, who happen to be Judges of the Court of Commerce at Hamburg. It is not proposed that the commission should be directed to them in that character. The commission here applied for is to be in the common form, omitting only the oath, to which the proposed commissioners feel objections. It is as if they were Quakers or Moravians. The fourth section

fully warrants the application: the question is merely as to the "manner of such examination;" and it was probably for the purpose of meeting difficulties like the present that the discretion allowed by that section was granted. If this proposal be acceded to, the other alternative in the application will become unnecessary, yet even that seems warranted by the fourth section. [PATTESON, J. The forty-fourth section of stat. 13 G. 3, c. 64, gives no form, and does not require the commissioners to be sworn; and a mandamus would require no administration of an oath.] Faith is, in fact, given to a judicial functionary.

LORD DENMAN, C. J. I think that what is required may be done. The words of the statutes do not require an oath to be taken by the commissioners; and the fourth section of stat. 1 W. 4, c. 22, enables us to regulate the manner of proceeding, upon reasonable grounds. It does seem to me a reasonable ground for our making this order, that truth may be got at which would otherwise be lost. I think a court of equity would have felt itself entitled to act in the same way.

*811] *LITLEDALE, J. I must own I have great doubts. Certainly, the oath is not prescribed, yet it was never dispensed with before. But, as my lord and my learned brothers see no difficulty, the rule must be granted.

PATTESON, J. I think the rule may be granted.

WILLIAMS, J. I see no danger in this proceeding. That there is no precedent, arises, probably, from such a case not having occurred.

Wightman then applied for costs, on the ground of this being an indulgence, and the rule having prayed for too much.

Sir *John Campbell*, Attorney-General, opposed the application. The rule did not pray for more than is granted: the other branch was in the alternative.

PER CURIAM. The costs must be costs in the cause, under s. 9 of stat. 1 W. 4, c. 22.

The rule was as follows:—"It is ordered, that a commission issue, directed to the Court of Commerce at *Hamburgh*, in which commission the usual clause rendering the commissioners' oath necessary shall be omitted, for the purpose of examining upon oath *Vincent Elias Hermann Langenee*, and *Johann Martin Precht*, of the city of *Hamburgh*, witnesses on the part of the plaintiff, upon interrogatories to be exhibited to them before the said Court; and the said Court is hereby empowered to perform all such matters and things as are required and *812] authorized by the statute of *the first year of his present Majesty, chapter 22; and it is further ordered, that the defendants be at liberty to exhibit cross interrogatories to the said witnesses before the said Court; and, in case the defendants shall exhibit cross interrogatories for the examination of the said witnesses, then that their attorney or agent do deliver such cross interrogatories to the plaintiff's agent within five days after service of the rule, in order that such cross interrogatories may be thereupon and without delay forwarded to the said Court, together with the said commission, and the plaintiff's interrogatories in chief, to be executed pursuant to the said statute: and it is further ordered that the said interrogatories, cross interrogatories, and depositions so taken as aforesaid, be transmitted under the seal of the said Court, or otherwise, as the said Court shall deem proper, to *Charles Short, Esq.*, Clerk of the rules and orders on the plea side of this Court, and be permitted to be read in evidence on the trial of this cause; saving all just exceptions."

*813] *M'DOUGALL against NICHOLLS. Wednesday, June 17.

A party taking out a summons for an order to be made by a judge at chambers, may abandon the order when made. Therefore, where a judge at chambers had indorsed on the summons the minutes of an order, and the party taking out the summons refused to draw up the order, or to deliver up the indorsed summons, the court refused to com-
VOL. XXX.—24

pel him to do either, or to direct the judge's clerk to draw up the order from the minutes of counsel.

IN the year 1834, Taunton, J., ordered four bills of costs to be delivered by Mr. Nias, who had acted as attorney for the plaintiff, to be taxed by the Master. The attorney produced before the Master evidence to show that two of these had been taxed and paid. The Master not having made any allocutor, and expressing a doubt as to the effect of the order, so far as these two bills were concerned, Mr. Nias took out a summons, calling upon Mr. Green, the plaintiff's then attorney, to show cause why the order of Taunton, J., should not be rescinded or amended; and Coleridge, J., before whom the summons was heard, indorsed on the summons a minute that Mr. Nias should deliver the two bills in three days, the parties undertaking, to the Master's satisfaction, that payment should be made, as the case might be, within seven days from the date of the allocator. Mr. Nias, not being satisfied with the decision, did not draw up the order, but retained the summons and indorsement; and the Judge's clerk declined to draw up the order without them. Mr. Nias refused to deliver them up, but offered that the case should be reheard before the learned Judge; to which the other side did not assent. In this term *Sewell* obtained a rule calling upon Mr. Nias to show cause why he should not draw up the order, or produce to the Judge's clerk the summons with the original order therein indorsed; or why, in default thereof, the Judge's clerk should not draw up the order from the minutes [814] of the counsel who attended the summons.

Platt now showed cause. There is no authority for such an application as this. Any party applying for an order, who is dissatisfied with the terms on which it is made, may refuse to draw it up.

Sewell, *contra*. The question is, whether a party, after he has, upon his own application, attended a Judge, and after the minutes of the order have been made, can refuse to abide by the result. He may not be bound to draw up the order himself; but the opposite party is entitled to have it drawn up. It is *res judicata* as much as an allocutor: and the other party is not to be driven to take out a fresh summons. An allocutor is the property of the party in whose favour it is made; *Doe dem. King v. Robinson*, 2 Dowl. Pr. C. 503. Mr. Nias, therefore, has, at any rate, no right to retain the summons and minutes.

LORD DENMAN, C. J. A party who applies for an order is not bound, if he does not like the order made, to have it drawn up. It is said that this is *res judicata*, and it may possibly be so; but that is of no importance. The successful party, if he choose, may take out a summons to obtain an order. The case of an allocatur is altogether different.

LITTLEDALE, J. I think that a party obtaining an order may always abandon it.

*PATTESON, J. I always have thought so, and I have acted upon the opinion. But, if matter be gone into by consent of parties, it may per- [815] haps become *res judicata*.

WILLIAMS, J., concurred.

Rule discharged.

The KING against CURWOOD and Others. Wednesday, June 17.

An indictment for a nuisance contained twelve counts, describing the nuisance in different ways, and charging it to have been committed in different parishes and counties within the jurisdiction of the Central Criminal Court. This court, on reading the indictment only (which had been removed by certiorari,) and without affidavit, ordered the prosecutor to give the defendant a note of the several acts of nuisance which he intended to prove.

THE defendants were indicted in the Central Criminal Court. The indict-

ment contained twelve counts, and charged various nuisances created by the produce of certain gas works, corrupting the waters of the Thames, destroying the fish there, and rendering the air unwholesome. The nuisances were variously described; and the first three counts charged them as committed in the parish of St. Mary Lambeth, in Surrey; the three next as committed in the parish of St. Mary Battersea, in Surrey; the seventh, ninth, and eleventh as committed, as well in the parish of St. Mary Lambeth, in Surrey, as in the parish of St. Mary Battersea, in Surrey; the eighth, tenth, and twelfth, as committed in the county of Middlesex. The indictment was removed by certiorari; and, in this term, *Curwood* obtained a rule, drawn up on reading the indictment only, calling on the prosecutors to shew cause why they should not give to the defendants, or their attorney, a note of the several acts of nuisance which they intended to prove.

*816] *R. V. Richards* now shewed cause. This is an unprecedented application. In *Rex v. The Marquis of Downshire*, Hil. T. post, (but not as to this point,) which was an indictment for obstruction of highways, a single Judge ordered that particulars should be furnished; but he required strong affidavits: and a map, shewing the roads and the nature of the question, was laid before him. Here there is nothing but the indictment; and the same application might be made in every case of indictment for nuisance.

Curwood, contra. The principle of the application is not new. In Hawkins's chapter on Barratry, it is said, (Hawk. P. C. book I. c. 81, s. 18,) "Also it seemeth to be a settled practice not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove against him; for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances." That principle applies in the present case. A similar application was granted, on the Oxford circuit, in the case of an indictment for embezzlement.^(a) As to the want of an affidavit,^(b) the complaint of the defendant arises entirely on the indictment.

Lord DENMAN, C. J. We think the application reasonable.

*817] *LITLEDALE, J.* It would be granted, if the proceeding were by civil action.

PATTESON and WILLIAMS, Js., concurred.

Rule absolute.^(c)

The KING against JOHN WILSON. Wednesday, June 17.

A conviction for an unlawful detainer is bad, if it only state that the prosecutor complained to the justices of an entry and unlawful expulsion and forcible detainer, and that they personally came and found the defendant forcibly detaining the premises, whereupon they convict him, &c. For the justices cannot know, by their view, without evidence, that the detainer was unlawful, or that there had been an unlawful entry.

Seemle, per Lord DENMAN, C. J., that the conviction should set out the facts from which the unlawfulness of the detainer is inferred.

Seemle, that such conviction ought to shew that the defendant was summoned, or had otherwise an opportunity to defend himself.

At the time of the above conviction, the defendant tendered to the justices a traverse of the force complained of; and, a few days after, an inquisition was held before the magistrates for the purpose of trying the alleged force by a jury, who, after hearing evidence adduced by both parties, found the defendant guilty; and the magistrates then gave restitution. A return was made to this court, on certiorari, of the conviction

(a) See *Rex v. Hodgson*, 3 C. & P. 422, under stat. 7 & 8 G. 4, c. 29, ss. 47, 48.

(b) As to the affidavit necessary in an action of tort, see *Snelling v. Chennells*, 5 Dowl. P. C. 80. As to the practice in this respect, in criminal cases, (after 7 & 8 G. 4, c. 29,) see *Rex v. Hodgson*, 3 Car. & P. 422.

(c) See *Rex v. —*, 1 Chitt. Rep. 698.

and inquisition. The latter was entitled an inquisition indented and taken, &c., by the oath of twelve, &c., before, &c., who say, upon their oaths aforesaid, that, &c.: stating an unlawful entry and detainer, but not reciting any complaint made by the prosecutors.

Held, that the inquisition was founded on the conviction, and could not be sustained, the conviction being void; and that the inquisition, even if looked at alone, was bad, as it did not state any complaint, nor by what authority the jury was summoned.

Held, further, that the court was bound to award a re-restitution, as a consequence of quashing the conviction, without inquiring into the legal or equitable claims of the respective parties.

The proceedings being returned by certiorari, and the conviction being, upon a concilium and argument, pronounced bad, the court would not, as a consequence of that judgment, quash the inquisition also, but heard its validity separately discussed on motion.

THE proceedings in this case (viz., 1. A conviction of forcible detainer, dated September 8d, 1834, alleging an entry, and unlawful amotion, on the 28th of August; 2. An inquisition taken thereon, dated September 10th, 1834; 3. A memorandum of restitution, of the same date, indorsed on the inquisition;) being before the Court by return to a writ of certiorari (see *Rex v. Wilson*, 1 A. & E. 627.) (a)

**Hill*, on a former day of this term, (b) moved (on concilium) that the conviction might be quashed. The grounds of motion are, first, [*818 that no unlawful entry appears to have been averred in the information; secondly, that no evidence of such entry appears to have been given before the justices; thirdly, that the conviction does not find an unlawful entry. The conviction states that the justices found Wilson forcibly detaining; but they could not know, from their view of that fact, how he had entered. *Rex v. Oakley*, 4 B. & Ad. 307, (1 Nev. & M. 58,) must govern this case. There it was clearly the opinion of *the Court, that, to support a conviction of an unlawful detainer, that act must appear to have been preceded [*819 by an unlawful entry, or be shewn, by facts specified in the conviction, to have been in itself unlawful. And in the former case of *Rex v. Wilson*, 1 A. E. 627, (3 Nev. & M. 753,) upon the present conviction, *Rex v. Oakley*, 4 B. & Ad. 307, (1 Nev. & M. 58,) was cited, and its authority seems to have been recognised by the Court. The inquisition, as ancillary to the conviction, must be quashed with it.

Sir W. W. Follett, contra. This is a good conviction under stats. 5 R. 2, st. 1, c. 8, 15 R. 2, c. 2, and 8 H. 6, c. 9, *Rex v. Oakley*, 4 B. & Ad. 307, (1 Nev.

(a) The conviction is set out in the report above referred to. See also the judgment in the present case, page 822, post. The inquisition, which is less fully stated in the former report, was as follows:—

"County of Leicester, to wit. An inquisition for our sovereign lord the king, indented and taken at the town hall of Market Harborough, in the said county, the 10th day of September, in the fourth year, &c., by the oaths of twelve good and lawful men of the said county, before the Reverend Edward Griffin and John Wetherall, clerks, and William de Capell Brooke, Esq., justices, &c., assigned, &c.; who say, upon their oaths aforesaid, that John Wilson of M. H. aforesaid, carpenter, on the 28th day of August, now last past, into and upon one messuage, with the appurtenances, in M. H. aforesaid, in the county aforesaid, whereof T. B., of M. H. aforesaid, watchmaker, and J. S., of the same place, grocer, were then lawfully and peaceably seised to them and their heirs in their demesne as of fee, and which said messuage is situate" (describing the situation particularly,) "unlawfully did enter, and the said T. B. and J. S., of the messuage aforesaid, unlawfully ejected, expelled and amoved, and the said messuage from them the said T. B. and J. S., unlawfully, with strong hand and armed power, did hold, and from them detain; and from the said 28th &c., until the day of the taking of this inquisition, with like strong hand and armed power did keep out, and doth yet keep out, to the great disturbance of the peace, &c., and against the form of the statute in such case, &c. We whose names are hereunto set, being the jurors aforesaid, do, upon the evidence now produced before us, find the inquisition aforesaid true." (Signatures of the jurors).

The indorsement is fully set out in the former report, 1 A. & E. 629.

(b) June 10th. Before Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

& M. 58,) is no authority to the contrary. There it did not appear either by the information, as recited in the conviction, or by the conviction itself, either that the defendant had unlawfully entered, or that he was not the rightful owner; nor was any fact alleged to shew that he had unlawfully held possession, or kept any person out. He might have been holding his own. PATTESON, J., there pointed out, as the mischief which stat. 8 H. 6. c. 9, was intended to remedy, that "a party who had acquired the possession of lands peaceably though unlawfully, might afterwards detain them forcibly:" he referred to the precedent in *Rex v. Elwell*, 2 Ld. Raym. 1514, (3 Ld. Raym. 860.) The principle of *Rex v. Oakley*, 4 B. & Ad. 307, (1 Nev. & M. 58,) is, that the statute of Hen. 6, shall not be executed against a man forcibly holding property which he is entitled to, against a wrong-doer. That principle does not affect the present conviction, by which it appears that the defendant had unlawfully expelled the complainants, and that the magistrates* saw him unlawfully, with strong hand, detaining the premises, *820] according as the parties laying the information had complained. The defendant could not, on this statement, have been holding what he was entitled to. It cannot be necessary that the actual entry should have been unlawful, if the holding clearly is so: as for instance, if a party enters by license, and then expels the tenant, and holds by force. One of the precedents in 2 Burn's Justice, tit. Forcible Entry and Detainer, IX. No. 5, 26th ed. p. 803, ed. 1836, vol. iii. p. 235,) is adapted to such a case, and follows, as the present conviction does (in all the statement now in question) the precedent in *Rex v. Elwell*, 2 Ld. Raym. 1514, 3 Ld. Raym. 360. The objection that no evidence of an unlawful entry appears to have been given before the Justices, is answered by the former case of *Rex v. Wilson*, 1 A. & E. 627. In the inquisition no defect is pointed out. [PATTESON, J. I did not mean to say, in *Rex v. Oakley*, 4 B. & Ad. 314, that the precedent in *Rex v. Elwell*, 2 Ld. Raym. 1514, 3 Ld. Raym. 360, was good. How can a magistrate, by his own view of the detainer, know the previous circumstances? Lord DENMAN, C. J. The view cannot shew how the party obtained possession. In the former case of *Rex v. Wilson*, 1 A. & E. 627, we did not decide that the justices might properly convict upon their own view of the holding, but only that a mandamus to set out evidence was not wanted.] Here they do not proceed merely upon their own view, but upon the information of the complainants. [PATTESON, J. That is mere assertion; then, because the justices see the party holding possession, they take it for granted that the statement is true.] The statute 8 H. 6, c. 9, s. 2, says, that where *821] "any doth make forcible entry into lands, "or them hold forcibly, after complaint thereof made" to the justices by the party grieved, the justices shall put the statute in execution. The object of the statute was to prevent breaches of the peace; and it is sufficient if the justices, after complaint made, find the party complained against holding with a strong hand even what he claims to be lawfully possessed of. [PATTESON, J. Such a statute would be in favour of trespassers. Lord DENMAN, C. J. If there be evidence that the party entered unlawfully, the view of the justices will supply the fact of his forcibly continuing to hold: that does no violence to common sense; but an immense violence is done to it by saying that, upon complaint made, the mere fact of a party's defending his possession shall be proof of an unlawful detainer.] Still it may be a question, whether the complaint may not be made without oath. [Lord DENMAN, C. J. Where would such proceedings end? If Wilson is now put out, he may give information to the justices against the present complainants, and if they are found defending their possession, it may be said that that is a forcible detainer by them.] Justices present highways upon their view; yet they cannot know by the view what are highways; they must have other information. In *Rex v. Oakley*, 4 B. & Ad. 307, the present objection was not taken; nor was any intimation given by the Court that proof of an unlawful entry was necessary, independently of the complaint laid before the jus-

tices, or that a conviction stating the facts as in *Rex v. Elwell*, 2 *Ld. Raym.* 1514, 3 *Lord. Raym.* 360, would not be approved of. In *Regina v. Layton*, 1 *Salk.* 106, 353, (see pages 827, 828, post,) the defendant was convicted, on view, *of a forcible detainer; and on habeas corpus, one objection taken [*822 was "that the complaint was of a forcible entry and detainer, and here is no forcible entry at all; and a man's house is his castle, which it is lawful for him to defend with force;" and the court took time to consider. In *Hawk. P. C. b. 1, c. 64, s. 40, 7th ed.* (after stating that a conviction of forcible detainer is not good unless a forcible entry be shewn) it is said, "yet in *Leighton's* case it was resolved, that such a forcible entry is sufficiently set forth in the complaint recited in such conviction." The right of a party to defend his own seems to be provided for by 8 *H. 6, c. 9, s. 7*, which enacts that they who keep their possessions with force in lands whereof they or their ancestors, &c., have continued their possessions by three years or more, be not endamaged by force of the statute. *Curr. adv. vult.*

Lord DENMAN, C. J. now delivered the judgment of the Court as follows: This is a conviction by two justices of the peace, who recited that Thomas Bates and John Stiles had complained to them that John Wilson into the messuage of them the said Bates and Stiles did enter, and them the said Bates and Stiles of the said messuages whereof they were seised to them and their heirs, in their demesne as of fee, unlawfully ejected, expelled, and amoved, and the said messuage from them the said B. and S., unlawfully, with strong hand and armed power, doth yet hold and from them detain, against the form of the statute; whereupon the said B. and S. prayed the said justices that a due remedy might be provided for them according to the statute: which complaint and prayer being heard, the said justices personally *came and then found and saw [*823 the said John Wilson the aforesaid messuage with force and arms unlawfully, with strong hand and armed power, detaining, against the form of the statute, as the said B. and S. had complained: therefore it is considered that the said John Wilson of the detaining aforesaid with strong hand, by our own proper view, is convicted, according to the form of the statute; whereupon the said justices set upon him a fine of 5*l.*, and do cause him then and there to be arrested: and the said J. W. being convicted, upon our own proper view, of the detaining aforesaid with strong hand aforesaid, is, by the said justices committed to the county gaol, there to abide until he shall have paid the said fine.

Then follows an inquisition, by twelve good and lawful men, before the same justices and another, who say that the said J. W. into the said messuage, whereof B. and S. were lawfully and peaceably seised in fee, unlawfully did enter, and the said B. and S. of the messuage aforesaid unlawfully ejected, expelled, and amoved, and the said messuage from the said B. and S. unlawfully, with strong hand and armed power, did hold and from them detain.

On the inquisition is indorsed a memorandum of restitution made by the same three justices to Bates and Stiles.

This conviction has been questioned before us on the ground that no lawful entry is averred even in the information, or proved by evidence, or adjudged by the justices. And we are of opinion that the conviction is bad for these reasons perhaps for some others also.

The justices have proceeded on the statute 8 *H. 6*, following up two statutes of Richard 2; the object of *which, according to *Hawkins*, is to prevent breaches of the peace by parties forcibly asserting their own rights. [*824 The earliest statute merely prohibits the offence of forcible entry on pain of imprisonment; the second gives summary power to the justices; the third extends the remedy to cases where the entry may have been peaceable, but is followed up by a forcible detainer.

In the case of *Rex v. Oakley*, 4 *B. & Ad.* 307, 1 *N. & M.* 58, we had to consider of a conviction precisely similar to the present, except that it neither averred an unlawful entry nor an unlawful expulsion; the present conviction

alleging the latter only. We all agreed (Parke, J. indeed not without some hesitation) that, though by the third statute above mentioned the original entry need not be forcible, it must have been unlawful, to give the magistrates jurisdiction. We see no reason now for entertaining a different opinion; for otherwise the manifest consequence would be that a party seized in fee and unlawfully dispossessed, who should afterwards peaceably recover his possession and maintain it by force, might be ejected, fined, and imprisoned, by two justices. But the statutes will not be found to invest them with such a power. The 5 Ric. 2, st. 1, c. 8, is in these terms: "the King defendeth, that none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand," &c. "*and if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished,*" &c. The 15 Ric. 2, c. 2, requires that the former statutes be carried into effect, and further, that at all times when such *forcible entry shall be* *825] *made*, and complaint thereof come to the justices of peace, they shall *go to the place, and commit the offender to prison. The statute 8 Hen. 6, c. 9, gives the like remedy in the case there described. The foundation of the proceeding, then, is not the complaint, but the fact; a fact which we think should be proved to the satisfaction of those who are to exercise the power, and appear on the face of the conviction.

In what I am reported to have said in *Rex v. Oakley*, 4 B. & Ad. 311, it appears that I had thought the justices had there adjudged the keeping out to be unlawful, and that I held the adjudication bad, for want of specifying the facts from which its unlawfulness was inferred. Speaking for myself, I think that holding correct, though not necessary for deciding that case or the present. For, in the conviction before us, the party interested is said to have complained (not even upon oath) that he was expelled: but the justices heard no evidence and came to no other decision on the fact than this, that finding and seeing the defendant *unlawfully* with strong and armed force *holding possession*, "it is considered that J. W., of the *detaining aforesaid* with strong hand by our own proper view is convicted:" he is then sentenced to fine and imprisonment.

Now, it is plain that the view of the justices, though it might embrace a forcible detainer, could give them no information as to its unlawfulness. The fact, of which they are eye witnesses, is in its own nature indifferent, as the rightful owner, in peaceable possession, may be seen defending his possession by force, and would be justified in so doing unless his possession were unlawful. If it were, that should be proved to the justices and adjudged by them.

*826] *A substantial doubt of the goodness of the conviction arises here, from its not shewing that the party was summoned or had the opportunity of defending himself against the *ex parte* charge. Hawkins, P. C. B. 1, c. 64, s. 60, lays it down that this is necessary with reference to another provision of 8 Hen. 6. "As the justice is bound to stay the award of restitution, upon the defendant's tendering a traverse of the force, so it hath also been said, that he ought not to make such an award in any case in the defendant's absence, without calling him to answer for himself; for it is implied by natural justice, in the construction of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself." For this he quotes Savile, 68, where Wray, C. J., speaking of his own practice under 8 Hen. 6, said, that he never useth to grant restitution without hearing the party indicted. Hawkins cites also Aley, 78, where Rolle, C. J. agreed that one may be indicted for not taking the oath of headborough, when duly appointed, "but then he ought to be warned to appear before a justice of peace, there to take his oath, and for want of that," and for another objection, the indictment was quashed. My Brother Parke observed in *Rex v. Oakley*, 4 B. & Ad. 312, 1 Nev. & M. 65, that, when a complaint is made, the party has the opportunity of traversing the facts, and must be taken to admit them, if he omit to do so. But, in the present case, if not in every similar case, the party had no such opportunity, not

having been present when the complaint was made. He could not then traverse the complaint, nor could he confront the witnesses, for none were examined, *nor was he summoned. Every thing is done behind his back, till he [827] is found and seen detaining the possession, whereupon he is arrested and imprisoned. When the inquisition is thereupon found, that may indeed be traversed by the party: and, according to C. J. Wray, he must be summoned, before the award of restitution. The disadvantage under which he will dispute the facts, if already thrown into prison, need not be dwelt upon, and there seems no stronger reason for summoning him in the last stage to defend his property, than in the first, when he may be deprived of his liberty and fined. This objection however is not among the points set down for argument, nor one of those on which the judgment of the Court is founded.

The precedents and authorities were supposed to sanction the present conviction: but they are very scanty; and indeed Layton's Case, 1 Salk. 363, may a most be said to stand alone. That was a conviction by the Lord Mayor, for a forcible detainer, after a forcible entry, of the Fleet Prison, by which Layton was fined 100*l.* and imprisoned quousque. One objection was that it did not negative three years' peaceable possession; but this was held unnecessary, because that is matter of defence given by a proviso. The Court also said that the conviction was traversable because the party is to be imprisoned. But this is no authority for asserting that a complaint alone is sufficient to warrant a conviction; and, if it were, it would only prove the conviction bad for want of summoning the party to answer such complaint. With regard to the particular point raised here, on which we decided the King v. Oakley, 4 B. & Ad. 307, 1 N. & M. 58, viz. the want of averring *that the defendant's entry was [828] either forcible or illegal, no judgment was given. "Sir James Montague took exceptions," "that the complaint was of a forcible entry and detainer, and here is no forcible entry at all; and a man's house is his castle, which it is lawful for him to defend with force. Curia advisare vult." Thus far the report. Mr. Dealtry has found the warrant for Layton's committal to Newgate, bearing date March 27th, 1705. The objection we are now considering certainly appears upon the face of it, and must have been overruled by the great authority of Holt, if this Court ultimately convicted Layton by virtue of it. This fact however is not certain, nor very probable. For the commitment just referred to is undoubtedly imperfect, being for an indefinite period, and no fine being imposed. But we have been furnished from the same quarter with a second commitment, dated a week later, and executed in all probability when the defects of the first were discovered. In this the Lord Mayor says that he has fined the parties 100*l.* each; but the offence, of which on his own view he convicts them, is that of riot and forcible detainer. This is manifestly the conviction reported by Salkeld, on which the Court took time to consider. But the records of this Court farther show that Layton and the others were ordered to find bail to answer an indictment preferred against them at the Old Bailey sessions on the 18th April, 1705, for a riot and assault in the Fleet. It does not appear that they found bail, and in Easter Term of the same year they were committed to the Marshal. As we find no further record of these proceedings, they probably were not pressed to a legal decision, and it remains at least doubtful whether the imprisonment was upon the summary conviction or for want of bail. *Layton had been warden of the Fleet, and forfeited the office in 1699 [829] by a judgment which was affirmed in Parliament in 1704. He had the office again granted to him in January, 1707. Taken altogether, these circumstances wear the appearance of a compromise.

In Rex v. Elwell, 2 Ld. Raym. 1514, a conviction very like the present was brought before the Court and quashed. The objection was that imprisonment was awarded till fine paid, and no fine set. The form of that conviction is copied into Burn's Justice from the third volume of Lord Raymond, 3 Ld. Raym. 360, and was contrasted by my brother Patteson, in Rex v. Oakley, 4

B. & Ad. 814, 1 Nev. & M. 66, with that which was then held bad on another ground. It was thence inferred that he approved of the form in *Rex v. Ellwell*, 2 *Ld. Raym.* 1514, in every other particular; but surely no mode of arguing can be less just. One fatal objection is sufficient in each of these cases; and, in deciding *Rex v. Oakley*, 4 B. & Ad. 807, 1 N. & M. 58, it was not necessary to enter into that now before us.

The fact appears to be that summary convictions on these statutes were at all times of rare occurrence, and that parties were in the habit of proceeding to obtain restitution by the safer course of indictment. But far greater precision was required in the form of the indictment than is found in this summary conviction: see *Fitzwilliams's Case*, *Cro. Eliz.* 915, *Cro. Jac.* 19, and many other cases collected in *Viner's Abridgment*, tit. *Forcible Entry*, and in 1 *Hawk. Pl. Cr.* p. 495, 8th (Carwood's) edition.

Upon the whole, we think the conviction bad for these reasons, and it follows that the inquisition founded upon it must also be quashed.

*830] *(THE COURT*, however, being afterwards of opinion, that the inquisition could not regularly be quashed on the present proceeding, there being no rule before the Court for that purpose, the judgment was entered for quashing the conviction only).

Conviction quashed.

A rule was obtained in Michaelmas term 1835, calling on the prosecutors to shew cause why the inquisition should not be quashed, and a writ of re-restitution awarded. The motion was grounded upon affidavits filed in this case on former occasions, by which the following facts, among others, appeared. Wilson claimed the premises as heir at law; Bates and Stiles under a will. On the 28th of August, 1832, they entered during Wilson's absence, claiming to take possession; but on his return they were induced to depart, it being agreed that a meeting should be held for a settlement, if possible, of the dispute. On the 3d of September, Wilson, hearing that proceedings were about to be taken against him for a forcible detainer, attended without summons at the town hall of Market Harborough, where the magistrates were in the habit of assembling; and an information was then exhibited against him by Bates and Stiles, before two justices, Messrs. Griffin and Brooke, for forcibly detaining the above-mentioned premises. Witnesses were examined in support of the information, but the magistrates refused to allow Wilson's attorney to cross examine, or to produce witnesses on his behalf, alleging that the then proceeding was *ex parte*. The magistrates afterwards proceeded, with the attorney's clerk who attended for Bates and Stiles, to the dwelling house, part of the premises in dispute,

*831] where Wilson's wife and *family then were, Wilson being absent. The door was fastened; but, on a threat to break in, and at the desire of Mr. Brooke, the wife opened it. The affidavits on Wilson's part denied any use of force in resisting, or violent conduct afterwards; but on the latter point there were contradictory statements. Wilson came upon the premises after the magistrates had entered; and, upon his saying that he would not give up the premises unless compelled by law, the magistrates ordered a constable to apprehend him. He then served one of them with the following notice. "I do hereby give you notice not to trespass upon the premises in Market Harborough, now in my occupation; and further, as I understand you, as a magistrate, with your assistants, intend to enter upon the same premises, and dispossess me thereof, that I traverse the force alleged to have been used by me, touching the possession of the said premises; and that Messrs. Stiles and Bates, who I hear claim title thereto, never were in possession of the said premises; but that they intruded themselves thereupon when part of my family and my servants were in possession of such premises, and when I myself was attending the funeral of my mother, and stated that they would use force to turn me out; and that I am prepared with evidence to support these facts, and now tender my witnesses to you for examination; and that if, after this, you dispossess me, or interfere with me in any

respect, touching the possession of the said premises, you will do so at your peril. John Wilson."

The magistrates, about an hour afterwards, returned to the town-hall, where Wilson was brought before them, in custody, and informed that they had convicted him, on their view, of a forcible detainer, and had fined him *5*l.*, and that, in default of payment, he would be committed. They refused [*832 to hear any defence, stating that their own view was sufficient ground for a conviction. Wilson proposed to enter into recognizances to try the validity of the conviction and pay the fine and costs if it were confirmed; but the justices refused to accept this offer, and made out a warrant for Wilson's committal, which, however, they permitted to remain in the constable's hands, unenforced, till the following Tuesday, when they said they should again be assembled; and Wilson was set at liberty, but a sheriff's officer was placed upon the premises. On the Tuesday, September 10th, an inquisition was held at the town-hall, before Mr. Griffin, Mr. Brooke, and a third magistrate, Mr. Wetherall, for the purpose of trying the traverse of the force alleged to have been committed by Wilson. Upon this occasion, Bates and Stiles produced the will upon which they relied, and adduced other evidence, including the conviction of Wilson, all of which was objected to by him, but was admitted by the magistrates. Wilson cross-examined, and also called witnesses of his own to negative the violence imputed to him. The information, which lay on the magistrates' tables, and was admitted by them to be the information and complaint upon which they proceeded, was objected to on Wilson's behalf, as not alleging an unlawful entry; but the objection was overruled. The jury found Wilson guilty of an illegal detainer;(a) and the magistrates then turned his family out of the premises, and indorsed a memorandum of restitution on the inquisition, 1 A. & E. 629. Bates *and Stiles had never, before these proceedings, had [*833 possession of the premises, but they had been occupied by Wilson. 'Some statements were added, in the affidavits, on Wilson's part, as to his title, and the alleged invalidity of the will. In Trinity term, 1836.(b)

Sir *W. W. Follett* showed cause. The judgment at first given in this case, when the conviction was quashed, that the inquisition should be quashed also, was extrajudicial, and ought not now to have any weight. The conviction may be bad, and yet the inquisition valid. The conviction was for the purpose of arresting and fining the defendant, under stats. 15 Rich. 2, c. 2, and 8 Hen. 6, c. 9, sects. 1, 2. That was a proceeding on the 8d of September by two justices, finding an entry and unlawful detainer, on complaint and on their own view. The inquisition is wholly independent of the conviction; it is for the purpose of restitution under stat. 8 Hen. 6, c. 9, sects. 2, 3; it is taken on the 10th of September, before a jury, on examination of witnesses and hearing of the defendant; and they find, not only an unlawful detainer, but an unlawful entry. The finding of an unlawful entry is distinct from that of an unlawful detainer, and might be separately proceeded upon, under sect. 3 of the statute. The course taken here has been regular, according to that section, and authorises the magistrates to give restitution, although there may previously have been an insufficient conviction. The authorities formerly cited do not affect this case. A re-restitution is prayed; but the granting of this is not "ex rigore juris;" the power to grant it is vested in the court only by an equitable *con- [*834 struction of the statutes, and is never exercised but when, upon a consideration of the whole circumstances, the defendant appears to have some right to the tenements; 1 Russ. on Crimes, 293. Where the first restitution was tortious, re-restitution is to be granted of right; otherwise it is discretionary; *Rex v. Harris*, 1 Ld. Raym. 482. (He then commented on the facts of the present case, with reference to this point.)

(a) For the inquisition, as returned to the certiorari, see note (a), p. 817.

(b) May 26th. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

Hill, contra. It was clearly the opinion of the court, upon the former decision in this case, that the inquisition ought to be quashed with the conviction; their refraining so to quash it was upon a point of practice, it being suggested that, on the concilium, the inquisition was not before them for this purpose. The inquisition was, in fact, merely ancillary. It arose upon the traverse of the force, tendered by Wilson at the time of the conviction. The affidavits clearly trace the connection of the two proceedings. That which is called a conviction in this case is not to be considered, with reference to practice, like the summary convictions now in use. When the statute of Hen. 6 was passed, the power of justices to convict out of sessions on evidence had not been established, nor was it clearly so till after the stat. 33 H. 8, c. 6, 1 Paley on Convictions, Introduction, p. xxix. 2d ed. Until that power was established, justices out of sessions could convict only on confession or on view, and their conviction on view was traversable. The difficulty as to *Regina v. Layton*, 1 Salk. 106, 353, has arisen from the conviction being dealt with upon the same *835] principles as a modern summary conviction. The *Lord Mayor there had convicted on his view, reciting a complaint made before him of a forcible entry, and that was not traversed. And, as it appeared by the finding in the conviction that there had been a valid complaint, and no traverse was taken on that finding, the conviction was ultimately affirmed, *Queen v. Leighton*, *Fortesc. Rep.* 173 (*Mich. T. 7 Ann*); though, in the judgment of this court on quashing the present conviction, it was conjectured that no decision had taken place. The inquisition, then, in this case, though it appears a substantive proceeding, is merely a kind of issue, arising out of the conviction, for the trial of a fact there suggested, and which the defendant wishes to dispute. The affidavits show how it originated. But, further, if the inquisition be an independent proceeding, it is defective on the face of it, inasmuch as it does not state a complaint made. The words of 8 Hen. 6, c. 9, s. 2, "That from henceforth where any doth make any forcible entry in lands and tenements, or other possessions, or them hold forcibly, after complaint thereof made within the same county where such entry is made, to the justices of peace, or to one of them, by the party grieved," extend both to the proceeding by conviction next referred to, and to that by inquisition, directed by the following section. Neither proceeding is to originate with the justices; each must be grounded on a complaint. [PATTERSON, J. Has the jury upon the inquisition anything to do with the complaint?] It is necessary, to give jurisdiction under the statute, and ought therefore to be stated, to show that the statute has been regularly pursued. *836] This is analogous to the rule now prevailing as to summary *convictions. If the jurisdiction do not appear, the conviction is bad, and cannot be helped by affidavit. It is true that the complaint is no part of the finding of the jury; but the justices return, with the inquisition, a memorandum in the nature of a caption, and that ought to state the matter necessary to give jurisdiction. [LITLEDAL, J. It seems by the inquisition that they profess to act merely on their own authority. Looking at the inquisition and at the statute, I begin to think that the proceeding is defective as you say. At first I thought that the inquisition was perfect in itself.] As to re-restitution, it may be admitted that the law is as stated in 1 Russ. on Crimes, 298, from Hawk. Pl. Cr. Book 1, c. 64, s. 65. But here the equity is with the defendant. (He then commented on the affidavits as to this point.)

Sir W. W. Follett. In 2 Burn's Justice, tit. Forcible Entry and Detainer, s. VI, (page 798, (26th edit.) s. V. p. 230, ed. 1886,) it said (upon the words "complaint by the party grieved,") "Yet these words do not enforce any necessity of such a complaint; for it is holden, that the justice may and ought to proceed upon any information or knowledge thereof whatsoever, though no complaint at all be brought unto him by any party grieved thereby;" and Lambard 147, (*Eirenarcha*, book II., c. 4, p. 147, (1619), is cited. And the form

(No. 9.) of an inquisition, under the same head, says nothing of a complaint. *Cur. adv. vult.*

Lord DENMAN, C. J. in the same term (June 13th) delivered the judgment of the Court.

*In this case, which has been before the Court on a former occasion, [*837] we are moved to quash an inquisition, and award a writ of re-restitution, in pursuance of our former judgment, which set aside the conviction of the defendant by magistrates for the offence of a forcible entry, and in which we expressed an opinion that the inquisition founded upon it must also be set aside. The grounds of that judgment were fully stated and have not been questioned in the argument on this rule; but it was said that, however defective the conviction, the inquisition, being the act of a jury regularly brought together, and the result of an examination of witnesses at which both parties assisted, ought not to be set aside. We are however of opinion, that as the inquisition was founded on the conviction, which turns out to be a complete nullity, for reasons which it is unnecessary now to repeat, the inquisition also is a proceeding without any warrant of law, and must be set aside. Whether it may have any effect as evidence in other controversies between the parties, we need not consider now. But, indeed, the inquisition is in every other respect wholly inoperative, its use being to give effect to a conviction, which is of course impossible where the conviction itself is void. If it could be permitted to stand as a part of the proceedings, it would appear to justify the transfer of the possession worked by the conviction, when the conviction itself is given up as indefensible, which cannot be permitted. And the inquisition, if taken by itself without reference to the conviction, is in itself defective, inasmuch as it does not shew that any complaint had been made, nor by what authority or on what account the jury was summoned.

But the defendant would gain nothing by our judgment, *if we should merely declare the proceedings null: another step is necessary on the [*838] part of the Court, in order that full justice may be done him.

If we allow him to remain dispossessed of the premises held before, full effect will be given to an act which we have pronounced wrongful.

A writ of re-restitution is prayed, to prevent this consequence; and the original complainant has stated his objections to our awarding that writ. On looking into the authorities, (a) we find that the Court has been in the habit of awarding that writ, when it has quashed the conviction for forcible entry; otherwise the whole proceeding here would be nugatory; and the practice is accordingly said to have grown out of an equitable construction of the statutes.

It has been said that the Court will not do this unless the party unlawfully dispossessed should appear to have title to the premises,—a most inconvenient inquiry upon affidavit, and a course full of danger to the public peace, as protecting the execution of an unlawful sentence. But in *Rex v. Jones*, 1 Stra. 474, the Court declared, even where the conviction was quashed for a merely technical error, and the lease of the dispossessed person had expired during the litigation, “that they had no discretionary power in the case, but were bound to award restitution on quashing the conviction.”

This rule therefore for quashing the inquisition must be made absolute, and re-restitution will also be awarded. Rule accordingly.

(a) 1 Hawk. P. C. B. 1, c. 64, s. 65, 66. 13 Vin. Abr. 392, tit. Forcible Entry and Detainer, O. Bac. Abr. Forcible Entry and Detainer (G), vol. iii. p. 725 (7th ed.).

*FARLEY and Others, Executors, *against* JOHN WILLIAM BRIANT and others. *Wednesday, June 17.*

1. B., as surety for J., became party to an indenture whereby A. leased land to J., at a rent payable by J., for a term determinable on A.'s death; and B. and J. covenanted jointly and severally for themselves and their heirs that B. and J., or one of them, or their heirs, executors, &c., should pay the rent reserved, and also a further rent, as liquidated damages, if the land were farmed contrary to the covenants of the lease. After B.'s death, rents of both kinds became due: Held, that B.'s devisees were not liable, under stat. 3 & 4 W. & M. c. 14, to an action of debt for any of the sum due.
2. In the above action, the declaration stated that, during the term, to wit, 1st of August, 1823, B. died, and that the rents became due on days named, which appeared by the dates, but were not alleged, to be later than that day. Plea, that B. died before any part of the debt became due, concluding to the court. On special demurrer to the plea, for not traversing or denying, or confessing and avoiding, and for putting in issue matter of law: Held, that if the declaration did not show a debt in B.'s lifetime, it was bad; and that, if it did, the plea traversed it; and that the conclusion to the Court, if bad at all, should have been specially objected to by the demurrer.
3. In order to induce the court to exempt an executor, who has fallen in an action brought by him in that character, from costs, under stat. 3 & 4 W. 4, c. 42, s. 81, it is not sufficient that the action has been brought bona fide, under counsel's advice, and that it has been defeated on a difficult point of law, unless there be improper conduct on the part of the defendant. Unnecessary prolixity in the pleadings is not such conduct. Nor omitting to give the plaintiff information which might have prevented his proceeding with the action, if the plaintiff did not apply for the information.

DEBT, by the executors and executrix of Sir Thomas Hussey Apreece, Bart., *against* John William Briant, heir of John Briant, and Mary Briant, William Henry Briant, and Charles Briant, surviving devisees of John Briant, of divers lands, &c. of John Briant.

The first count of the declaration (dated 21st of December, 1832) stated that, in the lifetime of Sir T. H. Apreece, to wit, 29th of September, 1819, by indenture between Sir T. H. Apreece of the first part, John Robert Jenkins of the second part, and the said John Briant, as surety for J. R. Jenkins, of the third part, the date whereof is a certain &c., to wit, the day and year last aforesaid, Sir T. H. Apreece demised to Jenkins certain messuages and lands for fourteen years from the date, if Sir T. H. Apreece should so long live, at a yearly rent of 590*l.*, payable quarterly, and also at certain further rents for
 *840] every acre which Jenkins should use *in certain ways respectively in the indenture specified, and a further rent for every acre husbanded contrary to the covenants in the indenture afterwards contained; which further rents it was thereby declared and agreed, should be deemed, and taken, and be paid as and for liquidated sums by way of settled damages, and not by way of nomine pœnæ or in terrorem: and J. R. Jenkins and John Briant, for themselves, jointly and severally, and for their several and respective heirs, executors, administrators, and assigns, did covenant, &c., with Sir T. H. Apreece and his assigns, that J. R. Jenkins and John Briant, or some or one of them, or their heirs, executors, administrators, or assigns should pay the said rent of 590*l.*, and such further rents as should become due; and also that J. R. Jenkins should farm the land in a husbandlike manner, and should not sow, &c. (as in the indenture particularised). The declaration then stated that afterwards, to wit, 27th of May, 1833, Sir T. H. Apreece died, and that, during the term and in the lifetime of Sir T. H. Apreece, to wit, 25th of December, 1832, a large sum, &c., to wit, 295*l.*, for rent for two quarters became due and still is unpaid. The declaration then stated different breaches by Jenkins of covenants as to farming, and that further rents thereby became due, amounting on the whole, on 25th of December, 1832, to a large sum, &c., to wit, &c., which is still unpaid; and the declaration also set forth other breaches of the same kind, by which further rents, amounting on 25th of

December, 1832, to large sums, to wit, &c., became due and are still unpaid: averment that, after the making of the indenture and during the continuance of the term, to wit, 1st of August, 1823, John Briant died, having by his last will and testament *duly executed and attested to pass real estates, and [*841 bearing a certain date, to wit, 19th of November, 1822, devised certain lands, &c., to the defendants, Mary Briant, William Henry Briant, and Charles Briant, and to one William Back, since deceased, which lands and tenements the said John Briant had power so to dispose of.

The second count averred only breaches of the covenants as to cultivation, whereby, afterwards, to wit, 29th of September, 1832, a large sum of money, to wit, &c., for further rents, became due and is still unpaid.

The four defendants all pleaded separately.

Mary Briant pleaded:

First, that the indenture in the second count is not the deed of John Briant.

Secondly, after setting out on over the indenture in the first count, that Sir T. H. Apreece, in his lifetime, and at the time of his death, was not a creditor of John Briant, having a just debt due and owing to him the said T. H. Apreece, upon or by virtue of any bond or other speciality within the meaning of the statute in such case, &c.: verification.

Thirdly, as to the first count, that, before any part of the said debt in the said first count mentioned accrued due, as in that count mentioned, and in the lifetime of the said Sir T. H. Apreece, the said John Briant died: verification.

Fourthly, fifthly, sixthly, and seventhly (to the same count), traversing different breaches by Jenkins.

Eighthly, to the same count, that, by the last will and testament of John Briant, he gave, &c. (mentioning several devisees besides the defendants), and that the several devisees are still living and have not renounced, &c.

*Ninthly, to the same count, that the defendant had no lands by de- [*842 vise, except certain premises in Essex and Middlesex: that the former had been sold, and the proceeds applied to satisfy a bond debt of the devisor; and that the latter had been taken by the directors of the St. Katharine Docks Company (under stat. 6 G. 4, c. cv., local and personal, public), for a sum assessed by a jury, which had been paid into the Bank to the account of the Accountant-General of the Court of Exchequer, and invested in 3 per cent. consols.

Tenthly, to the same count, that, after the making of the indenture, and the death of John Briant, and in the lifetime of Sir T. H. Apreece, by indenture dated 1st of January, 1826, made between Sir T. H. Apreece of the one part, J. R. Jenkins of the second part, and the defendant Mary Briant and W. Back of the third part, the rent mentioned in the indenture of lease was reduced, and the option of determining the term released, and the provisions of the lease in other respects altered.

Eleventhly, to the same count, that, by a certain other indenture, dated 9th of January, 1833, between J. R. Jenkins of the first part, Mary Briant of the second part, and Sir T. H. Apreece of the third part, the residue of the term was surrendered to Sir T. H. Apreece.

The defendant William Henry Briant pleaded the twelve following pleas, and the same were also pleaded severally by Charles Briant.

The first eight were the same respectively as the first eight pleaded by Mary Briant.

The ninth was a plea corresponding to the ninth of Mary Briant, mutatis mutandis.

*The tenth and eleventh pleas were the same as the tenth and [*843 eleventh pleas of Mary Briant.

The twelfth plea was a plea of a bankruptcy by each defendant.

John William Briant pleaded:

First, like Mary Briant's first plea.

Secondly, after setting out on oyer the indentures in the first count, that he took nothing by descent from the said John Briant.

Thirdly, like Mary Briant's second plea, but without oyer.

Fourthly, like Mary Briant's third plea.

Fifthly, sixthly, seventhly, and eighthly, like Mary Briant's fourth, fifth, sixth, and seventh pleas respectively.

Ninthly, like Mary Briant's tenth plea.

Tenthly, like Mary Briant's eleventh plea.

Issue was joined on the first, fourth, fifth, sixth, and seventh pleas of Mary Briant, William Henry Briant and Charles Briant, on the twelfth plea of William Henry Briant and Charles Briant, and on the first, second, fifth, sixth, seventh, and eighth pleas of John William Briant.

The plaintiffs demurred to the second, third, eighth, and eleventh pleas of Mary Briant, William Henry Briant, and Charles Briant, and to the third, fourth, and tenth pleas of John William Briant.

On the ninth plea of Mary Briant, William Henry Briant, and Charles Briant, the plaintiffs prayed judgment, &c., to be levied upon the lands, &c., of John Briant, which should or might thereafter come to those defendants respectively, as devisees of the said John Briant, in case judgment should be given against them on their other pleas.

*844] "To the tenth pleas of Mary Briant, William Henry Briant, and Charles Briant, and to the ninth plea of John William Briant, the plaintiff replied, that the deed was executed by Sir T. H. Apreece on the 5th of October, 1832, and that no day or month was therein mentioned by way of date, with a special traverse of the deed being executed at the time mentioned in the plea, concluding to the country.

The defendants joined severally in demurrer.

All the demurrers were special. The Court pronounced its judgment only on the demurrer to the third plea of Mary Briant. The causes assigned in that demurrer were, that the said plea was defective, as it did not consist of matter of fact, but of argument and legal inference only; that the plea neither traversed nor denied, nor confessed and avoided, the causes of action; and that it put in issue matter of law; also, that it was no answer to the action.

In Easter term last, Friday, May 1st, (a) the demurrers to the second and third pleas of Mary Briant were argued. The Court having confined its judgment to the third plea, the arguments on the second are omitted.

Stephen, Serjt. in support of the demurrer.

I. Upon the demurrer to the third plea, the substantial question is, whether, under st. 8 & 4 W. & M. c. 14, s. 3, the death of John Briant prevents the plaintiff from recovering. On this record, it must certainly be taken that he died before any of the breaches occurred. But neither the intent nor the *845] letter of the statute confines the remedy to cases where the debt becomes payable in the lifetime of a covenantor or obligee. It is true that the first three sections speak of creditors; but the whole context shows that the word is used so as to include this case. The evil pointed at in the recital, in the first section, is that persons have "by bonds or other specialties bound themselves and their heirs, and have afterwards died seized in fee simple of and in manors, &c.," "or had power or authority to dispose of or charge the same by their wills," and have, "to the defrauding of such their creditors, devised the same, or disposed thereof, in such manner as such creditors have lost their said debts." The creditors here spoken of are, therefore, parties in favour of whom the bond or specialty is made. Sect. 2, makes wills fraudulent and void as against *such creditors* as aforesaid; and sect. 3, gives to every *such creditor* an action of debt against the heir and devisees jointly. The creditors here meant are such persons as, by virtue of the bond or instrument, ultimately

(a) Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Js.

become creditors. It is not essential to the relation of creditor and debtor that money should be payable during the lives of the parties. Such a relation may exist before anything be actually payable, as in the case of a debitum in presenti solvendum in futuro. The policy of the statute is to prevent owners of lands from placing their land out of the reach of the liability arising upon their own deeds; which, within both the statutable and the moral sense, is a fraud. [LITLEDALE, J. An executor may pay simple contract debts, though his testator be under a covenant, if the covenant has not been broken.] For the purpose of the present argument, it is sufficient that he cannot do so if he have *notice of a breach of covenant subsequent to the testator's death. That shows that such a breach creates a debt from the testator. In Wilson [*846 v. Knubley, 7 East, 128, it was held that covenant would not lie against a devisee for breaches in the testator's lifetime, the statute mentioning only debt. That was an instance of the mischief arising from a narrow interpretation of the statute; and it led to the enacting of stat. 11 G. 4, and 1 W. 4, c. 47, s. 3, (a) which gave the action of covenant also.

The new act may be taken as a legislative declaration of the intent of the former act, so far as the form of action is not concerned; and here the form of action is not concerned, for debt is unquestionably a proper form of action on this specialty. Now, in sect. 2, of the new act, the legislature, in declaring against what parties the will is to be fraudulent and void, does not (as in the earlier act) use the word creditor, but only mentions such persons with whom the deviser "shall have entered into any bond, covenant, or other specialty binding his, her, or their heirs." Then sect. 3 enacts, that "*such creditor*" shall have his action of debt and covenant. Thus, in the later act, creditors are generally persons with whom the specialty is entered into: that must therefore be the meaning of the term in the earlier act, since the latter act was not meant to introduce any change as to the parties benefited. "Creditor" is used in the same sense as covenantee or obligee. If the meaning were so confined as must be contended on the other side, it would have been easy, in the earlier act, to say, "where any person shall die, owing such money."

*One test of the applicability of stat. 3 & 4 W. & M. c. 14, is, whether the heir could be sued alone at common law; for the intention was [*847 to extend the previous liability of the heir to the devisee. Now in 14 Vin. Abr. 288, Heir (A.) pl. 1, it is said, "If A. grant for him and his heirs to B. for years, or, &c., an annuity to have to him after the death of A. the grantor, though A. himself could never be charged upon this grant, inasmuch as it is to be paid after his death, yet, inasmuch as he binds himself and his heirs, his heir shall be charged if he has assets, as well as where a man binds himself and his heirs by obligation to pay money after his death." That goes much beyond the present case; for there the obligee could in no event have been liable in his lifetime. In Plasket v. Beeby, 4 East, 485, it was contended that an infant devisee might pray that the parol might demur, on the ground that the intent of the statute was to place the heir and devisee on the same footing; but the court held that the privilege of the heir was peculiar, originating in the situation in which the feudal law of tenure placed him, with regard to his land, during his infancy. But the liability to the specialty debts of the ancestor, does not rest upon any feudal privilege: that case, therefore, affords no ground for distinguishing, in the present question, between the heir and the devisee.

Another test is, whether the executor could retain, if he were himself the covenantee; for that would depend upon his claim constituting, or not, a debt from the testator. Now he could so retain; Plumer v. Marchant, 3 Bur. 1380. There the testator had covenanted that he by will, or *his executors or administrators within six months after his death, should pay to the de- [*848

(a) Which (sect. 1) is not applicable to the case of persons dying before the passing of the act, 16th July, 1830.

defendant 700*l*. The defendant, having become administrator to the covenantor, claimed to retain the 700*l*. In the argument against the claim, it was urged that it was not "a debt in the testator; but the court allowed the claim.

In *Ex parte Tindal* (a) a party covenanted to cause to be paid 4000*l*., within twelve months after his decease, to his wife's trustees, the annual produce to go to her for life, in case she survived him. The covenantor having afterwards become bankrupt in his wife's lifetime, the wife's trustees claimed to prove under stat. 6 G. 4, c. 16, s. 56; and one question, as stated by Tindal, C. J., in delivering judgment, was, whether the bankrupt had, before the commission issued, "contracted any debt payable upon a contingency" which had not happened before the issuing of the commission; and it was held by Lord Brougham, C., Tindal, C. J., and Littledale, J., that the demand was proveable. There the husband himself could not have been called on to pay in his lifetime; and there was no reason for holding that he had contracted a debt, which would not be good in the present case. In *Westfaling v. Westfaling*, 3 Atk. 466, Lord Hardwicke expressed himself against giving a limited construction to the statute, as being made for preventing fraud. It has often been said that early statutes are more loosely worded, and should receive a more liberal construction, than *849] modern ones. (b) A strong instance *of this mode of interpreting statutes is the construction put upon stat. 8 & 9 W. 3, c. 11, s. 8, where the word "may" has been construed as if it were "must."

II. The third plea is defective in form. From *Bissex v. Bissex*, 3 Bur. 1729, it appears that, where the time is material, it is sufficiently alleged, though it be laid only under a *videlicet*, upon general demurrer. Therefore, the plea, if it deny the time of the death, should have been in the form of a traverse, and have concluded to the country, Com. Dig. Pleader, (E. 32), (G. 2); Bac. Abr. Pleas and Pleadings, (H. 3), vol. vi. p. 262, (7th ed. 1832); note (3) to *Hayman v. Gerrard*, 1 Wms. Saund. 103 a.; since the plaintiff, in reply, could only repeat the allegation in the declaration. The plea, is in fact a constructive denial of the allegation in the declaration. [PATTERSON, J. It treats the declaration as ambiguous, and makes it certain.] That cannot be done. The defendant should have demurred for ambiguity, or else he should have denied or confessed. If the plea admit the time of the death, it is a mere allegation of a matter of law.

R. V. Richards, contra.

I. Sect. 1, of stat. 3 & 4 W. & M. c. 14, shows that the intention was to prevent debtors from defrauding their creditors; and so the next two sections are to be understood. Then was John Briant a fraudulent debtor? Was he ever liable to be sued on this specialty? If not, he was not a debtor, nor were the covenantees his creditors. No time can be pointed out, at which he was so liable. This was not a *debitum in præsenti solvendum* in future: the money was not, *850] during his life, payable at all events: there might have been no breach of covenant, or an eviction, or a determination of the lease by the death of Sir T. H. Apreeca. Then, again, the *reddendum* is by Jenkins alone, though some of the covenants are by Jenkins and Briant. The only safe method of interpreting the act is to adhere to the words. The analogy between heir and devisee does not exist, as appears from *Plasket v. Beeby*, 4 East, 485. The heir's liability is by common law; that of the devisee by the statute only. The remarks of the judges in *Wilson v. Knubley*, 7 East, 128, though the decision certainly was upon the form of action, show that the statute is not to be extended beyond its terms, which point only to actual debts existing in the devisor's time. In *Welch v. Welch*, 4 M. & S. 388, the plaintiff was surety for the defendant

(a) 8 Bing. 402. S. O. 1 Deac. & Ch. 291. 1 Mont. Ca. Bank. 375, 462. See the previous decisions, 1 Mont. & Mac. 415, 422.

(b) See some instances collected in the arguments in *Adam v. The Inhabitants of Bristol*, 2 A. & E. 395, 398, 399, 400, 401.

in an annuity deed : afterwards the defendant became bankrupt and obtained his certificate ; and the plaintiff, having subsequently been compelled to pay arrears due after the commission, sued the defendant, who relied upon stat. 49 G. 3, c. 121, ss. 8 and 17 : but Lord Ellenborough said that it was not a debt, quoad the surety, until he was in a condition to be damned by it. That principle was adhered to in *Flanagan v. Watkins*, 8 B. & Ald. 186, which was affirmed in error, *Watkins v. Flanagan*, 1 Ring. 413, in the Exchequer Chamber. These decisions led to the enactments in stat. 6 G. 4, c. 16, ss. 54, 55. In *McDougal v. Paton*, 8 Taunt. 584, the plaintiff, being surety for the defendant's payment of certain rents, had been compelled to pay arrears accruing after a commission of bankrupt had issued against the defendant, who had obtained his certificate : and it was held that the plaintiff's claim was not met by stat. 49 G. 3, *c. 121, s. 8 : and Dallas, C. J., during the argument, said, "Is it [*851 possible that this rent, which was not due till after the bankruptcy, can be considered as a debt due at the time of issuing the commission?" So, in *Alsop v. Price*, 1 Doug. 160, it was held that a surety in a bond, which had not been forfeited till after the bankruptcy of the principal, was not barred by stat. 7 G. 1, st. 1, c. 31, s. 1, from recovering against the principal, after his certificate, for money paid upon the forfeiture of the bond ; and Lord Mansfield said, "It was not a debt to be paid by him in futuro, at all events, but depended on the acts of the principal, viz. whether he did or did not comply with the stipulations in the condition of the bond." This was afterwards met by stat. 49 G. 3, c. 121, s. 8. *Ex parte Adney*, 2 Cowp. 460, and *Goddard v. Vanderheyden*, 8 Wils. 262, are to the same effect. These decisions show how far the present case differs from that of a bond conditioned for future payments absolutely, where there is a debitum in presenti solvendum in futuro. [LITTLEDALE, J. Suppose a bond for the payment of rents. COLERIDGE, J. An obligee acknowledges himself indebted. The statute is to prevent fraudulent devices ; but how can there be a fraud in not providing against a claim of which the devisor does not know the existence? In the case of a bond for a penal rent, which never can become due, the argument for the plaintiff would draw the whole within this act.] And it would make John Briant, at the moment of the execution of the deed, a debtor for every breach which could accrue afterwards.

II. The plaintiff is bound to bring the case within the act by his declaration. If the substantial objection *be good, and the declaration shew that the [*852 breaches were subsequent to the death of John Briant, the declaration is bad : if this do not appear by the declaration, then the plea introduces new matter.

Stephen, Serjt. in reply.

First. The fact of the damage being contingent does not make the devise the less fraudulent : the devisor, knowing his contingent liability, ought to have charged the lands in the event of the damage accruing. [COLERIDGE, J. You are assuming that he knew that the liability of the land continued after his death.] It might equally well be said that the legislature, at the time when stat. 8 & 4 W. & M. c. 14, passed, assumed that a devisor, antecedently to the act, knew that his lands were liable ; for the devising them away is treated as defrauding the creditors, in sect. 1. [COLERIDGE, J. Would the creditors be bound to proceed against the specific fund created by such a charge as you suggest?] The decisions on bankruptcy questions, which have been cited on the other side, are inapplicable. The surety, in proving, had to swear that the bankrupt was indebted at the time of the bankruptcy ; and the question was, whether, in the particular case, he could so swear. But here the question is whether a posthumous liability is not within the statute.

Secondly. The third plea does not deny the declaration, for it is not opposed to it : and it does not confess, for it is inconsistent with it.

THE COURT stated that they would say, on the Friday following, whether they thought it necessary to hear arguments on the other points raised by the record.

*853] On Friday, May 8th, the Court having intimated ^atheir intention to consider the question already argued, before any others, *Stephen, Serjt.*, (a) suggested that the demurrers on the other pleas must be argued and decided, inasmuch as the officer, in taxing the costs, ought to know for whom each issue was found. [PATTESON, J. If one issue *of fact* decide the whole question, the practice at nisi prius is to discharge the jury as to the rest.] Since the rule of Hil. 2 W. 4, I. 74, 3 B. & Ad. 385, it seems to be necessary that every issue should be determined. [COLERIDGE, J. A point something like this was discussed in two late cases upon awards; one in the Common Pleas, (b) the other in the Exchequer. (c)]

LORD DENMAN, C. J. Our impression is that, if our decision should be against you on the point already argued, neither party would be entitled to costs on the other issues, under the rule of Hil. 2 W. 4, I. 74. But if you think you can maintain the contrary, you can argue it hereafter. (d) *Cur. adv. vult.*

LORD DENMAN, C. J. now delivered the judgment of the Court.

This was an action of debt on 3 & 4 W. & M. c. 14, brought by the executors of Sir T. H. Apreece against the heir and devisees of one John Briant. It appears by the declaration that he, described therein as a surety for the *lessee, had joined in the covenants of a lease for years granted by Sir T. H. Apreece to one Jenkins, determinable on the death of Sir T. H. Apreece. By the lease, a yearly rent of 590l. was reserved, and several penal rents, to a large amount, to arise conditionally on the cultivation of the land in particular specified modes. Breaches were assigned in respect of both classes. Several pleas were pleaded; but we were only called upon to consider the second and third; and it is only necessary for us now to consider the latter. That plea stated that, before any part of the debt in the declaration mentioned accrued due, and in the life time of Sir T. H. Apreece, John Briant died, concluding with a verification. This plea was specially demurred to; and it was objected, in argument against it, that it contained only an indirect and argumentative denial of the facts alleged in the declaration, that it put in issue a matter of law, and was improperly concluded with an averment. But the substantial question between the parties was, whether the case, as it appeared on the record, was within the statute on which the action was brought.

Upon this point, it was contended for the plaintiffs that, although it were to be taken that no breach of covenant had occurred in the lifetime of the testator, still upon that liberal interpretation of the statute, which the Court ought to make, the testator must be considered as debtor in his lifetime to the covenantee. That the words of the preamble applied, not merely to persons *owing money* in their lifetime, but to those who had "by bonds or other specialties bound themselves and their heirs;" and that the relation of debtor and creditor might exist, although no money were actually payable at the time, and although even *855] it might be ^acontingent whether any would ever become payable. In support of this argument analogies were relied on, from the liabilities of executors, and the bankrupt laws.

The decisions upon this statute are not numerous; and there is none directly applicable to the present case. Neither do they lay down any other rule of construing it than we should be bound to follow on general principles, that, namely, of ascertaining the mischief intended to be remedied, and adapting the remedy so far as the words of the enacting part will, in a fair interpretation, and without any straining, enable us to go.

The mischief described in the preamble is, that by the practice or contrivance of debtors, creditors were defrauded of their just debts; that it often happened

(a) Before Lord Denman, C. J., Little Dale, Patteson, and Coleridge, Js.

(b) Probably *Norris v. Daniel*, 10 Bing. 507.

(c) Probably *Dibben v. The Marquis of Anglesey*, 10 Bing. 268.

(d) No application was afterwards made by the plaintiffs' counsel on this point. See *Ridg. v. Higginson*, Trin. T. 1826, post.

that persons who had often bound themselves by bonds or other specialties, by their last wills devised their lands, or disposed thereof in such manner that such creditors had lost their debts. "For remedying of which, and for the maintenance of just and upright dealing," the statute first avoids all wills, &c., of such lands, as against such creditors, and next, in order to enable "such creditors to recover their said debts," enacts, by the third section, that, in the cases before mentioned, every such creditor may have and maintain his action of debt, upon his bond of specialty, against the heir at law of such obligor, and such devisee, jointly.

It is at least clear, upon these words, that, in order to bring a case within the statute, the relation of creditor and debtor, in whatever sense we understand those words, must exist between the plaintiff and the deviser in the lifetime of both. In the present case, John Briant had become liable for the performance of covenants *by another man no payment would be due from him; he would not be indebted, either in ordinary parlance, or in ordinary legal language, until there was a breach by his principal. No such event happened in his lifetime. Some other meaning, therefore, than that which ordinarily attaches to the words creditor and debtor must be resorted to, in order to support this action; and, accordingly, it is said that, to advance the remedy given by the act, we ought to hold that a man becomes indebted the moment he has made himself contingently liable for the breach of any covenant, as from that moment it becomes a legal fraud in him so to dispose of his lands by will as to prevent a covenantee from having recourse to them, and as from that moment the land becomes indebted. [*856]

The latter of these reasons appears to be an argument in a circle; for the land is not indebted, or bound to the discharge of the future demand, in such a sense as to prevent its alienation by devise, unless the owner was indebted in his lifetime within the meaning of the statute: this latter proposition therefore cannot be proved by the former.

With respect to the argument, that a devise under the supposed circumstances is a legal fraud, in order to be satisfied of that, it is not enough that we should think that the remedy would have been more complete, if it had been extended by apt words to such a case; but we ought to have almost irresistible evidence of the intention of the legislature to control the general power of disposition by devise to this extent before we should be warranted in affixing to the language used any other meaning than it would bear in ordinary parlance or common technical acceptance. Upon this point some *information may be derived from the case of *Wilson v. Knubly*, 7 East, 128. This Court there thought it safe to collect that intention of the legislature, to which alone effect could be given, from the language of the enacting part of the statute; they thought therefore that it pointed to a distinction between debts, strictly so called, and damages arising from the breach of covenants. Grose, J. says that "A mere breach of covenant cannot be considered as a debt." Lawrence, J. says, "All through it speaks of *debts*, which must mean existing debts," and observes that the damages there sought to be recovered "never could be considered as a *debt* due from the testator at the time of his death within the meaning of the act. Le Blanc, J. says, the legislature "only contemplated what were *debts* strictly so called, and did not mean to extend the remedy against devisees to the recovery of *damages* for breaches of covenants or contracts made by their testators." That case, therefore, which determined that an action of covenant could not be brought upon this statute against the devisee, proceeded as much upon the presumed intention as the mere letter. In the present case, the damages for the breaches of covenant declared on are liquidated, and therefore, in form, may be sued for in an action of debt; but they are not the less in substance damages. Nor, in the present case, is it to be forgotten that the testator was a surety, whose eventual liability was contingent only on the future default of his principal. The substance of the testator's contract was, to secure to the lesser the performance of the covenants by the lessee. [*857]

*858] It was said, however, that, whenever a testator is *bound by a personal covenant, the executor may be sued, and that as he is only answerable for the debts of his testator, this implies that the testator's liability on his covenant constitutes a debt existing in him in his lifetime. In support of this was cited the case of *Plumer v. Marchant*, 3 Burr. 1380, in which it was held that the trustee of a marriage settlement, containing a covenant by P. M. that he should by his last will, or that his executors, &c., should within six months after his death, pay 700*l.* to the trustee on certain trusts, might, after P. M.'s death, and becoming his administrator, retain the sum of 700*l.*, and give such retainer in evidence under the plea of *plene administravit* to an action of debt on the intestate's bond. The reason of this decision is clear. If the trustee had not also been administrator, he might have sued the person filling that character on this covenant; it followed therefore that, filling both characters himself, he had a right to retain the amount; the retainer was an actual payment of it, and an administration pro tanto of the assets: but this decides nothing applicable to the present question. The executor is the general representative of the testator as to his personal contracts, whether the breach accrued in the lifetime of the testator, or after his death; whether after breach the sum due be called a debt, or the penalty of a broken covenant, are indifferent matters. In the case cited, the instant P. M. had died intestate, the 700*l.* was a liquidated debt, due from the representative to the trustee, the payment of which indeed might, in case of the estate, be delayed for six months, but which

*859] the representative would have been justified in *paying, and therefore was justified in retaining, *instante*. In the principal case, the liability of the devisee is created wholly by statute, and is not founded on the same principle, nor can be carried to the same extent, as that of the executor. Another case was cited of *Ex parte Tindall*, (a) in which it was held that, to covenant that a sum of money should be paid to trustees within twelve months after the party's decease, on certain contingencies, was to *contract a debt* payable on a contingency within the meaning of the 6 G. 4, c. 16, s. 56, for the valuing and proving of contingent liabilities, under the bankrupt laws. This also appears to us wholly inapplicable to the present case. Under this section, the issuing of the commission is the analagous point to death under the statute of W. & M.; and both the letter and spirit of the section point to a liability which, at the date of the commission, not only has not yet become ripe, so that an action can be maintained on it then, but to one which rests in uncertainty whether it may ever attach at all. Such a future and contingent liability the legislature has brought within the range of the bankrupt law, and in so doing has called a debt. But for the statute it is obvious that the covenantor in the case cited could not have been considered a debtor to the covenantee, for not only no action of debt, but no action at all, could ever have been maintained against him. And as regards the parties themselves, the law would remain the same after the statute. Though the statute calls it a debt, none of the legal incidents to the relation of the creditor and debtor exist as between the parties.

*860] The decision therefore of the case cannot be *extended to help the present argument for the plaintiff; it is merely the construction of those words, taken with their context, and with reference, as well to the manifest intention of the section itself, as the general policy of the bankrupt law.

The plaintiffs' counsel, therefore, has failed to satisfy us that we ought to construe the words of this statute in any other than their ordinary meaning: and we think that the remedy given by it applies only where a debt in that sense exists between the parties in the lifetime of both.

With respect to the pleas, it is enough to say that, if the declaration be taken as affirmatively alleging that any part of the debt mentioned in the declaration

(a) 8 Bing. 402. S. C. 1 Deac. & Ch. 291. 1 Mont. Ca. Bank. 375, 462. See the previous decisions, 1 Mont. & Mac. 415, 422.

accrued due in the lifetime of Briant, the third plea appears to us to traverse that allegation with sufficient directness; on the other hand, if the declaration does not do that, it is substantially defective, and it becomes unnecessary for the defendants to have recourse to any plea. As to the objection that the third plea is improperly concluded with a verification, that, if available at all, ought to have been specially assigned; and, it not having been so assigned, the plaintiffs cannot now avail themselves of it.

We think, therefore, there must be judgment for the defendants on the third plea. (a)

A rule having been accordingly taken out for judgment for the defendants, on the third plea of Mary Briant, William Henry Briant, and Charles Briant, and on the fourth plea of John William Briant.

*Stephen, Serjt., in Michaelmas term, 1835, obtained a rule to show [861] cause why the plaintiffs should not be exempted from payment of costs. The affidavits in support of the rule stated that, at the commencement of the action, Jenkins was indebted to the executors in the sum of 250*l.* for rent, and that the injury done by him by breaches of covenant for good husbandry amounted to 710*l.*, independent of the further rents thereby incurred; by way of stipulated damage: that the plaintiffs had endeavoured to obtain the amount from Jenkins; that he had absconded, and that they believed him to be insolvent; that they had ascertained that John Briant's personal estate was exhausted; and that they had been informed and believed that his real estate was large, and were unacquainted with the incumbrances on it: that they had ascertained that a suit was pending in the Court of Chancery for the purpose of having the trusts of John Briant's will carried into effect, and the incumbrances on his real estates ascertained, in which a decree had been made, referring to a Master of that Court to take an account of such incumbrances; and that the plaintiffs were advised by counsel that, until they had established their debt in a Court of law, they would not be entitled to prove it in the Master's office: that they had afterwards brought the action, under the advice of a gentleman of the common law bar, who advised that the point of the liability of the defendants was one in which the plaintiffs were likely to succeed, or, at any rate, one upon which it was their duty to take the opinion of a Court of law: that all the defendants appeared by the same attorney: and that the pleadings and the results were as has been above stated. It was further deposed that the pleas of Mary [862] *Briant, William Henry Briant, and Charles Briant, contained 280, and those of John William Briant 165, common law folios; and that the plaintiffs' attorney had requested the defendants' attorney to consent to a consideration rule, which the latter had refused to do.

The affidavits in answer stated that Mary Briant was not, at present nor at the commencement of the action, in the enjoyment of any benefit under the will: that William Henry Briant and Charles Briant took no beneficial interest other than a reversionary interest expectant on a contingency which had not yet occurred, of which interest they had been divested by their bankruptcies: and that John William Briant took nothing by descent: that the practice of the Court of Chancery did not make an action at law a necessary preliminary step to claiming before the Master: that the defences had been severed at the recommendation of a special pleader: that the attorneys of the parties had repeatedly attended Patteson, J., who had made orders permitting the defendants to plead the several pleas (and four others, which however had not been pleaded); and had allowed them to plead separately, after his attention had been especially called to the objection: that the defendants' attorney had declined agreeing to the consolidation; in order that, if judgment should be given against any of the pleas of one defendant on technical grounds, the pleas of the other defendants might be amended; that he had offered that, until the case of Mary Briant was decided, the other cases should stand

(a) The plaintiff was advised to enter a *nolle prosequi* on the second count, the principle of the decision appearing to go to the whole declaration.

over; but that the plaintiffs' attorney had made up all four demurrer books, and had set all the cases down for argument.

*863] *Mauclé* showed cause in the same term. (a) The meaning of the legislature in stat. 3 & 4 W. 4, c. 42, s. 31; was to put an end to the inconvenience arising from the rule that executors were not liable to costs like other plaintiffs. They are by that section subjected to the common liability, the Court, or a judge, having however the power in extraordinary cases to exempt them from it. In *Lysons v. Barrow*, (b) the Court of Common Pleas exempted an executor from costs, on the ground that it was his duty to attempt to recover the money. That decision cannot be supported; for, according to *Dowbiggin v. Harrison*, 9 B. & C. 866, and *Jobson v. Forster*, 1 B. & Ad. 6, the executor was not suing in a representative character, and therefore the statute was inapplicable. And, supposing *Lysons v. Barrow*, (b) to have been a case under the statute, the decision is inconsistent with a later case in the Common Pleas, *Southgate v. Crowley*, 1 New Ca. 518; where that Court held that the circumstance of an executor having brought an action properly is not an answer to the defendant's claim for costs under the statute, and that the onus of showing the exception is upon the executor, the general rule being that, if unsuccessful, he is liable to costs. *Southgate v. Crowley*, 1 New Ca. 518, has been confirmed, in the Common Pleas, by *Engler v. Twisden*, 2 New Ca. 263. The *864] exemption of executors, before the late statute, arose from the notion (first supported in *Haywarth v. David*, Cro. Jac. 229, (c) in 7 Jac. 1, and scarcely justified by the language of the legislature) that stat. 4 Jac. 1, c. 3, s. 2, did not extend to executors. It was not supposed that executors had any claim to the exemption upon general principles of justice. The only question now is whether, in any particular case, the defendant has so acted as to deprive himself of his ordinary right to costs. Here several parties are sued; and it appears from the pleas that the defences are different. Every plea discloses a defence on the merits; and the learned judge before whom the matter was discussed thought them all proper. The proposal to consolidate was inadmissible. [*Stephen*, Serjt., here intimated that he did not rely upon the refusal to consolidate.] The action itself is vexatious.

Stephen, Serjt., contra. It appears that the plaintiffs were advised that this action was necessary, unless they chose to forfeit their claim to have the demand taken into the account of incumbrances by the Master in Chancery. They were advised by counsel, that the legal claim existed, or at any rate ought to be insisted upon with a view to obtain the opinion of the Court upon it; and therefore they could not abandon it consistently with their duty. The question has been decided against them upon an abstruse point of law, which appeared to this Court to require time for deliberation; and the action cannot, therefore, be said *865] to have been commenced vexatiously or on frivolous grounds. *This is the first case, since the statute, in which executors have failed on a question of law. In *Southgate v. Crowley*, 1 New Ca. 518, the Court certainly laid down the rule more strictly than before against executors; but one of the learned judges dissented. *Engler v. Twisden*, 2 New Ca. 263, turned upon want of caution on the part of the executor. It may, however, be conceded that mere bona fides in the executor is not sufficient to exempt him from costs; but the present case shows more. Then, as to the conduct of the defendants, the information as to the want of assets by devise was withheld. And the severing of the defences was carried to an extent that created unnecessary expense; for, though some of the defences were applicable to some of the defendants only, and

(a) November 23d, before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) 10 Bing. 563. This decision was overruled, as to cases where executors do not sue in their representative capacity, in *Ashton v. Poynter*, 1 C. M. & R. 738. S. C. 6 Tyrwh. 322; and see *Spence v. Albert*, 2 A. & E. 785.

(c) And see *Barret v. Winchcomb*, 12 Ja. 1, Cro. Jac. 361.

not to the rest, yet, as to the majority of the pleas, it was otherwise, and no severance was required. *Cur. adv. vult.*

In the following Hilary term, January 30th, 1836, Lord DENMAN, C. J., delivered the judgment of the court.

This is an action by executors against an heir and devisees upon stat. 3 & 4 W. & M. c. 14; and the present application is, that the plaintiffs may be exempted from payment of costs, under stat. 3 & 4 W. 4, c. 42, s. 31.

This latter statute points to making executors, who are plaintiffs, generally liable to costs, in the same way as parties who sue in their own right. That is the general rule; and it is founded on the natural justice of indemnifying successful defendants from an action *wrongfully brought against them. [866 The privilege which executors have hitherto enjoyed was not founded on natural justice, but upon their not being named in st. 4 J. 1, c. 3, s. 2.

The stat. 3 & 4 W. 4, c. 42, ingrafts on the general rule the exception, "unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order." That being the exception, a party applying for the benefit of it must make out special grounds for the interference of the court.

The plaintiffs believed that there were large assets by devise, and that it was necessary to establish their debt at law before it could be taken into the account by the Master in Chancery. They were advised by counsel that they ought to bring the action at law. Also, they impute to the defendants, first, that they have introduced an unnecessary prolixity on the record, and, secondly, that they were aware of facts, which, if communicated to the plaintiffs, would have prevented them from proceeding with the action.

These imputations we dismiss from our consideration: the first, because the question is not affected by the conduct of the defendants after the commencement of the suit; the second, because no previous inquiry on the part of the plaintiffs has been shown; and it was their business to seek information, not that of the defendants to volunteer it.

It comes then to this only, that the action was brought *bonâ fide* and under legal advice; and, we may add, that it was always an action of very doubtful result: but we think these not sufficient grounds for depriving the defendants of their costs, they having been *guilty of no concealment or improper conduct. There is no ground for relieving the estate of the plaintiffs' [*867 testator, supposing that there are assets, nor the plaintiffs themselves, supposing that there are none, from the payment. The plaintiffs, if they had abstained from bringing the action, would not, in so doing, have been guilty of a *devastavit*.

There are three cases on this point; *Wilkinson v. Edwards*, 1 New Ca. 301, *Southgate v. Crowley*, 1 New Ca. 518, and *Engler v. Twisden*, 2 New Ca. 263. We concur in these decisions; (d) and we are of opinion that this rule must be discharged.

Rule discharged.

(a) See also *Godson v. Freeman*, 2 Cr. M. & R. 585. S. C. 1 Tyrwh. & G. 35.

END OF TRINITY TERM.

*TRINITY VACATION.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE KING'S BENCH.)

BESWICK *against* JAMES SWINDELLS. *Thursday, June 18.*

By the condition of a bond for payment of 400*l.* it was recited, that the obligor was about to marry E. E., linen draper, and thereby to become possessed of a stock in trade, now hers, and that in consideration thereof it was agreed that he should execute a bond to the obligee to pay to the children of E. E. by her late husband 300*l.*, within twelve months next after E. E.'s death, in the event thereafter specified: and the condition, therefore, was, That if S. (the obligor) shall within twelve months next after the decease of E. E., pay to her child or children, &c., 300*l.*, "if upon an account of the stock in trade and effects in the linen-drapery business, if then carried on by the said S.," the same "shall amount to the sum of 400*l.*, but in case, upon such account to be taken as aforesaid, the said stock in trade and effects shall amount to less than that sum, then if the said S." shall pay to the child or children, &c., 120*l.* within twelve months next after the decease of E. E., the said obligation shall be void, &c. Plea, that E. E. died, and that, before her death, and ever since, S. had ceased to carry on the business, and that he had not, at or since the time of her death, any stock in trade, &c. Replication, that at the end of twelve months from E. E.'s decease, there were, and still are, children of E. E. by her late husband living:

Held, on demurrer, that, as the recited agreement was to pay in the event after specified, and the condition was to pay 300*l.* or 120*l.* according to an account to be taken of the business, *if then carried on*, the obligor might discharge himself by pleading that he had discontinued the business.

DEBT on a bond for 400*l.*, given by the defendant to the plaintiff and another, since deceased, with a condition (which was set out on oyer) as follows:—

"Whereas a marriage is intended to be shortly had and solemnised between the above bounden James Swindells and Elizabeth Etechells of Stockport aforesaid, linen-draper, by which event he the said James Swindells will become possessed of a considerable stock in trade, goods, chattels, and effects, now the property and in the possession of the said Elizabeth Etechells; and it was agreed upon the treaty for the said marriage, and in consideration of the emolument which the said James Swindells would acquire by such marriage, that he, the said James Swindells, should execute and give a sufficient bond unto the said *869] Joel Beswick and John Swindells, to *pay unto the children of the said Elizabeth Etechells by her late husband Edward Etechells deceased, or the survivors or survivor of them, and the issue of such of them as shall happen to be dead leaving lawful issue, the sum of 300*l.*, to be equally divided between and amongst them, if more than one, share and share alike, and, if but one, to such only child in manner hereinafter mentioned, within the space of twelve months next after the decease of the said Elizabeth Etechells, in the event hereinafter specified: now, therefore, the condition of the before written obligation is such that, if the above bounden James Swindells, his heirs, executors, or administrators, do and shall, within the space of twelve months next after the decease of the said Elizabeth Etechells his intended wife, well and truly pay or cause to be paid unto the child or children of the said Elizabeth Etechells by the said Edward Etechells deceased, which shall be then living, or the issue of such of them as shall be then dead leaving lawful issue (such issue taking only the part or share his, her, or their deceased parents or parent would have been entitled unto if living,) the full and just sum of 300*l.* of lawful money of the United Kingdom of Great Britain and Ireland current in England, unto and equally between them, in the proportions aforesaid if more than one, and, if but one child, then the whole to such surviving child, if, upon an account of the

stock in trade and effects in the linen-draper, haberdashery, or mercery trade, or business, if then carried on by the said James Swindells, (Sic.) shall amount to the sum of 400*l.*; but, in case upon **such* account to be taken as [870] aforesaid, the said stock in trade and effects shall amount to less than that sum, then if the said James Swindells, his heirs, executors, or administrators, do and shall well and truly pay or cause to be paid unto the child or children of the said Elizabeth Etchells by the said Edward Etchells deceased, or the survivor of them, or the issue of such of them as shall be dead leaving issue in manner before limited, the full and just sum of 120*l.* of like lawful money, within the space of twelve months next after the decease of the said Elizabeth Etchells, then the before written obligation shall be void;’ otherwise, &c.

Plea, that, after the said marriage and before the commencement of this suit, viz., 26th of December, 1831, the said Elizabeth died, and that long before her death, viz. first of November, 1830, “he the defendant retired from and ceased, and from thence hitherto has ceased, to carry on the trades and businesses of a linen-draper, haberdasher, and mercer, or any of the said trades and businesses, or any other trade or business whatever, and that, at the time of the death of the said Elizabeth his wife, he had not, nor has he at any time since hitherto had, nor had he at the time of the commencement of this suit, or since, nor has he now, any stock in trade or effects in the linen-draper, haberdashery, and mercery trades and businesses; or in any of them, or in any other trade or business whatever, and that no account of the said stock in trade and effects in the said condition mentioned was or could be taken at the time of the death of the said wife of the said defendant, or at any other time from thence hitherto.” Verification.

Replication, that, at the expiration of twelve months **from and after* [871] the decease of the said Elizabeth, viz. on, &c., there were and still are living two children of the said Elizabeth by the said Edward Etchells, viz. (naming them,) and that before her death, viz. on, &c., one Nancy Beswick, another child of the said Elizabeth by Edward Etchells, died, leaving lawful issue, viz. eight children (naming them,) and the said children of Elizabeth Etchells and Nancy Beswick were, at the expiration of twelve months *from and after* the decease of the said Elizabeth, and still are living. Verification.

Demurrer, stating for causes, that the plea alleges matter which is a complete answer to the declaration and defence to the action, and independent of the fact of the said Elizabeth having any children by Edward Etchells, and yet the plaintiff has not traversed the same or any part thereof by his replication; and also that the writing obligatory, set out on oyer, was subject to a condition, breaches whereof ought to have been assigned or suggested by the replication, according to the statute, yet no breach is assigned, &c.; and that an issue joined on the said replication would be immaterial; and that the replication is in other respects, &c. Joinder in demurrer.

On argument of the demurrer, in Hilary term 1834, the Court of King’s Bench gave judgment for the defendant, 5 B. & Ad. 914. Upon this judgment error was brought in the Exchequer Chamber; and the case was argued in Easter vacation 1835, May 14th, before Tindal, C. J., Lord Abinger, C. B., Vaughan, J., Boland, Parke, and Alderson, Bs.

**Sir W. W. Follett*, for the plaintiff. The defendant married a widow, [872] carrying on trade and having children; and he thereby acquired property which, but for the marriage, would have gone to the children. In consideration of this he agreed to execute, and did execute, a bond, as stated in the pleadings. The condition of that bond was, in effect, that he, in consideration of receiving the property of Etchells, the deceased husband, should provide for Etchells’s children by his wife. The carrying on of the business has nothing to do with the engagement. The defendant bound himself to pay the wife’s family 300*l.* at her death; with this benefit, however, reserved to him: “If, on an

account taken of the stock in trade of the business, if then carried on, the same shall be worth 400*l.*, the obligor shall pay 300*l.*; but if, upon such account to be taken as aforesaid, the stock in trade shall amount to less than 300*l.*, he shall pay only 120*l.*" It was not meant that the bond should be void if he ceased to carry on the business. The proviso was for his benefit: if he ceased to carry on the business, he lost that benefit, and the bond became single. The condition could no longer be fulfilled; there was a failure of the contingency upon which the proviso turned. If the act of God, or that of the obligee, had caused such failure, the obligor would have been discharged; but, as the obligor's own act occasioned it, he is liable. Suppose A. is bound to B. in a bond, with a condition that, if A. goes to York, provided he rides his horse P., the obligation shall be void. If A. chooses to sell the horse, and therefore cannot ride him to York, is he discharged from the obligation? This is not like a *873] covenant or condition. The obligation *depends wholly on the obligor's part of the bond; the condition is introduced subsequently for the obligor's advantage. The authorities on this subject are collected in Sheppard's Touchstone, ch. 21, and it is said there, p. 392, "If the condition be that the obligor shall ride with I. S. to Dover such a day, and I. S. doth not go thither that day; in this case, it seems, the condition is broken; and that he must procure I. S. to go thither and ride with him at his peril." Both parts of the condition there are put in the light of acts to be done by the obligor; if I. S. do not go, the bond is single. Here, it was the defendant's own fault that he did not continue the trade. [Lord ABINGER, C. B. Is that quite certain? The pleadings do not show any excuse; if there was one, the defendant ought to have shown it. [PARKE, B. As to the instance from Sheppard; the condition to be like this, should have been, "If the obligor shall ride with I. S. to Dover, if I. S. go there." You compare it to an undertaking by the obligor, that I. S. shall go there.] The obligor in the first instance acknowledges himself indebted. He is bound unless he gets rid of the obligation. A condition is stated, by means of which that is to be done. If the condition be, that he shall go with I. S. to Dover if he will go, and I. S. will not go, the bond is single. The condition is subsequent to the legal obligation; if the condition be not fulfilled, the obligation remains. In Bro. Abr. Conditions, pl. 127, four ways are pointed out in which performances may become impossible; viz. by the *874] act of God; by the act of a stranger; by the act of the obligor; and by that of the obligee. In the first and last cases only, no forfeiture ensues: and the present is not one of those.

The Court of King's Bench has considered this as the case of an agreement, not keeping in view the nature of the instrument in question. In the case of an agreement, the performance of which depends on something to be done previously, the performance of that must be proved by the plaintiff: in the case of an obligation, with a condition added as here, the defendant has to prove that the condition is satisfied, or non-performance excused, and that the obligation, therefore, is discharged. In Com. Dig. Condition (L. 7), (M. 3), it is shown that the non-performance of a condition shall be excused by the default of him who ought to do the first act; the instances given there, and in 5 Bro. Abr. Obligations, (F), clearly mark the distinction between the present case and that of an action upon an agreement. Looking to the intention of the parties, it cannot have been meant that the defendant, executing this bond, should take the whole property, and should be at liberty the next day to leave off trade for the purpose of making it his own. [Lord ABINGER, C. B. It might be argued on the other side, that he cannot have meant to bind himself to carry on the business under all possible circumstances. Probably there was an intermediate meaning; that he should not carry it on under such circumstances; that the interests of the widow, together with his own, should have been affected.] The parties do not, in fact, appear to have contemplated his abandoning the business.

But the defendant has to show that his doing so renders *the obligation void. If the meaning is doubtful, the defendant must suffer by the ambiguity, not the plaintiff as in an action of assumpsit. [*875
 "When the condition of an obligation is so insensible and uncertain, that the meaning cannot be known, there the condition only is void, and the obligation good." Shepp. Touchst. c. 21, page 373. The defendant is to show the meaning of that which he relies upon to discharge him. [Lord ABINGER, C. B. Suppose the bond were to pay a certain sum, with condition, that if the obligor paid 500*l.* on a ship arriving, the bond should be void; and the ship did not arrive: what do you say the consequence would be?] If the condition depended on the ship arriving within some limited time, the case would be parallel to this: and then the question would be, what caused the non-arrival. Unless that were occasioned by the act of God, or of the obligee, the bond would be in force. Here it is as if the obligor had written to the captain not to come. The case which might be put, of the act becoming illegal, forms a different head of excuse, and need not be considered.

Wightman, contra. As to the intention of the parties. The bond seems to have been intended to secure to the children the probable advantage they would have derived if the mother had remained a widow and carried on the business till the time of her death. Had she not married the obligor, she might have continued the business or abandoned it, as she thought proper: the children could not have interfered; though, at her *death, if she had still been carrying it on, they would have had the benefit of it. But, after that [*876 marriage, if she died and the business still went on, the husband, not the children, would be entitled to the benefits. The intention then was, by this deed, to place them, after her death, in a situation resembling that in which they would have stood if she had not married again; and the defendant's situation, under the deed, was the same, as to continuing the business, as hers would have been if she had remained a widow. If the trade was going on twelve months after her death, the stock was to be valued, and a payment made to them according to the valuation. [ALDERSON, B. You are to be discharged on performance of a condition: what do you say the condition is?] The obligor was to pay on two events happening, that is, if the wife died, and if, at the time mentioned, the business was still carried on. [Lord ABINGER, C. B. Two events must concur to give you the benefit of the condition.] The plaintiff must contend that the defendant, in order to discharge himself, must at any rate carry on the business. Suppose the condition had been that he should pay a sum of money on the arrival of a ship having gold dust on board; then, as it is argued, he would be liable if the ship did not arrive with gold dust. [Lord ABINGER, C. B. Yes. PARKE, B. He has to relieve himself from the obligation.] The obligation is, in effect, a penalty fixed, to secure payment of a sum if certain events shall happen. Their not happening does not render the bond single, because at the time of executing the bond they were possible; they might have happened, although they have not happened. A bond becomes single, when the *event conditioned for become impossible: here it conditioned to be possible during all the time contemplated. [ALDERSON, B. There is a fallacy in your argument. You say that a bond is given, but the sum is not to be paid unless certain events happen; but is not the effect of the deed, that the obligor shall not be excused from paying except on certain events? Lord ABINGER, C. B. If this had been a mere agreement, that in case the business were carried on at a certain time the party would pay in proportion to the value of the stock in trade, it would be admitted, according to the argument on the other side, that, if the business were not carried on at the specified time, the plaintiff must prove fraud in discontinuing it, in order to recover. But the question here is, whether the defendant has not bound himself at all events, and although there be no fraud, if the business be discontinued.] In *Brett v.*

Pildredge, cited by Windham, J. in *Goodiar v. Clarke*, 1 Sid. 102, (a) a father, on his daughter's marriage, made a proviso that if his daughter shall die without issue in two years, then her husband shall repay 500*l.* of her portion; she had issue, and she and it died within two years; and it was held that the 500*l.* should not be repaid, for by the having of issue the condition was fulfilled. The condition, here, controls the penal part of the bond. The plaintiff can recover only if the business continue to be carried on; but the obligor is not bound to carry it on. If he is compelled, by force of the obligation, to pay though the business has ceased, it must be said that he is bound to pay 400*l.*, the whole penal *878] sum, though the *stock in trade be of less value than 400*l.* If the business was fraudulently given up, that might have been replied. The penal clause must be read with reference to the condition, where there is one which might have been fulfilled; and if the event upon which the fulfilment depended has not happened, that may be pleaded in discharge of the obligation; unless the event failed to happen by the obligor's default. [ALDERSON, B. It is said, on the other side, that you reverse the onus probandi.] We shew enough to divest ourselves of the *prima facie* liability. [LORD ABINGER, C. B. Perhaps a distinction may arise where the condition recites an agreement; the bond then seems to be given for securing the performance of such agreement by a penalty; and, if the condition fails, it may be necessary to see whether or not the agreement has been broken; and, if not, then the obligor may not be liable though the events referred to by the condition have not all happened. Thus, in the supposed case of a condition for payment on the arrival of a ship laden with gold dust, it would make a great difference, whether the deed contained simply an obligation followed by such a condition, or whether it first recited an agreement under which the obligor would be liable to pay on the arrival of a ship so laden, but not liable if the ship did not so arrive.] In this case the plaintiff says that the event mentioned in the condition was to discharge; the defendant says it was to make liable. The plaintiff's argument is, in effect, that the obligor is liable to the whole penalty, unless he can discharge himself by paying the minor sum mentioned in the condition. But the defendant's argument is, that he is not liable to pay the penalty, unless *879] liable *to pay one of the sums mentioned in the condition. The clause "if upon an account, &c., of the stock in trade of the business is then carried on," &c., is embodied in the subsequent part of the condition by the words "in case upon such account to be taken as aforesaid," &c. If so, he was not liable to pay either of the sums, the business having ceased.

Sir W. W. Follett in reply. As to the effect of the recited agreement; that agreement says nothing of any sum but 300*l.*, which is to be paid within twelve months after the wife's decease, to the persons mentioned in that recital. The conditions added merely regard the amount to be paid; so much, if the property be of such value, so much, if less. But, if the business be no longer carried on at the time when the valuation should be made, both the contingencies fall to the ground, and the obligation stands good for 300*l.* The obligees would never have consented to an agreement by which the obligor, the day after executing the bond, might sell the property and convert all the proceeds to his own use: for, according to the defendant's construction of the deed, that would have been no fraud. The provision for payment of a minor sum does not imply that nothing was to be paid if the business ceased: to assume so is importing a new stipulation into the deed. [LORD ABINGER, C. B. The recital is connected with the subsequent part of the deed by the words "in the event hereinafter specified." It would have been folly in the husband to engage himself to carry on the business even though a failing one, or else to pay 300*l.*] An agreement, *880] on the marriage, to pay 300*l.* at all events, would not have *been unreasonable. And on the other hand the wife, who intended to provide

(a) Cited, 5 Vin. Abr. 149, pl. 19, tit. Condition (R. a.) "How it shall be performed. The intent ought to be performed."

for her children, was giving up all the property to him, without any means of obliging him to provide for them, except by this agreement. [BOLLAND, B. And he had this advantage, that he might reduce the stock below the value of 400*l*. by selling off, and then pay only 120*l*.] The bond is, to pay 300*l*. unless the stock should not be worth 400*l*. if the business should be carried on at the time specified. The business not being then carried on, the bond is single; not in the strict sense of the word, but the party claiming the benefit of the condition is not brought within the terms of it. [ALDERSON, B. You mean that it operates as a single bond would.] The doctrine as to the performance and non-performance of the conditions by the obligor or obligee, is stated in the judgment of Eyre, C. J. in *French v. Campbell*, 2 H. B. 178. (a) The way in which the party is to discharge himself in each case will depend on the form of the agreement and condition; but the law is the same. [Wightman referred to *Fitzhugh v. Dennington*, 2 Salk. 585. TINDAL, C. J. The request there was not to be the act of the obligor, but of the other party. ALDERSON, J. No breach was shewn. TINDAL, C. J. Here, if the obligor was bound, as the plaintiff alleges, he has himself shewn a breach of the condition.] *Cur. adv. vult.*

TINDAL, C. J. now delivered the judgment of the Court.

The question in this case arises on the construction of the condition of a bond, expressed in such terms as to be open to doubt and uncertainty: but, taking the whole of the condition together, we agree in opinion, that the Court of King's Bench have put the proper construction upon the condition, and that the judgment of that Court ought to be affirmed. [*881]

The bond appears to us, to have been given to secure the performance of an agreement, entered into between the defendant and the plaintiff, previous to the marriage of the defendant with one Elizabeth Mitchells; and the question in the case does therefore become this, what was the real intention of the parties to the agreement as expressed upon the face of it? The agreement is contained, in part, in the recital prefixed to the condition of the bond, and, as to the residue, is to be collected from the condition itself; and taking them both together, the agreement will be found in its terms to be this; that if the marriage then intended should take place, the defendant should within twelve months next after the decease of his intended wife, pay to her child or children by her former husband, the sum of 300*l*., if upon an account of the stock in trade and effects "if then carried on by the defendant" the same should amount to the sum of 400*l*.; but in case upon such account to be taken as aforesaid, the said stock in trade and effects should amount to less than that sum, then that the defendant should pay to such child or children the sum of 120*l*. within twelve months next after the decease of their mother. And whether it was the intention of the parties to this agreement, that the money should be payable at all events, within twelve months after the wife's death, as contended for by the plaintiff, or that it should be payable only in case the trade continued to be carried on up to the time of the wife's death, as contended for on the part of the defendant, is the question between them. [*882]

Now it seems to us to be the proper interpretation of that agreement, that it was made in contemplation of the trade being carried on up to the time of the wife's death; and that the money is to be payable amongst the children, in that event, and in that event only.

The agreement is express, "that the money is to be paid, in the event hereinafter specified." The agreement is also express, "that the stock shall be taken," and that the amount of the sum to be paid shall depend on the value of the stock. The agreement is further express, that the stock is only to be taken (indeed, it could only be taken), if the trade "be then carried on by the de-

(a) He then read the passage, beginning at "We agree with those," and ending at "condition precedent."

pendant." The event, therefore, which has actually happened, namely, that the trade and business were actually given up and abandoned, long before the wife's death, appears to us to be an event not provided for by the agreement; it is *casus omissus*, and we think we should make an agreement for the parties, instead of putting a construction upon that which they have made for themselves, if we should hold that the defendant was bound under this condition of the bond, to pay either of the two sums therein mentioned, in the event which has actually taken place. The construction contended for by the plaintiff would either make it compulsory on the husband to carry on the trade during the life of his wife though it became a failing, or even a ruinous concern to the husband; *883] or would render him liable to the payment of the money *in the event of his yielding to the pressure of unforeseen circumstances, and of his giving up the business. And we think, if the parties had intended this, they would have used the very simple expedient of making the bond conditional for the payment of a certain sum of money within twelve months after the death of the wife.

We agree entirely in the position laid down by the counsel for the plaintiff in the course of his argument, that when a condition becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond. But we differ from him in the application of that principle to the present case; because we think we must infer the intention of the parties to leave it open either to the prudence of the husband, or to casualties, or circumstances which could not be foreseen, to put an end to the trade, and consequently, the liability to pay the money. It is not, therefore, that the obligor has made the performance of the condition impossible by his voluntary act; but that he has exercised a power of closing the concern, which the very condition itself reserved to him.

Upon these grounds, we think the judgment of the Court of King's Bench ought to be affirmed. Judgment affirmed.

IN THE EXCHEQUER CHAMBER,

(ERROR FROM THE KING'S BENCH.)

*884] *PADDON *against* BARTLETT and Another. *Thursday, June 18.*

In an action of debt, for twenty years' rent, commenced July 22d, 1833, on an indenture of demise, the defendants pleaded. 1. Non est factum. 2. (under stat. 3 & 4 W. 4, c. 27, s. 42). That no cause of action accrued within six years; which the plaintiff traversed. 3. and 4. As to seventeen years and three quarters' rent, that on, &c., the plaintiff assigned over all his interest in the premises, and that no part of that rent became due before such assignment. To the last two pleas, the plaintiff pleaded *non est factum*. The jury found on the first two issues for the plaintiff, without damages, and on the last two for the defendants. Judgment was entered up for the defendants: Held, on error, by Tindal, C. J., and Lord Abinger, C. B., that, on this record, assuming the plea founded on the statute to be available, the plaintiff was entitled to judgment for two years and a quarter's rent.

But, held by the whole Court of Error, that the plea was not available, for that stat. 3 & 4 W. 4, c. 27, s. 42, as to actions for arrears of rent, is not retrospective.

Quære, Whether the above section, in so far as it limits the bringing of actions for rent to six years after such rent becomes due, &c., be repealed by stat. 3 & 4 W. 4, c. 42, s. 2, where the rent is reserved by indenture?

Quære, Whether the Court of Error in the Exchequer Chamber can grant a repleader?

DEBT by the plaintiff in error against the defendants in error, for rent reserved by an indenture of lease, made between the defendants and the plaintiff. The writ was issued, 22d of July, 1833. The amount claimed in the declaration

was 1600*l.* for twenty years' rent, from February 2d, 1812, to February 2d, 1833.

Pleas : 1. Non est factum.

2. That no part of the rent in the declaration mentioned became or was due, and the causes of action in the declaration mentioned in respect thereof, did not, nor did any or either of them, accrue to the plaintiff within six years next before the commencement of this suit, in manner and form, &c.

3. "As to so much of the said declaration as relates to the sum of 1420*l.*, part of the said rent in the said declaration mentioned, and thereby alleged to be due *and owing from the said defendants to the said plaintiff as afore- [*885 said, for the space of seventeen years and three quarters of another year, ending on the said 2d day of February, 1833:" that by certain indentures, set out in this plea, the last bearing date 30th of June, 1815, the plaintiff conveyed away all his estate and interest in the premises, and his said estate and interest therein became and was, on the last mentioned day, wholly ended and determined; and that no part of the said 1420*l.* became or was due from the defendants to the plaintiff at any time before that day.

4. This plea was also pleaded as to the 1420*l.*; the introduction was the same as in the preceding plea; and the assignment of the plaintiff's interest by the deed of 30th of June 1815 was stated, with variations which are not material here, and with an averment, as in the third plea, that no part of the 1420*l.* became due before the last-mentioned day.

Replication : 1. Joining issue on the plea of non est factum.

2. That the said causes of action in the second plea and in the declaration mentioned, did accrue, &c. Issue tendered and joined.

3. That the plaintiff ought not to be precluded, &c. in respect of the part of the rent in the introductory part of the third plea mentioned, because the supposed indenture of 30th of June 1815, in that plea mentioned, is not the deed of the plaintiff. Issue tendered and joined.

4. The like as to the indenture of 30th of June 1815, in the fourth plea mentioned. Issue tendered and joined.

*The cause was tried before Lord Denman, C. J., at the assizes for [*886 the county of Devon, July 1834. The verdict was; on the first issue, that the indenture in the declaration mentioned is the deed of the defendants. On the second issue; that the causes of action did accrue within six years. On the third issue; that the indenture of June 30th, 1815, in the third plea mentioned, is the deed of the plaintiff. On the fourth issue; that the indenture of June 30th, 1815, in the fourth plea mentioned, is the deed of the plaintiff. And the judgment was, that the plaintiff take nothing by his writ, but be in mercy, &c., and that the defendants do recover against the plaintiff 83*l.* for their costs, &c.

The proceedings were returned on writ of error to the Exchequer Chamber, and the following errors were assigned, (Hilary term, 5 W. 4.) "That judgment was given against the said plaintiff, whereas judgment ought to have been given in his favour for the said sum of 180*l.*, inasmuch as the third and last pleas (being the only two pleas found for the said defendants,) are pleaded in bar to part only of the said action (that is to say,) to the sum of 1420*l.*, part of the said rent or sum of 1600*l.* by the said declaration demanded; and, therefore, the said plaintiff is entitled to recover the said sum of 180*l.*, being the difference between the said sum of 1600*l.* above demanded, and the said sum of 1420*l.* covered by the said third and last pleas." And, further, that the second plea is bad in law. And the plaintiff prayed that the judgment might be reversed, and that he might be adjudged to recover the said sum of 180*l.* Joinder in error, of the same term. The case was now argued *in the Exchequer Chamber, (a) before Tindal, C. J., Lord Abinger, C. B., [*887 Park, Bosanquet, and Vaughan, Js., and Alderson, B.

(a) At the trial of this cause, leave was given to move to enter a verdict for the plain-

*888] *Newman*, for the plaintiff. The plaintiff has obtained a *verdict on the first and second pleas: the defendants on the last two only. But, as to rent for two years and a quarter, the last two pleas give no answer; the plaintiff, therefore, is entitled to recover £80L., and the judgment ought to be entered for him. (He was then stopped by the Court.)

Crowder, contra. The plea of the statute of limitations was intended to bar the whole of the claim for rent. On production of the demise from the plaintiff to the defendants, it appeared that rent had accrued during the last six years; and, upon the evidence, the jury found for the plaintiff on the second *889] *plea; that is, they found, as to that plea, that causes of action had accrued within six years, and within six years only. The plaintiff's demand could not, by stat. 3 & 4 W. 4, c. 27, s. 42, (a) be carried farther back.

tiff on the last two counts, on an objection to the stamp upon the assignment; and likewise to move to enter such damages as the Court might think the plaintiff entitled to on the first two counts; the Lord Chief Justice intimating an opinion that the plaintiff was not entitled to any. The motion was made upon the first point (*Paddon v. Bartlett*, 2 A. & E. 9), in Michaelmas term, 1834, and a rule refused. *Newman*, for the plaintiff, then declined moving on the second point, saying, that the plaintiff was authorised by the verdict, as it stood, upon the first two issues, to take judgment for the rent not covered by the pleas found for the defendants. As to this the Court gave no opinion. The plaintiff's attorney afterwards obtained the *postea* from the associate; whereupon, in the same term, a rule was obtained, calling on the plaintiff's attorney to show cause why he should not deliver up the *postea* to the attorneys for the defendants. The court, after hearing *Newman* against the rule, and *Crowder* (who relied upon the several findings on the record), in support of it, made the rule absolute, on the last day of the term.

The following variances in entering up a judgment, viz. that the plaintiff, as to certain "counts" (instead of "issues"), take nothing by his "bill" (instead of "writ"), and that the "defendant" (instead of "defendants") recover costs, &c., are clerical errors, which, when ascertained by comparison with the record of proceedings in the cause, the court will amend, though the judgment be of a past term, and though a writ of error be pending in which these and other errors are assigned.

The court refused to make such a rule absolute in the first instance.

The party moving must pay the adverse party his costs of such amendment.

Judgment was then entered up by the defendants, and a part of the judgment as recorded was, that the plaintiff, as to the last two counts of his declaration, should take nothing by his *bill*; and that the *defendant* should recover his costs as to those counts. Error being brought, these variances, among other things, were assigned for error.

Crowder, in Easter term, 1835 (April 15), moved that the clerk of the treasury of this court might be directed to amend the entry of the judgment. He moved this on an affidavit, which stated that the deponent had inspected the roll, on which the proceedings were entered on record, and which was filed of record in this court, and that from such inspection it appeared that the clerk had improperly entered up final judgment, not in accordance with the previous proceedings, the *postea*, and the finding of the jury, inasmuch as the action was commenced by *summons*, the declaration contained only *one count*, and the finding was for the plaintiff on the first two *issues*, and for both defendants on the last two. *Crowder* contended that the variances were clerical errors, which the court would amend as of course. The court refused to grant a rule absolute in the first instance, but granted a rule nisi. *Newman* showed cause (May 13), and contended that this judgment, being of a former term, could not be altered; that, at all events, the defendants had been guilty of laches in not making the application sooner; that the errors were not clerical, but the mistake of the party; and that the amendments ought not to be allowed, in a judgment which was in other respects erroneous.

PER CURIAM. (Lord Denman, C. J., Little Dale, Patteson, and Coleridge, Js.) The plaintiff has suffered no prejudice from the lapse of time, and he is not entitled to say here that the judgment is erroneous in other respects than those now in question. As to these particular errors, the rule must be absolute, on payment of costs by the defendants.

Crowder, for the defendants, submitted, that it was hard on them to pay costs for an error which was not attributable to them, inasmuch as they could not interfere with the *postea* after it was carried in, but to the officer of the court.

PER CURIAM. We think that the plaintiff ought to have the costs of setting this right, and that the defendants must pay them. Rule accordingly.

(a) Stat. 3 & 4 W. 4, c. 27, s. 42, enacts, "That after the said 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or

But then the defence raised by the third and fourth pleas, viz. that the plaintiff had assigned his interest, covers the six years, and goes back to a period long antecedent; and the jury, having found for the defendants on those pleas, find, in effect, that during the time referred to in them, that is from June 30th, 1815, downwards, the plaintiff had no interest or cause of action. Upon the whole record, therefore, it appears that no debt is due. And the jury have not found any damages. It is as if the defendants had pleaded the statute as to the whole period, except the last six years, and, as to that, the assignment of the plaintiff's interest, and that plea had been found for them. [TINDAL, C. J. You assume that the jury found, on the plea of the statute, that rent had accrued within the *last six years. Lord ABINGER, C. B. Suppose it had been proved [*890 that the defendants, within the six years, had given a written acknowledgment or promise in respect of rent due nineteen years ago?] The Court will not make a supposition against the judgment. [TINDAL, C. J. The difficulty you are under as to the plea of the statute arises from your not having pleaded according to the fact. If you had done so, you might have obliged the plaintiff to reply that a part of the causes of action, viz. the last six years' rent, accrued within six years. As it is, the replication may apply to a cause of action in respect of any part of the rent.] It is true that the verdict might have been as it is, if a written acknowledgment had been proved, respecting rent due nineteen years back. But the question is whether, upon any supposition, the judgment can be supported. [Lord ABINGER, C. J. If the last two pleas had not been pleaded, and the verdict had been given, as here, upon the first two, what do you say the result would have been?] That would have been a verdict for the plaintiff as to the last six years. [ALDERSON, B. No; as to the whole.] The jury, having found for the plaintiff on the plea of the statute, but given no damages, and having found for the defendants on the assignment, have in effect found that; although the plaintiff's case on the plea of the statute was supported, the assignment was an answer. [Lord ABINGER, C. B. If the assignment left the plaintiff no cause of action during the six years, the verdict should have been for the defendants on the plea of the statute. But we are bound, if possible, to suppose such a case as will support the verdict: and that case may be such a written acknowledgment as *has been suggested, or a payment [*891 of interest. The judgment is only a conclusion from the verdict. The circumstance of the jury not having given damages is no reason that the plaintiff should not have judgment. We must take the record as it stands, and see if the declaration is not sustained as to so much time as is not covered by the last two pleas.] If the defendants are wrong on this point, the Court will probably grant a venire de novo. [TINDAL, C. J. It should be a repleader; and I doubt if we can award that. The most satisfactory course would be, that, on payment of costs, you should be allowed to amend your plea, and go to trial again on the real point in dispute. But we should wish to hear the other side on the question, whether the statute 3 & 4 W. 4, c. 27, extends to this case; because, if the second plea is bad in law, the amendment would be of no use.] Newman, for the plaintiff. The writ issued, July 22d, 1833. The statute

payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

3 & 4 W. 4, c. 37, received the Royal assent, July 24th, 1833, and it enacts (sect. 42.) that, after the 31st of December, in that year, no arrears of rent "shall be recovered" by any distress, action, or suit, but within six years next after the same shall have become due, &c. That does not apply to an action commenced before the statute passed. The intention was that, after the 31st of December, no person should bring an action for the causes mentioned in sect. 42. The intention to limit the right, not of recovering in actions already begun, but of commencing actions or other proceedings in future, is plainly expressed *892] in sect. 2, and sect. 40, of the same statute, and *in stat. 3 & 4 W. 4, c. 42, sect. 3, which is in *pari materia*. Again, supposing even that stat. 3 & 4 W. 4, c. 27, s. 42, were retrospective, it applies only to rents on parol demises, not on demises by specialty, which latter rents appear to be provided for by sect. 40. [Lord ABINGER, C. B. If none but rents on parol demises were contemplated, the stat. 21 Ja. 1, c. 16, s. 3, would have been sufficient.] That does not bar the right of distress. But further, if the forty-second section applies to rents secured by specialty, it may be a question whether it is not virtually repealed as to the limitation of time by stat. 3 & 4 W. 4, c. 42, s. 3, which enacts that "all actions of debt for rent upon an indenture of demise," which "shall be sued or brought" after the end of that session of parliament, "shall be commenced and sued" within ten years after the end of the session, or twenty years after the cause of action. The Court here called upon.

Crowder, contra. It must be admitted that, if the plea of the statute be bad, the defendants' pleadings cover only seventeen years and three quarters, and the plaintiff is entitled to recover 180*l*. But the statute does operate on actions already brought. The sections referred to as showing a contrary intention are not to be so considered. [ALDERSON, B. The words of the proviso in sect. 42, of stat. 3 & 4 W. 4, c. 27, are "within one year next before an action or suit shall be brought." That proviso refers only to one subject, distinct from rent. Sect. 40, cannot apply to rents. The words are, "no action or suit," &c., "to recover any money," "charged upon or payable out of any *893] land or *rent." The legislature cannot have meant to speak of a rent as "payable out of a rent." Sect. 3 of stat. 3 & 4 W. 4, c. 42, as it regards the present subject, seems to have been a mistake of the legislature. [Lord ABINGER, C. B. I cannot interpret away the words "all actions of debt for rent upon an indenture of demise." At all events the latter statute does not repeal the former. It was indeed needless, after enacting that no debt of a certain class should be recovered but within six years, to say that all actions for such debt should be brought within twenty years; but still the defendants may rely upon the first enactment, as not contradicted by the second. Several cases on other statutes are favourable to the retrospective construction of this; as *Towler v. Chatterton*, 6 Bing. 258. [TINDAL, C. J. The question there was, whether, when the cause came on to be tried, the Judge was to be governed, in receiving evidence, by that which was then the law of the land. Lord ABINGER, C. B. The enactment relied upon there, had particular words which made it applicable, after a certain time, to suits already depending.] *Freeman v. Moyes*, 1 A. & E. 338, and *Pickup v. Wharton*, 2 Cro. & M. 405, S. C. 4 Tyr. 228, (on stat. 3 & 4 W. 4, c. 42, s. 31,) also favour the retrospective construction. Here, as in those cases, the statute takes effect upon an action already depending. The action, when commenced, may have been in proper time; but the statute intervenes and prevents the recovery. [Lord ABINGER, C. B. You must contend that the words of the stat. 3 & 4 W. 4, c. 27, s. 42, are as strong as those of 3 & 4 W. 4, c. 42, s. 31; "in every action brought *894] by *any executor," "such executor" "shall be liable." And you must say that, if proceedings at law or in equity, were commenced in good time, subsequently to the stat. 3 & 4 W. 4, c. 27, but the recovery were put off, as by delay in obtaining a decree in Chancery, the plaintiff must be barred.]

That is an argument from inconvenience, which cannot govern the construction of an act. [ALDERSON, B. In the case of executors the inconvenience attached only to actions then commenced; here it would be felt through all future times.] The difference of language in this section and in sect. 40. (where it is said that "no action can be brought,") shows a difference of intention. [ALDERSON, B. The words here are, that no arrears of rent "shall be recovered;" recovering is by bringing an action. The words used as to rent are also used, in the same section, as to legacies; and in sect. 43, it is enacted that no person claiming any legacy "for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual Court to recover the same but within the period during which he might bring such action or suit at law or in equity."'] Another authority for construing the words retrospectively is *Cox v. Thomason*, 2 Cro. & Jer. 498; 2 Tyr. 411, on Reg. Gen. Hil. 2 W. 4, I. s. 74, (3 B. & Ad. 385). The letter of the statute is in favour of the defendants; and the correct rule is to construe acts of parliament according to their grammatical and natural sense, unless the context show clearly that a different sense was intended: *Rex v. Ditchet*, per Parke, J. (9 B. & C. 186.) This rule was lately followed by the Court of *King's Bench in *Rex v. Mabe*, Ante p. 531, though it led, there, to [*895 an apparent absurdity.

TINDAL, C. J. We are all of opinion that the plea of the statute of limitations is bad. Admitting that the case depends on stat. 3 & 4 W. 4, c. 27, s. 42, and not on stat. 3 & 4 W. 4, c. 42, s. 3, still we think that the clause in question is prospective only, not retrospective, and therefore does not affect this action. The language of the clause itself shows this; for it enacts that, after a future day, no arrears of rent shall be recovered by any action, but within six years after the same shall have become due. The natural import of that is, that the act shall have no operation till the day named, and therefore shall not take effect, by being pleaded, in an action commenced before that day; such at least would be the construction, unless there were other words to the contrary. And in the same section of the act there is a proviso, that, where any prior mortgagee shall have been in possession within one year next before an action shall be brought by any person entitled to a subsequent mortgage, that person may recover in such action or suit the arrears of interest for the whole time that such prior mortgagee was in possession, though exceeding six years. Why are we to suppose that the first clause relates to actions commenced in bygone time, when the proviso refers only to future ones? Both are in *pari materia*; and it is no sufficient reason for construing them differently, that the last has some words which are wanting in the first. We ought to be careful of *construing statutes so as to abridge the rights of parties in actions al- [*896 ready commenced. Upon the whole of the this record there must be judgment for the plaintiff for 1802.

LORD ABINGER, C. B. I am of the same opinion. When a statute fixes the precise day at which its provisions shall take effect, I should not easily suppose that it pointed at any thing to be done in the intermediate time. Courts, in general, will not construe acts as retrospective unless the meaning is very plain. It is true that, if the words of a statute are plain, they must be strictly followed; but if they are ambiguous, the whole context must be looked to for the explanation. If that were not done here, we must come to a conclusion which would cut off rights of parties in actions commenced before the statute came into operation.

The rest of the Court concurred.

Judgment for the plaintiff for 1802. (a)

(a) See, as to stat. 3 & 4 W. 4, c. 27, s. 42, and stat. 3 & 4 W. 4, c. 42, s. 3, *Paget v. Foley*, 2 New Ca. 679.

*897] [*The following case is printed out of its regular order, for the purpose of bringing it into the same volume with the special verdict, set out in the former case, p. 3, *antè*. Many of the authorities cited in the following argument are given more fully in the previous report, to which accordingly frequent reference has been made :—]

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE KING'S BENCH.)

JOHN LUMLEY SAVILE Earl of SCARBOROUGH, *against* DOE on the demise of FREDERICK LUMLEY SAVILE, Esquire.

Lands were devised to R. for life; remainder to trustees to preserve contingent remainders; remainder to R.'s first and other sons successively in tail male; remainder to J. R.'s younger brother, for life; remainder to trustees to preserve, &c.; remainder to J.'s first and other sons successively in tail male; remainder to F., another younger brother of R.; remainder to trustees to preserve, &c.; remainder to F.'s first and other sons successively in tail male: remainders to other younger brothers of R.; and (after remainders to preserve, &c.) remainders respectively to their sons successively in tail male: remainders over.

The will contained two provisos.

First, that every person and persons who, by virtue of the will, should become entitled to certain premises, being part of the lands devised, should, within two years after he and they should severally become so entitled, take upon himself and themselves the surname of S., jointly with any dignity or title that might be vested in him or them, and quarter the arms of S. with his or their own family arms, and take such means as might be requisite to enable him or them respectively so to do; and, in case any such person or persons should refuse or neglect so to do, then the limitation to him or them (such neglect, &c., being made during the lives of R. or of any of his younger brothers, living at the devisor's decease, or within twenty-one years after the survivor's decease) should cease, determine, and become utterly void; and the lands should immediately go to the person next in remainder under the will, in the same manner as if such person or persons so neglecting, &c., being tenant or tenants for life, was or were dead, or, being tenant or tenants in tail, was or were dead without issue male, without prejudice to such jointures, portions, terms, &c., as, by virtue of powers afterwards contained in the will, should have been limited, &c., before such cesser or determination of the estate of the person or persons so neglecting, &c.

Secondly, that, if the title to a certain earldom (which was the only dignity or title shown to exist in the family) should descend to any of them the said R., J., F., &c., or to any of their sons (within any of the lives, &c., as before), then, and in such case, and as and when the title should come to him or them, the estate which he or they should then be entitled to in the lands, under or by virtue of the will, should cease, determine, and become void; and the lands should immediately go to the person and persons who under the limitations aforesaid, should then be next in remainder expectant on the decease and failure of issue male of the person to whom the title should so come, in the same manner as such person or persons so in remainder would take the same by virtue of the will, in case he or they to whom the title should come was or were actually dead without issue; such person and persons so in remainder complying with the first proviso; provided that any such cesser of the estate of the person or persons to whom the title should come should not prejudice, &c. (as before, for preserving jointures, &c.).

The title descended to R., while in possession of the lands, whereupon J. took possession, and assumed the name and arms of S.

J. being in possession, a common recovery was suffered, in which the lands were conveyed (by lease and release by J. and his eldest son) to a tenant to the præcipe for the joint lives of such tenant and J., and J.'s eldest son was vouched over, but J. was not vouched; and the uses of the recovery were declared to be to J. for life, remainder over.

While J. was in possession, F. and his eldest son, by deed truly reciting the facts, released their interest to trustees, who were strangers in interest, habendum to and to the use of the trustees in fee, upon such trusts as should correspond with the uses and trusts which had been declared of the recovery; and F. and his eldest son covenanted

with the trustees that they had not encumbered or impeached, and for further assurance.

Afterwards the title descended to J.

F. having died, and his eldest son having brought ejectment against J.: Held, (Assuming, first, that the second proviso was capable of operating more than once, and was not at an end upon the descent of the title to R.:

Assuming, secondly, that the proviso, upon the title coming to a tenant for life, determined the estates both of such tenant for life and of all his sons:

Assuming, thirdly, that the plaintiff was not barred or estopped by the release to the trustees, or by the above-mentioned covenants:)

That the second proviso created no new estate on the descent of the title; that the lessor of the plaintiff could claim only by virtue of the limitation expectant upon the estate tail of J.'s eldest son; and that the recovery defeated such a limitation, and was therefore a bar to the ejectment.

THREE actions of ejectment were brought against the father of the plaintiff in error, one for lands in Durham, another for lands in Yorkshire, and another for lands *in Nottinghamshire. The first was brought in the Court of Pleas of the county palatine of Durham, the other two in the King's Bench. [*898 In the first a special verdict was found and judgment entered for the defendant in the Court of Pleas of the county palatine, which was reversed on error in the Court of King's Bench; ante, p. 2. On that judgment error was brought in the House of Lords (and not in the Exchequer Chamber, as stated ante, p. 46). In the two actions for the lands in Yorkshire and Nottinghamshire, the same special verdict(a) was found, and judgment entered for the plaintiff in both, in the King's Bench, of Michaelmas term, 1834. The defendant below having died, error was brought, in the Exchequer Chamber, on the judgment in the action for the lands in *Nottinghamshire, by the present plaintiff in error, as [*899 his heir and next in remainder.

By consent of the parties, the special verdict was amended, by inserting, in the finding of the lease and release of July 1st and 2d, 1817, (ante, p. 11, line 24,) the following portion of the deed:—

"And each of them the said Frederick Lumley the elder and Frederick Lumley the younger, so far as related to his own acts and deeds only, did for himself, his heirs, executors, and administrators, covenant and declare with and to the said Bryan Cooke and Philip Egerton Ottey,(b) their heirs, executors," &c., "that they the said Frederick Lumley the elder and Frederick Lumley the younger have not, nor hath either of them, at any time heretofore made, done, committed, or executed, or knowingly or wilfully permitted or suffered, or been party or privy to, any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said manors, messuages," &c. "herein-before mentioned, and intended to be hereby granted and released, covenanted to be surrendered, and assigned, respectively, or any of them, or any part thereof, are, is, can, shall or may be impeached, charged, affected, or incumbered, in title, estate, or otherwise howsoever, or whereby the said Frederick Lumley the elder and Frederick Lumley the younger, or either of them, are, is, can, shall or may be prevented or hindered from granting, releasing and conveying the said hereditaments and premises respectively in manner aforesaid, according to the true intent and meaning of *these presents. And, further, that the said Frederick Lumley the elder and Frederick Lumley the younger, and [*900 each of them, their and each of their heirs, and all and every persons and person having or lawfully or equitably claiming, or who shall or may at any time or times hereafter have or lawfully or equitably claim, any estate, right, title,

(a) The mistake in the recital of the deed of 1817, as to the recovery (ante, p. 9, last line), did not apply to the premises in Yorkshire or Nottinghamshire.

(b) These were the trustees to whom the grant, &c., was made (ante, p. 11, line 5). The habendum was to them in fee, and to their use in fee, upon such trusts as should correspond, &c. They were not parties to, or named in, any of the other deeds mentioned in the verdict.

trust, or interest in, to, or out of the said hereditaments and premises hereinbefore mentioned and hereby granted and released, covenanted to be surrendered, and assigned, respectively, or any of them, or any part or parts thereof respectively, by, from, or under, or in trust for, them or either of them, or by, from, or under their, either or any of their, right, title, estate, or interest, shall and will from time to time, and at all times hereafter, at the request of the said Bryan Cooke and Philip Egerton Ottey, their heirs, executors, administrators or assigns, but at the costs and charges of the said John Lumley Savile, his heirs, executors, or administrators, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all and every such further and other lawful and reasonable act and acts, thing and things, conveyances, surrenders, assignments, and assurances in the law, for the further and better more perfect and absolute conveying and assuring of all and singular the said hereditaments and premises hereinbefore mentioned, and hereby released, covenanted to be surrendered, and assigned, respectively, or intended so to be, with their and every of their appurtenances, unto and to the use of the said B. C. and P. E. O., their heirs and assigns, in manner and upon the trusts aforesaid, be the same by fine or fines, common recovery or common recoveries, or any other matter of record, or otherwise howsoever, as by the said B. C. and P. E. O., *or either of them, their or either of their heirs or assigns, or *901] their or any of their counsel in the law, shall be reasonably advised, or devised and required."

The case was argued before Tindal, C. J., Park, J., Parke, B., Bolland, B., Alderson, B., and Gurney, B., on Tuesday, 1st December, and Wednesday, 2d December, 1835, and on Friday, 22d January, 1836.

Sir *W. W. Follett*, for the plaintiff in error.

In applying the principle, that the intention of the testator is to be regarded, the Court will collect the intention from the terms which he uses in the will, and not from the result which subsequent events may produce. The Court below appears to have founded its judgment upon the effect which the recovery, if it operated as a bar, would have in defeating the testator's intention. This reasoning is inadmissible: a recovery almost always defeats the limitations upon which it acts; but the effect of the limitations, in themselves, must be collected without reference to the effect which a recovery would produce upon them.

The plaintiff in error insists upon five points.

I. The proviso for shifting the estates in the event of the descent of the title was capable of operating only once; and, therefore, after it had operated, upon the descent of the title to Earl Richard, it was at an end.

II. Assuming that the proviso was to operate more than once, still, upon the title devolving on a tenant for life, the estates of his sons were not made to cease.

III. If the plaintiff in error should not succeed on the above points, still the proviso created no new interests, but merely gave a determinable quality to the *902] *estates avoided, so as to accelerate and bring into possession the estates in remainder; and therefore the recovery barred those estates in remainder.

IV. If it did create new interests, such interests were nevertheless barred by the recovery.

V. The lessor of the plaintiff below was at any rate precluded from maintaining this action by the deeds of 1817.

I. The proviso is to divest vested interests; such a proviso is to be construed strictly, and not extended by implication. This was laid down in *Doe dem. Luscombe v. Yeates*, 5 B. & Ald. 554.

The Court below appear not to have felt the importance of the question, whether the proviso could operate more than once; for they say (p. 45,) that, even if the words do not point to a succession of persons, "still the lessor of the

plaintiff may take an estate in tail; and it is not necessary now to determine, whether those in remainder after him can take any thing or not." But, if they can take nothing, the lessor of the plaintiff below could himself take nothing; for the proviso had operated once, before the event upon which he claims had occurred.

The Court below assume (p. 45), that it was clearly the devisors' intention that his estates should never go in the same line, or to the same persons, as the earldom. It lies on the lessor of the plaintiff below to show that this intention appears in the will. The words are (p. 7), "then and in such case, and as and when" the title shall fall in possession. "As and when" do not more obviously mean "when and *as soon*," than "when and *as often*," *or [*903 "when, and in every such case as." And, again, the proviso (p. 7), speaks only of the person, not persons, to whom the said title shall so descend. Yet the testator knew how to frame a proviso which would operate successively; for he has actually done so in the instance of the proviso relating to the name and arms, where he uses the words (pp. 5 and 6,) "every person and persons," "himself and themselves," "his or their own family arms," "any such person or persons shall refuse," "him or them so neglecting," &c. Clauses for successively shifting estates are not uncommon, though perhaps they are not often applied to the event of the descent of a title: a precedent may be found in 1 Sanders on Uses and Trusts, Appendix, No. II., p. 382, ed. 4, where the expression is "then, and in that case, and so often as the same shall happen." A proper form may be found also in Butler's note (2) (II. 2) to Littleton, s. 596, p. 327, a. Indeed the will shows that, upon any construction of the proviso, the testator actually did contemplate, in some events, the union of the estates and the title. If the defendant below, John Lumley Savile, and his eldest son, had both died, leaving a grandson by his eldest son, and then Earl Richard had died without issue, such grandson would have taken both the estate and the title: and a second son of the defendant below would, on the death of such grandson (being Earl) have taken the estate and title at the same moment, so that the proviso would not have applied, and the estate would not have shifted. So the ultimate remainder man, the right heir to the testator, might take both the estates and title. Further, the *proviso as to the name and arms (p. 5,) [*904 requires the party taking the estate to bear the surname of Savile "jointly with any dignity or title that may be vested in him." Now, as there was no dignity or title in the family except the earldom of Scarborough, the testator seems to have had in view the event of the same person enjoying the estates and the earldom. At all events, no necessary implication as to the shifting of the estate more than once arises; and the case is within the principle laid down in Lord Eldon's judgment in *Wilkinson v. Adam* on the subject of implication. (a)

II. The clause, in the proviso, which directs the cesser of the estate of the person to whom the title descends, would, of itself, merely let in the estate of the son of the defendant below, upon the defendant himself becoming earl. But the latter part of the proviso is relied upon on the other side. The estates are to go to the person next in remainder expectant on the decease and failure of issue male of the person taking the title, as if the latter were actually dead without issue. It is contended that this excludes the issue of the person taking the title. But this construction leads to inconsistencies. If the defendant below had died before Earl Richard, and if the defendant's son had been in possession at Earl Richard's death, then the estate must have gone over to the second son of the defendant. It is not likely to have been intended that the second and other sons of the tenants for life should be excluded upon the contingency merely of the title descending upon the tenant for life, but should be let in if it descended on the tenant in tail.

(a) 1 V. & B. 466; and see *Driver dem. Frank v. Frank*, 3 M. & S. 31, 36.

*905] III. It has been conceded, and will not be disputed, *that all the remainders were vested. This is then the common case of a recovery by a tenant in tail, with the concurrence of the tenant for life in possession, barring all the remainders. But then it is said that the proviso created new interests, and that several parties in remainder had, in addition to their vested estates in remainder, other interests, as possibilities, by way of executory devise or shifting use. This was assumed at the bar, and in the judgment of the Court, below, but was not supported by either authority or argument. It will be shewn that no new interests were created, but one set of estates only, namely, remainders to come into possession, either on the natural determination of the prior estates, or on their earlier determination by the devolution of the earldom.

If the testator's intention can be accomplished by holding that remainders only were created, then the Court is bound by the rules of law to treat the estates as remainders, and not as executory devises or shifting uses. There is nothing to prevent this intention being accomplished by means of remainders, and these only. There is no necessity, in order to carry his intention into effect, to nullify, on every shifting, all the limitations of the will, and to create a thorough and complete new series. In any point of view, the supposed intention of the testator could be defeated by a recovery; it is admitted that the present claimant, should he succeed, could, as being tenant in tail in possession, bar the further operation of the proviso.

It is a rule that, if an interest can be supported as a remainder, it shall not be construed as taking effect by way of executory devise or shifting use; *Purefoy v. Rogers*, 2 Saund. 380, and cases in note (9) to p. 888, of that case; *906] Lord Northington's remarks in *Carwardine v. Carwardine*, 1 Eden Ch. C. 84; *Doe dem. Mussell v. Morgan*, 3 T. R. 768, and Lord Kenyon's remarks there; Sugden's note to Gilbert on Uses, p. 171. Now here there is nothing to prevent the interests taking effect as remainders. The parties claiming on the devolution of the title claim only that which, in case the title had not devolved, would have come into possession when, but not before, the estate tail had determined; so that it is merely an acceleration of the remainder. The case is not like that of an interest limited to a new family having no interest antecedently limited; though, even in such a case, the new family would not take by way of shifting or executory devise.

It is also a rule that, wherever a limitation can be held to be vested, it shall not be construed as contingent; *Driver dem. Frank v. Frank*, 3 M. & S. 82. Here there are no words of contingency. The devise gives vested interests in the first instance; and the proviso merely annexes a determinable quality.

Suppose land given to A. in tail, and, if he die without issue, to B. in fee, with a proviso that, if A. marry, his estate shall cease and B. take as if A. were dead without issue: B. could not be considered to take different interests on the two events. Suppose, again, a devise to testator's wife for life, remainder to C. in fee, with a proviso that, if the wife marry again, her estate shall cease, and the land go over as if she were dead: C. has simply a vested remainder to take effect on either event. Suppose, in such case, C. charged his remainder *907] *with incumbrances, and the widow married again, could C. avoid the incumbrances on the ground that he was in of a new estate? The same reasoning applies to the present case.

In *Newis v. Lark*, Plowd. 408, (commonly cited as *Scolastica's Case*) the facts were these:—Henry Clerk devised to his son John Clerk in tail male, remainder to testator's son Francis in tail male, remainder to testator's daughter Scolastica in tail male, remainders over in tail, and the final remainder in fee to one of the city companies; and there was a clause as follows:—"I would none of the entailtees" "to alien, bargain, sell," &c., "but every one successively" shall "use and take the commodity and profit of the same," &c. "According to which my devise" "I will," "that if any of the said persons before entailed," &c., "or their heirs, do" "mortgage, bargain, sell," &c.,

"then and from thenceforth all and every such person and persons, and his or their heirs," "shall forthwith be clearly discharged, excluded, and dismissed as touching the said entail of mine, and the conveyance by words foregoing of the entail of my said lands and tenements towards him or them to be of no force, benefit, or advantage towards him or them, but the same my lands and tenements immediately to descend and come unto the party next in tail unto him or them, as effectually as if such disorderous person or persons had never been minded of in this my present testament and last will." Such a proviso against alienation would now be held totally void; but, as the Court in that case assumed the validity of the proviso, and entered *into the consideration of the effect produced by it upon the limitation, their decision as [*908 to this last point may be applied to the case of the present proviso. John (being in possession,) and Francis, for 300*l.* covenanted with Lark that John and his wife should levy a fine to Lark, and that afterwards a recovery should be had against Lark, in which Lark should vouch John, who should vouch Francis, who should vouch the common vouchee: and John gave Francis 40*l.* for his concurrence. The fine was levied, and the recovery suffered. John died without issue; and the plaintiffs, one of whom was Scolastica, claimed against Lark the defendant. All the judges (page 412,) agreed that the acts done were within the clause. "But the great doubt was whether the penalty, which Henry Clerk has added to the act done to take away the tail, be a condition, or a limitation and no condition, and how it stands with law, and who shall defeat the tails, and by what means. And as to this, all the Justices argued that it is no condition, for if it should be a condition, and should be broken by any in possession or in remainder, then the heir, to whom the privy of conditions in inheritances descends, should enter, and thereby defeat all the estates;" which was not the devisor's intention. "Page 413. Further it was moved, that if the penalty shall not amount to a condition containing a re-entry, whether or no it shall be a limitation in estate, and if it be a limitation, whether entry is necessary before it be ended, and whether the next in remainder be privy enough to make entry." "And as to this all the Justices argued, that the clause in the will which saith, that the person mortgaging or entangling shall be clearly discharged," &c., "touching *the [*909 entail, and that the conveyance of the entail shall be of no force, benefit, or advantage towards him or them," shall be taken and expounded in law as a limitation, that is to say, it shall be taken in sense to be a devise to him in tail, until he mortgage, alien, pledge, entangle, incumber, or does the other acts there expressed. And when he shall do any of these acts, then the estate shall end as fully as if he had died without issue male; so that after the act done the right of the tail shall cease, and the tail is merely dissolved. As if land is given to a man in tail as long as J. S. shall have issue of his body, or until J. S. shall die without issue of his body, there if J. S. dies without issue, the land shall revert, and the freehold in law shall be presently cast upon the donor, so that he has the possession in law before entry. And as fully is the estate and right of the entail ended in this case here, when he does any of the acts, for when the intent is shown by words, and the words are not aptly put, then such sense ought to be put upon the words as is suitable to the intent; and forasmuch as in sense such words amount to limitations, they shall be taken as a limitation, and especially when the case is upon a devise, where the intent only is regarded, and the words, although they are not apt in law for the matter, shall be drawn to the intent." "Wherefore inasmuch as it appears here to be the intent of the devisor, that he who does any of these acts shall lose his estate-tail, the law, which is desirous that the intent should be observed, says that the tail is limited to continue until the act prohibited is done; and so it is consonant to law. And Dyer resembled this to the case of an action *causa matrimonii prælocuti*, where the estate shall be defeated by the intent, without

*910] an *express condition in deed. And so where land is given to husband and wife during the coverture, or as long as such a one is abbot of such a place, these are times of limitations, and the estate shall end if the husband or wife die in the one case, and if the abbot be deposed in the other case." . . . (Page 414). And Dyer cited a conveyance which Fitz-James, Chief Justice of the King's Bench, caused to be made to his wife in Anno 28 H. 8, which he had seen, whereby Elizabeth his wife had an estate for life with remainder over, upon condition that if she should make a discontinuance of other land which was assured to her, that then her estate should cease, and he in remainder should enter. And it is to be presumed that he being Chief-Justice made this estate with the assent of the other Justices who were his companions, and that they took it that the condition there expressed was not a condition, but a limitation which should end the estate of his wife, so that that being determined, he in remainder should enter. And if it shall be so in that case where it was by deed, a fortiori shall it be so here where it is by last will, in which the intent rules the words, and not the words the intent." . . . "And all the Justices agreed upon the matter in law, viz. that the said clause of restraint shall be a limitation which shall determine the estates, and not a condition requiring re-entry." The intent, which was relied upon in that case, is equally clear in the present: it is manifest that the testator meant that the estate of any one, upon whom the title should descend, should cease exactly as if it had not been created by the will, or as if the person were dead without issue. Those "next *911] in remainder," who are *entitled "under the limitations aforesaid," are to take "in the same manner" as on the natural expiration of the preceding estates. With respect to the argument suggested (pp. 18, 19), that the repetition of the proviso as to the name and arms would have been unnecessary if the estates let in upon the descent of the title were the estates previously limited, the answer is that the repetition is unnecessary even upon the construction contended for on the other side; for the original clause for taking the name and arms applied to every person becoming entitled "by virtue of this my will;" which comprehends as well new estates as the remainders first limited.

Newis v. Lark, Plowd. 408, has often been referred to, as establishing the principle that the effect of the limitation is simply to determine the first estate, as for instance in *Ferne's Contingent Remainders*, 272. It is also discussed in *Mary Portington's Case*, 10 Rep. 40 b, where Lord Coke makes two objections; one, that the proviso is bad at law, which is true, but does not destroy the authority of the case as to the point now in discussion; the other, that the words create a strict condition. The second objection would not now be upheld: but it was, at any rate, not denied that the proviso, if it created a conditional limitation, had the effect of simply determining the precedent estate. And, as to this, the authority of *Newis v. Lark* has never been impugned. This proviso was afterwards under consideration in *Sharington v. Minors*, Moore, 543, where a remainder-man recovered on the forfeiture of *Scolastica*; and, although Pop- *912] ham, C. J., differed from the rest of the Court, that was merely *on the question whether there was not a discontinuance: the effect of the proviso as simply letting in the remainder was not denied.

In *The Lady Anne Fry's Case*, 1 Ventr. 199, (a), a man devised to his granddaughter in tail, on condition that she married with the consent of certain persons, and, if she married without such consent, or died without issue, remainder over in fee. She married without the consent; and the remainder-man recovered. The Court considered that, by the marriage, the remainder became vested in possession. Thus *Rainsford, J.*, says that the words "must be taken as a limitation, to support the intent of the deviser, and so let in the remainder which he limits over." And *Hale, C. J.*, said "'Tis as much as if he had said,

(a) S. C. as *Williams dem. Porter v. Fry*, 1 Mod. 86. See *Fry v. Porter*, 1 Mod. 300.

and if she marries, &c., then to remain, without the word condition."
 "Here is an estate tail devised to the defendant, subject to limitations, the one of law, viz. dying without issue; the other express and in fact (viz.), marrying without the consent, &c., and both are coupled together; so that whenever she marries without consent, &c., her estate determines and is transferred to him in the remainder, without either entry or claim. 'Tis all one as if the estate had been devised to her for life, and if she marries, then to remain, which had been but an estate *quandiu sola vixerit*."

Page v. Hayward, 2 Salk. 570, (a) is to the same effect. The suggestion, that the proviso created new estates, appears in no one of the cases: the proviso is always treated as qualifying the antecedent gift, as if it had been expressly incorporated with it.

"The lessor of the plaintiff below must show under what limitations he claims. Now his claim can be supported only on the supposition that, upon each descent of the title to a fresh branch of the family, toties quoties, the limitations to that and the younger branches are immediately avoided, and that a fresh set of limitations are created, exactly like the old one, and with the same proviso annexed. So violent a construction will not be adopted, in the absence of express words, or of some peremptory rule of law. [*913]

The practice of conveyancers is inconsistent with the supposition that the estates taking effect upon the descent of the title are new estates. When conveyancers intend to create new estates, they insert a clause directing the cesser, not merely of the prior estates, but of all those created by the original limitation; 1 Sand. Uses and Trusts, Appendix, No. II. 382, Ed. 4. In a manuscript of the late Mr. Butler, which is well known to the profession, the following passage occurs. "When an estate is limited to A. for life, remainder to B. in fee, with a proviso to determine A.'s life estate on the happening of a particular event, there, on the happening of that event, the life estate determines, and the remainder over takes immediate effect in possession. By this, the remainder takes effect in possession before the natural expiration of the preceding estate, and is therefore said to be accelerated. It is sometimes practised, in these cases, to insert in the clause determining the life estate a declaration that, on the determination of that life estate, the lands shall immediately go over to the remainder man. But this is unnecessary, as, by the *cesser of the life estate, the remainder man becomes immediately entitled in possession. [*914]

This doctrine, that, on the avoidance of a particular estate, the next immediate remainder takes effect, if the remainder man be in existence, is conformable to the authorities. Such are Lord Hardwicke's remarks in *Avelyn v. Ward*, 1 Ves. sen. 422, where the point was admitted; 18 Viner's Abridgment, 394, Remainder (G.), pl. 9. The same point was assumed in *Doe dem. Kenrick v. Lord Wm. Beauchamp*, 11 East, 657, and in *Gulliver dem. Corrie v. Ashby*, 4 Burr. 1929 (S. O. 1 W. Bl. 607, ante, p. 20).

IV. A recovery bars, not only remainders expectant upon the estate of the party suffering the recovery, but collateral limitations which would have the effect of determining that estate. It is true that it does not bar estates antecedent to the estate of such party, nor charges upon his estates. It is contended, on the other side, that the proviso is annexed to the life estate, and therefore interposed antecedently to the remainder in tail. But it is not confined, in its operation, to determining the life estate; it puts an end also to the remainder in tail, unless it be said that the proviso is to be construed divisibly, so as to determine the life estate in one event, and the estate tail in the other. But such a construction would, as the event is, leave the estate tail in remainder still undefeated, which will not be contended for on the other side. The proviso, therefore, defeated the estate tail; and, that being so, the recovery barred

(b) S. O. cited in *Andrews dem. Jones v. Fulham*, *Andrews*, 263, Pig. Rec. 176. Ante, p. 19.

the proviso. *Roper v. Halifax*, 8 Taunt. 845, ante, p. 18, was cited in the King's Bench on this point; but, supposing that decision to be good law, *it was the case of a power; and it is a rule that the interests created by appointment under a power take effect as if they had been created by the instrument creating the power, and thus have precedence of the estates which they defeat; cases cited in *Isherwood v. Oldknow*, 3 M. & S. 386. A proviso for shifting uses is not so construed; and, in *Roper v. Halifax*, 8 Taunt. 845, ante, p. 18, it was admitted that a shifting use would be barred by the recovery. A tenant in fee simple, possessing also a power of appointment, may defeat his wife's right to dower, which has previously attached, by exercising the power; *Ray v. Pung*, 5 B. & Ald. 561. But an executory limitation would not have such an effect; *Buckworth v. Thirkell*, 3 B. & P. 652 (n.), *Moody v. King*, 2 Bing. 447. Again, in *Roper v. Halifax*, the intention of the deed was to preserve the power, not to destroy it; and the intention in such a case is taken into consideration in interpreting the effect of the power and recovery; *Earl of Jersey v. Deane*, 5 B. & Ald. 569, *Tyrrell v. Marsh*, 3 Bing 31, *Davies v. Bush*, *McClell. & Y.* 58.

V. In the first place, the right of the lessor of the plaintiff below was assignable; *Jones v. Roe*, Lessee of *Perry*, 3 T. R. 88, and, see pp. 93, 95, *Doe dem. Cooper v. Finch*, 4 B. & Ad. 304, S. C. 1 N. & M. 170. It is a possibility coupled with an interest.

Secondly, such interest was, at any rate, releasable to the party having the freehold. It is true that the deed purports to convey to trustees; but, if a deed cannot operate in one way to effect the intention, it shall operate in another; an in *Tomlinson v. Dighton*, 1 P. Wms. 149. It is clear that the parties conveying meant, for good consideration, to give up all their interest. That deed may therefore be construed as a release.

Thirdly. The lessor of the plaintiff below cannot maintain the ejectment, contrary to his deed. A party who covenants not to sue on a covenant is barred of his action, though there be no express release; *Goodtitle dem. Edwards v. Bailey*, 2 Cowp. 597; cases cited in *Right dem. Jefferys v. Bucknell*, 2 B. & Ad. 280; *Dean v. Newhall*, 8 T. R. 168. Here the covenants against incumbrances, and for further assurance, are inconsistent with the claim of the lessor of the plaintiff below.

Sir John Campbell, Attorney-General, for the defendant in error.

I. As to the deeds of 1817, they furnish a ground, only for applying to a court of equity. Since the death of Lord Mansfield the courts of law have uniformly disregarded interest merely equitable. In *Goodtitle dem. Edwards v. Bailey*, 2 Cowp. 597, the legal estate in fact did prevail. It is true that a dictum of Lord Mansfield may be found in that case in favour of the equitable title against the legal, in ejectment; but that dictum has been considered bad law from the time of Lord Kenyon; *Adams on Ejectment*, ch. 3. p. 33, (3d ed.) *Halford v. Dillon*, 2 B. & B. 16, 17; *Shannon v. Bradstreet*, 1 Sch. & Lef. 68, 69.

First, the deeds of 1817 could not operate at law by way of transferring a legal interest, because the lessor of the plaintiff below had, at the time of executing the deeds, merely a possibility of interest, dependent upon the contingency of the uses shifting; and the trustees, to whom the conveyance is made, were mere strangers without any interest whatever. In the ordinary case of a lease and release, the bargain and sale for a year conveys an immediate possession by the operation of the statutes of uses: but here the bargainor had no possession to convey. The release, by common law, enlarges the estate of the person already in possession through the bargain and sale, but here is no such possession. A possibility is assignable or transferable in equity, but not at law, to a stranger; *Carter's Case*, (Cited in *Fulwood's case*, 4 Rep. 66 b.); *Lampet's Case*, 10 Rep. 47 b; *Poole v. Haskey*, Orl. Bridge 364; *The Earl of Kent v. Steward*, Cro. C. 358; *Doe dem. Brune v. Martyn*, 8 B. & C. 516; *Whitfield v. Fausset*, 1 Ves. sen. 391; *Wright v. Wright*, 1 Ves. sen. 411; *Sheppard's Touchstone*, 239, 431; 2 *Preston on Conveyancing*,

268; Watkins on Conveyancing, book i. ch. 14. In *Jones v. Roe*, Lessee of Perry, 3 T. R. 88; it was held that a possibility was *devisable*; but that decision was upon the particular wording of the statutes of wills (32 H. 8, c. 1, s. 1, and 34 & 35 H. 8, c. 5, s. 4,) and does not affect the question of assignability. There are many decisions to the effect that such an interest is assignable in equity: such is *Doe dem. Shaw v. Steward*, 1 A. & E. 300, where the marginal note indeed states that the interest there in question was held to be assignable at law, but the case shews only that such an interest of a bankrupt passes to his assignees; which it would do on the ground of their taking all that *he can assign either at law or in equity. But there is no author- [*918
ity for the interest being assignable at law.

Secondly, the deeds of 1817 cannot operate by way of *estoppel*, because they disclose the fact that the party conveying had only a possibility; note (1) to *Butler's Co. Litt.* 352 a; *Co. Lit.* 352 b; *Hermitage v. Tomkins*, 1 *Ld. Raym.* 729; *Poole v. Haskey*, *Orl. Bridg.* 369; *Right dem. Jefferys v. Bucknell*, 2 B. & Ad. 278, 281.

Thirdly, the deeds cannot operate as a *release*. It is true that, where a party, suing in covenant, has covenanted not to sue the defendant, the law construes the covenant of the plaintiff as a release, to avoid circuity of action; but here John Doe has executed no deed, and therefore the action cannot be released. *Tomlinson v. Dighton*, 1 P. Wms. 149; proceeded upon the intention; here the intention manifestly was to transfer the possible interest of the lessor of the plaintiff to, and to the use of, the trustees, upon trust for the benefit of the tenant. But this intention is inconsistent with a release to the tenant. Besides, the covenants are only against incumbrances and for further assurance; there is no covenant not to bring ejectment, nor even for quiet enjoyment; though such covenants would not operate as a release.

II. As to the argument, that the proviso could operate only once. The expressions "him or them," "he or they," and (in the concluding clause of the proviso) (a) "person or persons," shew that the proviso was intended to operate successively, toties quoties, and that *this is the meaning to be attached [*919
to the words "as and when." It is true that a case may be put, as in the event of the title and estate descending to a grandson of any tenant for life, in which the title and estate might be held together. But it is not necessary for the plaintiff below to shew that no possible case can arise in which this will happen; it is sufficient to shew that the testator has expressly provided that the union shall not take place in the event which has actually happened. And Lord Eldon's dictum in *Wilkinson v. Adams*, 1 V. & B. 466, cannot be applied to control the effect of an express proviso.

III. As to the argument that the proviso would carry the estate over, upon the descent of the title on Earl John, not to the lessor of the plaintiff below, but to the son of Earl John: the proviso directs that the land shall go to the person or person next in remainder *expectant on the decease and failure of issue male* of the person to whom the title shall descend. It is true that, if a tenant in tail become earl, his brother would take the estate, and not his uncle, as would have been the case if the title had descended upon the tenant for life. There is, however, no inconsistency in such a result. The estates are still kept in a line of descent distinct from that of the title; and in each event the issue of the party becoming earl is excluded. This is not a proviso of *forfeiture* like the proviso respecting the name and arms, where the estate is carried over to the son of the party not complying with the direction of the will; and it is reasonable that the two provisos should operate differently.

(a) That clause, ante, p. 8, line 1, commenced thus: "provided nevertheless, that any such cesser or determination of the estate of the *person or persons* to whom the said title of E. of S. shall come, shall not," &c.

*IV. As to the effect of the recovery. It has been asked, under what
 *920] limitations the lessor of the plaintiff below claims. The answer is, that he claims under the new use which the proviso creates, the proviso substantially declaring that a new set of uses shall arise whenever the title descends to a tenant for life entitled to the estates "under or by virtue of this my will." This interest is not barred by the recovery, which is merely the recovery of the remainder man in tail: the tenant for life, the defendant, was not vouched: and, even in the deed creating a tenant to the præcipe, in which the defendant below did join, the reversion for life was left in him, and could not be affected by the recovery, neither could the estates of the trustees for preserving contingent remainders. The interest now claimed was not barred, any more than it would have been barred by a recovery suffered by any member of the younger branches of the family. Indeed there is no more ground for contending that the lessor of the plaintiff is barred by the recovery which has taken place, than that the interests originally limited to Savile Henry Lumley and his issue male would be barred by a recovery suffered by a son of William Lumley. It is true that all interests which come after, or which operate so as to *determine*, the estate tail are barred by the recovery; but the interest here does not determine, it overreaches, the estate tail. It prevents that estate from coming into possession at all.

First, suppose that Frederick had taken no interest under the will except by the proviso, and that the limitation had been to John the father for life, remainder to trustees to preserve, &c., remainder to John the son in tail, provided
 *921] that if, *in the life of John the father*, *the title shall descend upon him, the land shall immediately go over to Frederick; and suppose John the father to have conveyed to a tenant to the præcipe, for the joint lives of himself and such tenant, and John the son to have suffered a recovery and to have been vouched. Then the proviso would not have been barred, because the recovery could affect only interests expectant upon the estate tail of John the son. The principle may be illustrated as follows. (1.) Suppose land limited to A. in tail, provided that, if a tree fall, it shall go to B. in fee; this is the same as if the limitation were to A. in tail so long as the tree stands; and, when it falls, to B. in fee. The limitation to B. is expectant upon, and in order of limitation comes after, and operates by way of determining, the estate tail of A., and will be barred by a recovery suffered by A. This is in effect the case of *Page v. Hayward*, 2 Salk. 570.(a) (2.) Suppose land limited to A. for life, remainder to B. in tail, provided that, if a tree fall, the land shall remain to C. in fee, but subject always to A.'s life estate. This is the same as if the limitation were to A. for life, and, after his decease, to B. in tail, so long as a tree stands, and, when the tree falls, to C. in fee, subject to A.'s life estate. Here again C.'s interest is expectant upon the determination of B.'s estate, and comes after it in order of limitation; and B. may bar it by a recovery. This is in effect the case of *Pullen v. Ready*, 2 Atk. 587. (3.) But suppose land limited to A. for life, remainder to B. in tail, provided that, if a tree fall during A.'s life, the limitations shall all cease and the land remain to C. in fee; this is *the same
 *922] as if the limitation were to A. for life, so long as the tree stands, and, if the tree fall during the life of A., then to C. in fee, but, in default of the tree falling during the life of A., remainder to B. in tail. Here, if B., during A.'s life and while the tree stands, suffer a recovery, that does not bar the conditional limitation in favour of C., which is not, as in the former case, expectant upon the estate tail, but is antecedent to it in order of limitation. [TINDAL, C. J. You suppose the tenant for life to join in the recovery.] Of course, so far as is necessary to make a good tenant to the præcipe. Now this case is in effect the same with that originally supposed.—The effect of a recovery suffered by a

(a) S. C. cited in *Andrews dem. Jones v. Fulham*, *Andrews*, 263. Pig. Rec. 176. Ante, p. 19.

tenant in tail has been considered as depending upon three different principles. In the first place, there is a supposed compensation by virtue of the voucher; that clearly does not apply to estates antecedent to the estate tail, and cannot bar such a proviso as this, the tenant for life and the trustees to preserve contingent remainders, and the person who is to take under the proviso, not having been vouched over. In the second place, the recovery destroys the estate tail, and therefore destroys such estates as are mere remainders supported by the estate tail; and, according to the view taken by Serjeant Hill, in the notes printed in 1 Sanders on Uses, p. 436, Appendix, No. VII., 4th ed., Ante, p. 22,) a conditional limitation is in the nature of a remainder. But the interest arising under this proviso is supported, not by the estate tail, but, so far as it is supported by any estate, by the life estate: and (whatever might have been the effect if the tenant for life and the trustees had *been vouched over) it cannot be affected by the destruction of the estate tail. In the third place, the recovery extends and prolongs the estate [1922] tail into a fee; in one direction, being a *continuance* of the estate tail, according to Lord Hale's language in *Benson v. Hodson*, 1 Mod. 109 (ante, p. 21). But it does not extend the estate tail backwards. The estate gained is derived wholly from the estate tail, as *continued* by the recovery: *Martin dem. Tregonwell v. Strachan*, in D. P. Wills, 444 (S. C. 1 Wils. 66; 6 Brown's P. C. 319, 2d ed.; and in K. B. 2 Str. 1179; S. C. 5 T. R. 107, note (b). Ante, p. 15,) *Roe dem. Crow v. Baldware*, 5 T. R. 104, ante, p. 15, *The Appeal of the Lord Derwentwater*, 9 Mod. 172 (and see *Pigott on Recoveries*, 119, ante, p. 15), *Garth v. Cotton*, 3 Atk. 751, 756, 757. Ante, p. 15, note (c), *Serjeant Williams's note to Careswell v. Vaughan*, 2 Wms. Saund. 42 m, n. note (7). Ante, p. 15. The note of Serjeant Hill printed in 1 Sanders on Uses, p. 436, Appendix, No. VII., 4th ed., ante, p. 22, leads to the same result. Hence interests, which are subject to the estate tail, are held to be barred by the recovery of the tenant in tail; *Lord Hale in Benson v. Hodson*, 1 Mod. 111, ante, p. 19, *Page v. Hayward*, 2 Salk. 570; S. C. cited in *Andrews dem. Jones v. Fulham*, *Andrews*, 263. *Pig. Rec.* 176. Ante, p. 19, *Gulliver dem. Corrie v. Ashby*, 4 Burr. 1929; S. C. 1 W. Bl. 607, Ante, p. 20, *Driver dem. Edgar v. Edgar*, 1 Cowp. 379, ante, p. 20, *Pullen v. Ready*, 2 Atk. 587. But, on the other hand, charges and other interests, which are paramount or antecedent to the estate tail, or which wholly override it, are not barred; *White v. West*, Cro. Eliz. 792, (ante, p. 14, note (c); and p. 16), *Smith dem. Richards v. Clyfford*, 1 T. R. 738, *Eales v. *Conn*, 4 Sim. 65, (ante, p. 17), 1 Sanders on Uses, (a) 2 Sudg. Pow. 573, Appendix, No. 4, (b) But- [1924] ler's note to Co. Litt. 203 b (not. 1, sect. 4), ante, pp. 16, 17. *Hoper v. Hallifax*, 8 Taun. 845, (ante, p. 18), is a direct authority to the same effect. It has been attempted to distinguish that case from the present, on the ground that an appointee, who takes under a power, is in the same situation as if he had been named in the instrument creating the power. But the same is true of a party taking under this proviso, who may not have been mentioned by name in the will. When the event mentioned in the proviso occurs, or the power is executed, then, in each case, and upon the same principle, the interest takes effect exactly as if the party claiming under it had been designated by name in the original instrument. In support of the distinction, the difference between the decision in *Ray v. Pung*, 5 B. & Ald. 561, on the one side, and those in *Backworth v. Thirkell*, 3 B. & P. 652 (n.), and *Moody v. King*, 2 Bing. 447, on the other, has been referred to. But, if those decisions are all good law, it is upon doctrines peculiar to the law of dower and curtesy. It is clear that there is no such distinction as that contended for. The same arguments will apply to a shifting use taking effect upon the occurrence of an event,

(a) P. 176, and p. 426, 4th ed. (ante, pp. 25, 26).

(b) Ed: 6, (1836). Printed in the text, p. 80, in ed. 5. Ante, p. 24.

as apply to an use taking effect upon the execution of a power. The nature of the event upon which the new use is to arise cannot vary the result. This is consistent with the view taken in 1 Sand. on Uses, p. 176, 7, 4th ed., (ante, p. 25, 26.) In the Appendix to 2 Sugden on Powers, No. 3, p. 563 (6th ed.), *925] it is demonstrated that *the two cases of a power and a proviso stand on the same ground. The argument may be put thus. Suppose there were two limitations to A. for life, remainder to B. for one thousand years on certain trusts, remainder to C. in tail: C.'s recovery here could clearly not bar the term. But, supposing the limitations were to A. for life, remainder to C. in tail, with power to B., during A.'s life, to create a term of 1000 years, then also, upon the authority of *Roper v. Hallifax*, 8 Taunt. 845, (ante, p. 18), C.'s recovery could not bar the term created by the execution of B.'s power. But how could the result be different, if, instead of an absolute remainder or a power of appointment, the limitation were that, if A. had younger children during his life, the term of 1000 years should arise, or that, in the same case, an estate tail should arise? The rule must be general as to all estates antecedent to the estate tail. It is clear, therefore, that, on the hypothesis of Frederick taking no interest except by the proviso, and the limitation being annexed only to the life estate of John the father, the recovery could not have barred the proviso.

Secondly, suppose Frederick still to take no interest except by the proviso, but to have contingent interests under two separate provisos. Thus, suppose the limitations to be to John the father for life, remainder to John the son in tail, provided that, if John the father become earl, the land shall go to Frederick, and, also, provided that, if John the son become earl, the land shall go to Frederick. Then the first proviso clearly cannot be affected by the existence of the second; and, therefore, a recovery by John the son, though it would bar the second proviso, would not bar the first.

*Thirdly, instead of the case last put, let the two separate provisos, *926] there supposed, be supposed to be incorporated into one. Then the result would clearly be the same. The proviso would still be taken divisibly, as in *Boyce v. Hanning*, 2 Cr. & J. 334, (S. C. 2 Tyrwh. 327. Ante, p. 28). [PARKER, B. Does not the proviso in the present case operate differently in the two events? In the one, it carries the land to a brother of the tenant for life; and, in the other, it is not to carry the land to the brother of the tenant for life so long as such tenant for life has issue male.] That difference makes it the easier to take the proviso divisibly. At least it does not prejudice the argument. In each case the proviso is to carry the land to the person next in remainder after failure of issue male of the person who shall become earl; and, in each case, Frederick here answers that description.

Fourthly, the case actually before the Court differs from the supposition last made in the circumstance only that the proviso, instead of giving the estate over to a person not named in the previous limitations, gives it to a branch of the family taking also interests in remainder. But the operation of the proviso cannot be different in the two cases of an interest being conferred on a new party, and on a party taking also an interest by force of another clause of the will. In each case new uses are created. Had a fresh family been substituted in every case of the earldom descending upon the party in possession of the land, it will not be disputed that the uses so coming into operation would have been new uses. What difference can it make, that the party to be benefited by the proviso happened to have an interest under the *927] *original limitations? There is no legal objection to the same party claiming by distinct interests. An instance of this occurred in *Goodtitle lessee of Vincent v. White*, 15 East, 174. In that case the party was held to have at once two distinct fees simple, which is as strong a case as can be imagined. If the testator had here said expressly that new uses should arise on every descent of the title, there could have been no objection. Where a power

is given to revoke uses and create new, a series of new uses, arises as often as the power is executed. Suppose a different condition had been annexed to each estate, there could then be no doubt that the uses would be distinct : what difference can it make, whether the nature of the condition be the same or not? [PARKER, B. What are the new uses which arose when the title descended upon Richard, and John the father took the estates?] There arose a series of new uses exactly similar to those limited in the earlier part of the will ; and so whenever the title descended upon a tenant for life in possession. There is no reason that there should not be a divesting of existing uses and a revesting of new uses similar to those divested, in infinitum. It has been suggested that there are no new uses, and that the words of cesser are the only operative words : but the mere extinction of the estates determined by the clause of cesser would not have effectuated the intention of the devisor. For, if the estate of John the father simply ceased (which is all that the clause of cesser directs,) if any estate in remainder came into possession, it would be the estate of John the son, not of Frederick. For that reason the words of gift are added. The lessor of the plaintiff therefore necessarily *claims by the gift over, not merely by the cesser. [ALDERSON, B. If the descent of the title had occurred after the remainder in tail had come into possession, the words "the estate shall cease" would effect the intention, for it would put an end to the estate tail.] It is sufficient for the present argument to shew that, in the event which has happened, that of the earldom descending on a tenant for life, the mere words of cesser cannot affect the intention. The present case is not governed by the decisions and dicta in *Newis v. Lark*, Plowd. 408, *The Lady Anne Fry's Case*, 1 Vent. 199, (S. C. as *Porter v. Fry*, 1 Mod. 86. See *Fry v. Porter*, 1 Mod. 300.) Page v. *Hayward* 2 Salk. 570, (S. C. cited in *Andrews dem. Jones v. Fulham*, *Andrews*, 263, Pig. Rec. 176, Ante, p. 19,) *Andrews dem. Jones v. Fulham*, *Andrews*, 263, *Avelyn v. Ward*, 1 Ves. sen. 422, *Gulliver dem. Corrie v. Ashby*, 4 Burr. 1929, S. C. 1 W. Bl. 607, Ante, p. 20,) and pl. 9, in 18 *Viner's Abridgment*, 894, *Remainder (G.)*, where, upon the cesser of the previous estate, no intermediate interest was passed over. It is said that the words of the proviso respecting the taking of the name and arms furnish no argument for the plaintiff below, because, having regard to the language of the name and arms clause, these words are in any point of view surplusage. This may be admitted ; yet the insertion of the words shows that the devisor contemplated that new uses were to arise, and, however superfluously, provided for such an event. It appears to be suggested, on the authority of *Purefoy v. Rogers*, 2 Wms. Saund. 880 ; and note (9) to p. 388, *Carwardine v. Carwardine*, 1 Eden, Ch. C. 84, and *Sugden's note to Gilbert on Uses*, 171, that the interest *under the proviso must be construed as a contingent remainder. The rule furnished by those authorities is that, where the question is between an executory devise and a contingent remainder, the Courts lean to the latter. But how does this rule apply here ? or how is it to be made available against the plaintiff below ? Supposing this a contingent remainder, the defendant below would not be benefited by such a construction ; for it would be a remainder expectant upon the life estate and that of the trustees to preserve contingent remainders, and therefore would not be destroyed by the recovery which has been suffered. But it is clear that this proviso cannot create a remainder, because the interest created by it does not await the determination of the first estate by the nature of the original limitation of that estate. *Fearne, Cont. Rem.*, p. 13, says that the remainder is the remnant expectant on the particular estate, the whole fee not having been limited in the first instance ; and he adds, p. 14, "The true point of distinction, as I take it, between such conditional limitations over as are, and such as are not remainders, in the strict sense of that word, lies here ; the former are limited to commence where the first estate is, by the very nature and extent of its original limitation, to expire or determine ; whereas the latter are limited so as to be independent of the measure or extent originally

given to the first estate) and to take effect in possession, upon an event which may happen before the regular determination, to which that first estate is liable from the nature of its original limitation, and so as to rescind it." So that it is clear, upon first principles, that the estate arising under the proviso in defeazance of the estate of John the father is not a *remainder. Driver dem.

*930] Frank v. Frank, 3 M. & S. 32, was cited to show that this, if possible, must be construed to be a vested remainder; and reliance was placed on *Newis v. Lark*, Plowd. 408, *The Lady Anne Fry's Case*, 1 Vent. 199, (S. C. as *Williams* dem. *Porter v. Fry*, 1 Mod. 86. See *Fry v. Porter*, 1 Mod. 800), *Page v. Hayward*, 2 Salk. 570; (S. C. cited in *Andrews* dem. *Jones v. Fulham*, *Andrews*, 263. Pig. Rec. 176. Antè, p. 19), *Andrews* dem. *Jones v. Fulham*, *Andrews*, 263, as showing that the proviso and the prior limitations may be *incorporated*, so as to give effect to all the limitations as remainders, and make the limitation to the lessor of the plaintiff take effect as a vested remainder. But the answer is, that the proviso and limitations cannot here be so moulded in the form of remainders as to give effect to all the different interests as vested remainders. The estate of John the son, if the proviso and limitations were incorporated, would be contingent upon the event of his father dying before the earldom descended to him. (a) Now a party having only a contingent remainder cannot bar by a recovery. And the recovery therefore would, upon that construction, be ineffectual. In *Newis v. Lark*, Plowd. 408, and the other cases relied on, the circumstance that, upon the cesser of the previous estate, no intermediate interest was passed over, made the suggested mode of construction admissible without considering any remainder as contingent. [PARKE, B. Suppose the proviso had said in express words that, if the earldom descended on John the father, the limitations to him and his issue should be struck out of the

*931] will?] That is very different *from the clause as it is actually framed. But, supposing it so expressed, and accompanied with a gift over, express or implied, the lessor of the plaintiff below would still claim under a shifting use, paramount and antecedent to the remainder in tail of John the son; and this, according to *Roper v. Hallifax*, 8 Taunt. 845, antè, p. 18), would not be barred. But, if there were merely such a clause of cesser, and no gift over, express or implied, the intention of the testator could not be accomplished; for no one except the testator's heir at law could then take advantage of the cesser.

Sir W. W. Follett in reply.

I. As to the deeds of 1817. It is said that the lessor of the plaintiff below is not precluded from maintaining this action by his covenant, because John Doe has not covenanted. But the Court will look to the real party. A tenant, who is defendant in ejectment brought on demise of his landlord, cannot dispute his landlord's title. So, in *doe* dem. *Morris v. Rosser*, 3 East, 11, where the lessor of the plaintiff and the defendant had submitted to arbitration, the award was held conclusive evidence between them. In *Thorpe v. Eyre*, 1 A. & E. 926, where that case was cited, it was indeed held that an award did not actually transfer the property; but not that it did not bind the party to the arbitration. Here the deeds are at least as conclusive as the submission to the award. Again, as to the question whether the deeds would convey the possibility, at law. It is argued that a lease and release cannot have that effect.

*932] Perhaps that form of conveyance is not the most *convenient. But, if the assignment be not impossible, the Court will look to the intention, and allow the lease and release to have the effect proposed; *Doe* dem. *Were v. Cole*, 7 B. & C. 243; *Doe* dem. *Milbourne v. Simpson*, 2 Wils. 22. The passage referred to from *Sheppard's Touchstone*, 431, was cited but without success, in *Jones v. Roe*, lessee of *Perry*, 3 T. R. 88. And formerly such interests were considered not merely as incapable of assignment, but as neither de-

(a) On this point, see the papers sent in after the conclusion of the argument, post, p. 942.

scendible nor devisable. Now they clearly may descend or be devised: and therefore it is not easy to say why they should not be held to be assignable also. (a) In 2 Preston on Conveyancing, 270, it is certainly said that they are not assignable; but the point is spoken of as one on which the profession are not unanimous. It was argued that the marginal note in *Doe dem. Shaw v. Steward*, 1 A. & E. 300, goes too far, for that the case merely shews the interest to be at least assignable in equity. But the successful argument in that case was directed to establish that it was assignable at law; and the judgment is to the same effect, the question discussed being, whether there was any equity in the wife to bar the assignees title under the husband. The prevailing opinion in the profession, on this point, certainly is in favour of the defendant in error; but no authority has been found which is conclusive.

II. As to the question whether the proviso can operate so as to shift the estates more than once. On the general principle of not allowing the estates to be divested without express words, *Doe dem. Luscombe v. Yeates*, 5 B. & Ald. 554, is not distinguishable. The expressions cited from the [*933] will, on the other side, may be consistent with the construction that the clause is to operate toties quoties, but the question is whether they necessarily require that construction. The circumstance that the proviso directs the estates to go to "person and persons" proves nothing: and, though the title is spoken of as descending to "him or them," yet these words have no antecedent; and they seem to mean no more than "any of them," the phrase used before. The proper form for a clause which is to operate more than once may be found in *Farrerly v. Ford*, 1 A. & E. 900. *Stanley v. Stanley*, 16 Ves. 491, is an instance of the strictness with which the words of such provisions are construed. And it may also be remarked that, neither in that case, nor in *Doe dem. Heneage v. Heneage*, 4 T. R. 13, was it attempted to shew that new estates were created by the proviso; the interests were treated merely as remainders.

III. As to the effect of the recovery, the plaintiff in error contends that the defendant takes merely a vested remainder, expectant on the determination (either by natural expiration, or the descent of the earldom) of the estates of John the father and John the son. On the other side, it is said that he takes two estates; but according to the construction attempted, he must take many more; he must have a vested remainder, together with a possibility upon John the father becoming earl; then another vested remainder, together with a possibility upon John the son becoming earl; and, upon younger sons of John coming into possession, other pairs of estates of the same kind, toties quoties. *It has not been shewn how, if that were possible, the proviso is to be attached to the new use. Such a complicated method of reading the lim- [*934] itations will not be adopted, if any more simple can be found. The principal reason suggested in the judgment below for rejecting the more simple construction seems to be that, if it were adopted, the testator's intent would be defeated by the recovery, which for the reasons before given, is not an admissible argument. In *Fearne's Contingent Remainders*, p. 257, it is said that the power to suffer a recovery is inseparably attached to every estate tail. [ALDERSON, B. The rule in *Shelley's Case*, 1 Rep. 104, a, ordinarily tends to defeat the intention, in the manner pointed out by Lord Eldon in *Jesson v. Doe dem. Wright*, 2 Bligh, 55.] Unless the liability to a recovery is to be taken into consideration, the intent may be carried into effect by construing the limitation as either a shifting use, or a vested remainder, and, on the authorities cited, the Court will prefer the latter. It is said that the rule of preference applies only where the question is between an executory devise and a contingent remainder: but the operation of an executory devise and a shifting use is the same. To the authorities before cited, on this point, may be added *Fearne*, Cont. Rem. p. 266,

(a) See Serjeant Williams's note (9) to *Purefoy v. Rogers*, 2 Wms. Saund, 388 l.

(citing Goodtitle lessee of Winkles v. Billington, 2 Doug. 753,) and Doe dem. Harris v. Howell, 10 B. & C. 191.

It has been argued that the clause of cesser is insufficient to effectuate the testator's intention; but it is also urged on the other side that the estates of both John the father and John the son are to cease upon John the father *935] becoming earl. Then the interest of *the brother of John the father comes into possession: which shews that it is impossible to distinguish this case from Newis v. Lark, Plowd. 408, and The Lady Anne Fry's Case(a) on the ground suggested; for in each case, the party taking up the cesser is the party whose interest is next in remainder to that which is to cease. Those decisions are therefore conclusive authorities, that in a devise, (for it may possibly be otherwise in a deed, at least in one operating purely at common law,) interests like that of the lessor of the plaintiff below must be construed as remainders expectant on the determination of the subsisting estate.

The only authority which really is in favour of the plaintiff below, is the passage in Fearn, Cont. Rem. pl. 14, (ante, p. 929.) But this doctrine cannot be supported. What is meant by "originally given," and "original limitation?" No one limitation is more original than another in the same instrument. The whole must be taken together as making up the disposition of the estate, and incorporated, as in Newis v. Lark, Plowd. 408, and The Lady Anne Fry's Case.(a) When they are so incorporated, the resulting limitation is a remainder, as appears by those cases, and according to Fearn's own view. In Butler's note (h) on Fearn, p. 10, the distinction is spoken of as artificial, but is admitted; but, in the same writer's note (1) at Co. Litt. 203 b. (III,) the language is more doubtful. In Douglas's note [1] to Goodtitle, lessee of Winkles, v. Billington, *936] 2 Doug. 755, the doctrine is disputed. Fearn has offered an *answer to the objections, (p. 15, and p. 267;) but he cites no authority except Cogan v. Cogan, Cro. Eliz. 360. Supposing that case to be good law (which is doubtful,) it may be distinguished from the present: it was a deed inter vivos, not a will: and it was a case of a strict common law condition, so that the life estate and remainder would be destroyed together. And the party to take under the limitation over was to take only on the particular event, and not in any event: there was no remainder to be accelerated. That Fearn himself had not taken a very accurate view of the distinction, appears from an inconsistency which occurs soon afterwards. At p. 18, he has the following passage:—"Suppose an estate devised to A. for life, remainder to B. in fee, provided that if A. should refuse to take the testator's surname within a short limited time, or certain lands should descend to him, then his estate should cease, and the lands go immediately to the remainder-man or his heirs—or, a limitation to A. for life, remainder to B. for life, remainder to C. and the heirs of his body, remainder to D. in fee, with a proviso that upon the accruer of certain other lands to A. or to B. or to C., or his issue, the estate limited by the will to the person to whom such other lands should so accrue, should thereupon cease, and the devised lands go immediately to the next in remainder, according to the will; or, suppose a devise to A. for life, provided that if the testator's son should return from the East Indies within two years after the testator's death, the estate of A. should thereupon cease, and the lands should go to the son for life, *937] or in tail, would such limitations be contingent remainders *barrable by the first tenant for life as such? If so, the tenant for life would have nothing more to do than to make a demise for 99 years in trust for himself, and then levy a fine, or make a feoffment, to get entirely rid of them. But if the decided case (Cogan v. Cogan, Cro. Eliz. 360,) I have referred to be law, the limitations I have put are conditional limitations, which, though void in conveyances at common law, are admitted to operate in a will as executory devisees,

(a) 1 Ventr. 199. S. C. as Williams dem. Porter v. Fry, 1 Mod. 86. See Fry v. Porter, 1 Mod. 300.

and consequently are not barrable as contingent remainders." Now, in the two first cases, the limitations, if they are remainders (which they are,) are vested, for they take effect sooner or later in every event. As to this, the test of contingency given by Fearné at p. 19, is conclusive. And, besides this, the supposed objection arising from the power of the tenant for life to get rid of the limitations is invalid; for it cannot be disputed that they are barrable by *some* recovery. Fearné's doctrine cannot therefore be supported. It is impugned in some remarks of the late Mr. Bradley, printed in Practical Points, or Maxims in Conveyancing by Charles Barton, jun. p. 195, (and in Atkinson's Practical Points in Conveyancing, p. 82.) "When two family estates are settled in such a manner as that by a probable event both may unite in the same person, it is usual to insert a proviso in the latter settlement, that if that event should happen the estate for life or in tail of that person in the premises comprised in the latter settlement should cease and determine, and the next remainder come into possession. It was referred to Mr. Fearné to settle a proviso in a case so circumstanced: that gentleman, after much consideration, introduced his opinion by defining 'the nature of an executory devise, stating the rules which the law has established with respect to the execution and commencement [*938 of contingent estates, and by a strange misapplication of those rules to the case under consideration, which had nothing in it which bore the least resemblance to the estates defined, he concluded that the proviso should confine the happening of the contingency within the period of 21 years from the death of a person in being. One cannot but wonder at so great a mistake. By uniting in the same person the premises comprised in both settlements, a vested estate-tail, if such were his estate, would indeed determine, and the next in remainder come into possession; *but clearly no new estate would arise or be created on that contingency*; and whether the estate-tail should expire by the failure of issue, or should determine by the happening of the contingency, and whether within twenty or two hundred years, the effect and consequences would be the same, the next in remainder would come into possession; but in neither case would any new estate arise or come in *esse*; and the proviso leaving the happening of the contingency indefinitely in point of time, would be so far from tending to a perpetuity, that it would have quite a contrary tendency; for the estate of an infant tenant in tail might, by happening of the contingency, determine during his infancy, and the person next in remainder (being of full age) and tenant in tail, by suffering a common recovery, or being tenant in fee-simple, might by a common conveyance, or by his last will, dispose of the inheritance at his pleasure; and any tenant in tail in possession being of full age might at any period of time, by suffering a common recovery, bar that estate-tail, and all remainders over, in the same *manner as if the proviso had not been inserted, and [*939 the proviso itself would cease for ever; but to make use of an argument in order to prove a point so clear, seems (in Mr. Bradley's opinion) to be no less absurd than it would be to attempt to prove by argument that two and two are equal to four; both the one and the other being self-evident truths."

It has been attempted to distinguish between a recovery suffered by a tenant in tail in possession, and one suffered by a remainder-man in tail with the concurrence of the tenant for life. Such a distinction is unimportant. All that is requisite is that there should be a vested estate tail, and a determination of that with the concurrence of the freeholder.

It is said that, if the proviso carried the estate over to a stranger, it would not create a remainder. But the only difference would be that it would create a contingent remainder instead of a vested one. And this is shown by the opinion of Serjeant Hill, printed in 1 Sanders on Uses, p. 436.(a)

It was attempted to divide the one interest of the lessor of the plaintiff below, taking effect at different times according to different events, into two, one to

operate in one event, one in the other. For this there is no ground: and, in order to support such a view, it was necessary to insert a condition, not contained in the devise, that the event should happen in the life of John the father. In fact, there are numerous varieties of events which would change the time at which the interest came into possession; if John the father died without issue, *940] Frederick would take on his death; so if John *the son, or any younger brother of his, first died without issue. But this does not convert the remainder of Frederick into so many distinct remainders, each supported by different particular estates. Frederick could take nothing at all till, by some event or other, the estates of John the father and of all his issue were determined. And whenever and however they were determined, he was to take.

It was attempted to show that, if Frederick's estate were construed as a remainder by incorporating together all the limitations, the estate of John the son would become contingent also. But that was made out by arbitrarily introducing, as a qualification of John the son's remainder, that it was to take effect only if the father died without being earl. But the limitation first gives an unqualified vested remainder; and then comes the proviso which is to be incorporated into the limitations, by the several interests lasting *until* the parties shall become earl. The limitations are to be blotted out on the event occurring, but to be in force till then. (a)

It was asked, whether a recovery by a later remainder man in tail would bar the previous estates? It would bar the remainder, whether to accrue by failure of issue or descent of the title, of all parties subsequent in point of limitation to the party suffering it. Thus, a recovery by Savile Henry Lumley would bar all the interest of William Lumley. So here the recovery of John the son bars all the interest of Frederick.

As for the argument from the repetition of the direction respecting the name and arms, the contrary is to be inferred from that circumstance; for, if the testator *had intended the proviso, which was to operate when the title de- *941] scended, to be repeated also, he would have inserted a direction for one as well as the other.

It was asserted, in order to make the case of *Roper v. Hallifax*, 8 Taunt. 845, (anté, p. 18), applicable, first, that the proviso created new estates; secondly, that the proviso was annexed to the life estate of John, the father, separately; thirdly, that the new estates were interposed before the remainder in tail of John the son. But the proviso destroys the remainder in tail at the same time with the estate for life. It has not been shown what is to become of the estate tail of John the son, upon the construction contended for on the other side. Then how can the proviso be confined to the life estate, or the interest arising under it be interposed between the two estates, which it destroys simultaneously? It was said that it did not destroy the remainder in tail, but only prevented its vesting in possession. But the remainder was actually vested; and the vested estate tail in remainder was defeated by the proviso at the same instant as the estate for life.

The argument against the applicability of *Roper v. Hallifax*, 8 Taunt. 845, (anté, p. 18), is not answered. It never was doubted that a proviso for a shifting use would have been barred in that case: the sketch of an argument, by Sir Edward Sugden, on that case, in 2 Sugd. on Powers, (p. 562, Appendix, No. 3, 6th ed.), assumes this as clear from doubt. Suppose land were devised to such uses as A. shall appoint, and, in default of appointment, to B. in tail; or, suppose an estate given to A. in tail, with power to the executors to *942] sell for payment of debts; could the tenant in tail *bar that by recovery? According to the present notion, taking *Roper v. Hallifax*, 8 Taunt. 845,

(a) As to this point, see the papers sent in after the conclusion of the argument, post, p. 942.

on the life estate determining in the life time of the tenant for life, still the remainder is to take effect in every case in which it possibly can, consistently with its duration. It is therefore a vested remainder. To deny it to be such, would be to hold that, though, subject to the life interest, an ulterior interest still remains, which may by possibility take effect during the life by forfeiture, &c., still that interest could not be made certainly to vest in any one without giving him an estate which might endure beyond the life; and for this there is no reason. On the contrary, there is every reason in law for allowing persons to parcel out the various interests in any way they see fit, and for making them vested, rather than contingent. The third instance may be tried by the same test. And so may the fourth instance, which is still more analogous to the principal case.

Suppose, in the principal case, the testator had expressly said that, though his intention was that the estate of each tenant for life should determine on his becoming earl, still the inheritance in remainder should nevertheless vest in the sons of a tenant for life on their births, and remain so vested till the earldom should devolve on the tenant for life. Is there any rule of law to prevent the accomplishment of such an intention? Is there any rule of law which peremptorily says that, because that estate of inheritance may by possibility determine by the same event which determines the estate for life, therefore it must necessarily remain in contingency, *and the inheritance by consequence descend to the testator's heir at law until a tenant for life shall die, notwithstanding the existence of sons? The rule of law as to vesting estates is quite the reverse. And, as to the testator's intention, he has in fact declared this: for he first limits the estates in words which would clearly give vested estates; and the proviso merely professes to determine these, and not to create any precedent condition as to their vesting.

The observation on the other side, that the remainders to the sons can take effect only if the father shall die without becoming earl, is erroneous, and founded on a sort of popular, and not a legal, view of the nature of a remainder. In the common case of a remainder to A. for life, and, after his decease, to B. for life, it would be popularly said that B. could not take unless he should survive A.; but this would be very inaccurate in a legal point of view, since B. might, by the surrender or forfeiture of A.'s life estate, take, although he should not survive A. So, in the present case, the son of a tenant for life may well take a vested interest immediately on his birth; and that interest might take effect in possession before it should be determined whether the father might become earl or not. Thus, on the father and son suffering a recovery, they would have acquired the whole interest in the estate, and might require the trustees to surrender their intermediate estate.

It is further submitted that the other side have no warrant for introducing the words "if," "unless," &c., into the limitations, either expressly or by construction. The will commences by giving vested estates; and the only words of contingency introduced in the proviso are those of a determined quality.

It should, perhaps, be mentioned that the second form submitted by the other side varies in words from the form submitted by the plaintiff in error, and thus gives the limitations the appearance of a repugnancy, as in the case of *Parkhurst v. Smith*, lessee of *Dormer, Willes*, 327, above cited, the remainder being literally limited, upon the tenant for life becoming earl, to his son until the tenant for life should become earl (that is, the same event,) &c. The words, if introduced, would, it is submitted, do no harm, any more than in the cited case, even if they should be held to go farther than pointing out the order of the time in which the various limitations determine and take effect, &c. But, in fact, the words are not in the will; and if as the plaintiff in error contends, proper vested remainders were created, he must have a right to mould the limitations in the way most proper to give effect to the intention; as in the form suggested by him, by the words "with remainder" &c., or in other words to the same effect. The testator may be considered as in effect having said thus: "I give to Richard for life, or until he shall become earl, and, as to what remains, or subject thereto (that is with remainder,) to the trustees and their heirs during his life, or until he shall become earl, in trust to preserve, &c.; and, as to what remains, or subject thereto, to his first son and the heirs male of his body until Richard or the son shall *become earl, &c." Here there is no contingency. [*947] The son, on his birth, supposing Richard not to have previously become earl, takes a vested estate tail, which may endure for ever; though indeed it is subject to be determined (unless prevented by a recovery) by the father or son becoming earl. This vested estate tail may be aliened, charged, &c., and by virtue of it the son may accept a surrender of the prior estate, or take advantage of any forfeiture. The other side have not explained how, if the estate of the son is contingent, the trustees' estate is not also contingent. If the limitation to the son is to be read so as to take effect after the determination of the father's estate by his becoming earl, in which event in fact it is not to take effect at all, why is not the limitation to the trustees to be read in the same way? In the paraphrase of the limitations suggested on the other side, they in fact drop all reference to the estate of the trustees. In this paraphrase, too, and in the observations

accompanying it, they wholly leave out of view the fact that, on a limitation to A. for life, and, after his decease, to B., B. has a present and immediate interest during A.'s life.

It should be noticed, too, that the observations on the other side are altogether opposed to the argument on that side in the court below. In that argument, on the point of remainders, there was no suggestion or hint that, if this construction were adopted, the estates of the sons would be contingent. On the contrary, their argument below (ante, 36; 4 N. M. 752,) proceeded upon a totally different assumption; since they admitted that the recovery had barred the estate of the lessor of the original plaintiff in one point of view, though not in another point of view. Whereas, if the remainder of the plaintiff in error was, as now suggested, a contingent one, as depending upon the fact of his father not becoming earl, the recovery was clearly altogether void, since, in the event which happened of the devolution of the earldom on his father, the remainder of the plaintiff in error never took effect at all.

IV.

(Defendant in error.)

(1.) It is argued that the only grounds on which the remainders to the sons of John the father, according to the method of moulding the limitations suggested on the part of the defendant in error, can be considered as contingent, is, either that they may never vest in actual possession, or that both the remainder and the particular estate may possibly determine by the same event. This is incorrect. Clearly, neither of these circumstances will make a remainder contingent. But the remainder to each son of John the father will be contingent for this reason, that the particular estate limited to John the father is originally so limited that it may expire on more than one event, i. e., either by his death or the descent of the title; and the remainder limited upon it is to come into enjoyment, if the particular estate determine on one of the events, viz., the death of the father, and is not to come into enjoyment if the particular estate determine on the other event, viz., the descent of the title. So that the right of enjoyment is to accrue on an event which is originally dubious and uncertain, such uncertainty being independent of the period for which the remainder may endure in the case in which it can come into actual enjoyment. The remainder therefore, has not originally a capacity of taking effect on every determination of the particular estate. It originally depends on a contingent determination of the particular estate, and is indisputably a contingent remainder of Fearn's first class. (Cont. Rem. p. 5.)

(2.) Instances have been put by the other side to establish the position, that a remainder may be vested, though it may never vest in actual possession, or though it may determine before or contemporaneously with the particular estate; a position which needed no proof. But those instances have no similarity to the present case. They are all cases in which the remainder may fall to come into possession, not by reason of its original incapacity of taking effect in enjoyment upon every determination of the particular estate, but merely by reason of the period, for which the remainder was to continue after any possible determination of the particular estate, having run out.

Thus, in the first example put, which is the common case of an estate to A. for life, and, after the determination of that estate by forfeiture or otherwise in his lifetime, to trustees and their heirs during his life, in trust, &c.: here, there is an event, viz. the death of A. without a determination of his estate by forfeiture or otherwise during his life, in which the estate of the trustees will not come into enjoyment: but the only reason why it will not do so is that, at the happening of such event, the period for which the estate of the trustee was to continue, in the case in which it might come into enjoyment, has run out and is expired. The second example put, which is that of the trustee to bar dowry, is identical with the first. So, in the third example, viz. a limitation to A. and his heirs for the joint lives of Y. and Z. with remainder to B. and his heirs for the life of Y. If Y. dies in the lifetime of Z., the remainder to B. during the life of Y. does not take effect. But this is merely because the period for which B.'s estate was to continue, in the case in which it might come into enjoyment, has expired. And so, in the fourth example, where an estate is supposed to be limited to A. for life so long as a tree shall stand, remainder to B. in tail so long as the same tree shall stand; if the tree fall during the life of A., the estate tail of B. will not come into enjoyment; but this is merely because the period, during which B.'s estate was to continue, in the case in which it might come into enjoyment, has run out.

(3.) To contrast these examples with the present case:—Suppose that the fall of a tree were, in the fourth example, confined to A.'s life, which will make that example identical with the principal case; the other side would then propose to frame the limitations thus: to A. for life, until a tree shall fall during his, A.'s life, remainder to B. in tail until the

*same tree shall fall during A.'s life. Now here A.'s estate is determinable on two events; viz. first, his death; secondly, the fall of the tree: and on the first event,

viz. on the death, it is to vest in possession in B. in tail absolutely; but, on the second event, viz. the fall of the tree during A.'s life, it is not to go to B. at all. B.'s estate, therefore, is expectant upon a contingent determination only of A.'s estate, not upon any determination of it; and it is clearly contingent. For the reason why, in the event of the tree falling in the life of A., the estate of B. will not come into enjoyment, is not (as in the examples put by the other side) because the period, during which the estate was to continue, in the case in which it might come into enjoyment, has run out; for, B. or issue of B. being alive, such would not be the case: but because (without regard to that period) the estate of B., as originally limited, was not to take effect if the tree should fall during A.'s life. This feature forms the essential distinction between the principal case and the examples proposed on the other side.

It may perhaps be said that, in order to put accurately the case last considered, notice ought to be taken of the possibility of A.'s estate determining by forfeiture; and that this ought to be regarded as one mode of determination on which the remainder is expectant. If this were so, it would not alter the result. The only difference would then be, that the remainder would be regarded as expectant on two out of three possible determinations of the particular estate, instead of being expectant on one out of two such possible determinations. But, in fact, the case as first put is accurately propounded; for B.'s remainder, not being in other respects (i. e. independently of forfeiture) a vested remainder, he would not be entitled to enter in case of forfeiture; and therefore his remainder is not expectant on that event.

(4.) The general rule is alleged by the other side to be that, if a remainder be limited to a person ascertained and in esse, and be to take effect in every possible case consistently with its duration, the remainder is vested. A more exact statement of the rule would be that, if a remainder be limited to a person ascertained and in esse, and be to take effect in every possible case, other than the effluxion of the period for which the remainder can in any event continue in enjoyment, the remainder is vested.

(5.) If the other side were right in their position, that, in moulding the limitations so as to embrace the objects of the shifting clause by way of remainder, the remainders to the sons of John the father might be made vested remainders, the effect would be that Fearn's first class of contingent remainders might, by a slight alteration in form, be abolished. Take an example of this class, put by Mr. Butler in his note to Fearn, Cont. Rem. p. 6, note (d). If an estate be limited to the use of A. till B. returns from Rome, and, on B.'s return, to the use of C. in fee, "A. takes an estate which will expire on his own decease, or B.'s *return from Rome, which shall first happen. In the case proposed, it is intended, that if A.'s estate expire by B.'s return from Rome, C. shall [950 have the land, but that if A.'s estate expire by his decease, C. shall not have the land. Now, while both A.'s life and B.'s residence at Rome continue, it is uncertain in which of these modes the preceding estate will expire; the remainder, therefore, evidently depends on a contingent determination of the preceding estate." But, according to the defendant's system, the limitation might be moulded thus:—to A. for life, or till B. return's from Rome, remainder (i. e. of the death of A. or the return of B. from Rome) to C. in tail until A. dies without B. returning from Rome; which produces the same result exactly as the former limitation. But then, as the other side say, the remainder of C., by this change in the words, will be altered from a contingent into a vested remainder.

So, again (see Fearn's Cont. Rem. p. 5), if an estate is limited to the use of A. in tail, until he A. shall do a certain act, and, after such act done by A., to the use of B. in tail; this, upon the system suggested, might be moulded thus:—to the use of A. in tail, or until he A. shall do a certain act, remainder (i. e. after the death of A. without issue or his doing the act) to B. in tail until A. shall die without having done the act; which gives the same result as the former limitation: and then, according to the proposed system, the remainder to B. would be altered from a contingent into a vested remainder.

Further, there is no reason why this should not be extended, and made efficacious for reducing into vested remainders many (perhaps, with ingenuity, all) other classes of contingent remainders, where the person to take is ascertained. For, in the common case of a limitation to the use of A. for life, and, if B. survive A., then to B. in tail (which is of course a contingent remainder), the limitation might be moulded thus:—"to the use of A. for life, remainder to B. in tail until B. dies in the lifetime of A.;" and then the estate of B. would be a vested remainder. In all the cases put, an estate is limited from the time of an event happening until the same event shall happen.

(6.) The fallacy of the system is that it arbitrarily converts a remainder, which is essentially dependent upon an uncertain event, into a remainder merely determinable upon such event.

(7.) With reference to the principal case, the true view of the matter is, that indisputably the testator's intention was that, upon the determination of John the father's estate, the inheritance should devolve in different ways, according to different events. In one event, that is, if John the father did not become earl, it was to go to his son. In the other event, that is, if John the father did become earl, it was to devolve on the lessor of

the plaintiff. There were, therefore, two separate ways in which the inheritance was to devolve immediately after the determination of John the father's estate: and this circumstance is of itself conclusive that the estates of inheritance to be conferred by the two courses of devolution *could not be simultaneously vested. If the proviso is held *951] to operate according to its natural purport, by way of shifting use or executory devise, the estate in respect of which the lessor of the plaintiff now claims was the contingent estate. If the will could be moulded as required by the other side, the estate of John the son would be contingent, and was so at the time of suffering the recovery.

(8.) It has been asked, "Suppose, in the principal case, the testator had expressly said that, though his intention was that the estate of each tenant for life should determine on his becoming earl, still the inheritance in remainder should nevertheless vest in the sons of a tenant for life on their births, and remain so vested till the earldom should devolve on the tenant for life. Is there any rule of law to prevent the accomplishment of such an intention?" The answer is, that no doubt the testator's intention, so expressed, could be accomplished; but that the object could only be effectuated (as it is in the principal case) by way of shifting use. It certainly could not be effectuated by way of vested remainders. If it could, why might not a similar direction be given in every case of a contingent remainder limited to a person in esse?

(9.) Again, with reference to the example which has been put, of a limitation to A for life, and, after his decease, to B. for life: this has no application to the point in dispute. It is merely the case of an estate for the two lives of A. and B., carved into a particular estate to A. and a remainder to B.; and if B. dies in the life of A., the reason why his remainder does not come into enjoyment, is, that the period for which such remainder would endure, in the case in which it could come into enjoyment, has expired.

(10.) Again, the case which has been put of a recovery being suffered by the father and son proves nothing. It involves a *petitio principii*; it assumes that the remainder, in the principal case, would, in the proposed mode of moulding the limitations, be vested, and argues as to what results may follow. But if (as is in fact the case) the remainder would be contingent, the recovery would be inoperative.

(11.) Again, it has been said that there is no warrant for introducing the words "if," "unless," &c., into the limitations, either expressly or by construction. This observation proceeds on a misapprehension of the argument. The argument is, not that the words "if," "unless," &c., ought to be introduced, but that, if the will were to be moulded so as to embrace the shifting clause in the way of remainders, the estates to the sons of John would necessarily be contingent remainders. And the words "if" or "unless" are used only to shew what would be the effect of thus moulding the will. They are used, in fact, only for the purpose of pointing out that, in the form submitted on the other side, the word "until" means "unless."

(12.) It has been urged that the form submitted on the part of the defendant in error *952] varies in words from the form submitted on the part of *the plaintiff in error, and gives the limitations the appearance of a repugnancy, which it is said does not exist. Now, as the form of words used can have no influence on the substantial question between the parties, and as both the proposed forms produce the same results, it may be conceded that, if the form submitted by the plaintiff in error would make the remainders to the sons of John the father vested, the form submitted by the lessor of the plaintiff would have the same effect. But then the converse of this concession will also be true; that is, if the remainder would be contingent under the latter form, it will equally be so under the former; the reasons that apply to the one, equally apply to the other.

In truth, the only difference between the forms is that, in the forms suggested for the defendant in error, the words introductory of the remainders are (according to the uniform practice in framing formal instruments, and according to the form of Sir George Savile's will) set out at length; and that, in the form suggested for the plaintiff in error, the effect only is given thus, "with remainder," which is the form used in abstracts, and sometimes, for the sake of shortness, in wills. The use of the latter form renders the repugnancy of the limitations less apparent; but the effect is the same in both.

It is further to be observed that, according to the proper and usual form of limiting remainders, the only event expressed in the introductory words is that in which the remainder is to vest in enjoyment. It would be absurd, in the case of the trustees to preserve, &c., to frame the limitations as follows:—"to A. for life, and, after the determination of that estate by any means (i. e. either by the death of A., or by forfeiture, or otherwise, in his life time), to B. and his heirs until the death of A.;" and the limitation is never so framed. And so, in the fourth example put by the plaintiff in error, it would be equally absurd to frame the limitations as follows.—"to A. for life, so long as a tree shall stand, and, after the determination of that estate (i. e. either by the death of A., or by the falling of the tree,) to B. in tail until the tree falls;" the tree, in the latter determination of A.'s estate, having already fallen. The proper mode would be thus:—"to A. for life, so long as a tree shall stand, and, after the determination of that estate by the death of A. to B. in tail so long as the same tree stands." Here all repugnancy is avoided. And it will

be seen that the case of the trustees to preserve, &c. and the fourth example, are in principle the same.

It may be worth noticing (in illustration of the principle that the form of words cannot influence the legal result) that, in the case of a limitation to A. for life, and, if B. survive him, to B. for life (which in form is contingent,) the remainder to B. is still clearly vested.

(13.) A complaint is made that no explanation has been given how, if the estate of the son is contingent, the estate of the trustees to preserve is not also contingent. The answer to this has now been given. In the case of the son, if the particular estate determine by the descent of the *title he takes no estate in enjoyment; but this is, not because there is a failure of issue during the particular estate, but because the estate [*953] tail is prevented from taking effect by a contingency. In the case of the trustees, upon any determination of the particular estate, the estates of the trustees comes into possession, unless the period during which it is to continue, in any case in which it may so come into possession, has run out. The cases would be identical if, in the case of the remainder to the trustees, an exception were made of a particular mode in which the estate of the tenant for life might determine in his lifetime: thus—to A. for life, and, after the determination of that estate by any means during his life, to B. and his heirs during the life of A., or until A. commit a forfeiture by a particular act." Here the effect is the same as if it had been said, "after the determination of that estate, during the life of A., by any means except the act in question." And the remainder to the trustees would then clearly be contingent.

V.

(Plaintiff in error.)

It is admitted, on the part of the defendant in error, that, in all the cases put for the plaintiff in error, the remainders would be vested. Unless, therefore, some solid distinction has been established between those cases and the present, the point at issue may be considered at an end.

It is attempted (3), with reference to the example put of the limitations depending upon the fall of a tree, to make a distinction on the fact, whether the estates are made determinable by the fall of the tree, generally, at any time, or only in the lifetime of the tenant for life; but no satisfactory reason is given for the distinction. It need not be disputed that, if the remainder were only to take effect if the tree were not to fall during the life of the tenant for life, then the remainder would be contingent; since to hold it vested, so as for the remainder-man to be capable of a surrender, or of taking advantage of a forfeiture during the lifetime of the tenant for life, and thus of enjoying the lands, though the tree might afterwards happen to fall during such lifetime, would be to give the party an estate directly contrary to the words of the settlement and the intention of the settlor: but still this is no reason for coming to the conclusion that the settlor might not, if he pleased, have given the remainder-man a vested remainder to *endure until* the tree should fall, and so as that the remainder-man might, in the case of a surrender or a forfeiture, actually enjoy the estate during that period and until the tree fell, whether the limitations were made to determine by the fall of the tree at any time, or during the life only of the tenant for life. It is clear, in both cases, that, if in fact the tree should fall during the life of the tenant for life and before a surrender, &c., the remainder could never come into possession. In one case, as admitted, the remainder is a vested one. Why should it not be equally vested in the other case? The case put on the other side is in effect this:—"a limitation to A. for *life, determinable if a certain tree shall fall, remainder to B. [*954] in tail, determined if the tree shall fall during A.'s life. What is there here to render B.'s estate contingent, any more than if the words "during A.'s life" were omitted, or than if, after the words "during A.'s life," the words "or at any time after his decease" were added? He has, in fact, a more enduring estate; and why should it not be deemed a vested one, as well as in the other case?

Objections are made (4) to the rule proposed for ascertaining what is a vested remainder; but no authority is given from the books, to which the rule would be inapplicable. Another rule is proposed on the other side, in the same language, save that for the words "consistently with its duration," the words "other than the effluxion of the period for which the remainder can in any event continue," are substituted. This substitution does not appear to render the rule more intelligible or consistent with the admissions made by the other side; and the rule originally proposed is simple, clearly intelligible, conformable to principle, and not impugned by any authority. At all events, without regard to the correctness of either rule, it is submitted that the examples put in the paper III., and not disputed on the other side, are not, with reference to the point under discussion, substantially to be distinguished from the principal case.

It is said (5) that, if the view taken by the plaintiff in error be correct, Fearne's first class of contingent remainders, and possibly many other contingent remainders, might be made vested remainders by the alteration of a few words, or by construction. It would

not be surprising that such contingent remainders as are not necessarily contingent (as those are where the parties are unborn, &c.) should, by the alteration of a few words, be rendered capable of being vested; since they are simply contingent because they are made to depend, by the will of the settlor, upon an uncertain event. In the particular instances cited from *Fearne*, the remainders were only to take effect if a particular party returned from Rome, or if a particular act were done. In such cases, it is impossible to hold that the remainders are vested without altering the words; for, if the remainders were held to be vested, the remainder-men might, by forfeiture, &c., come into the enjoyment of the lands and hold them, though in fact, ultimately, the event should not happen in which alone they were to take. So, if the remainder were in tail, a recovery might be suffered, discharging the entail from the determinable quality, &c.; and the lands would be enjoyed for ever, contrary to the expressed intention. This would be making a will, and not construing it. It is not necessary to contend that there is any reason for so altering or moulding limitations of that nature, or, in other words, where a testator has declared that a remainder-man shall take if a certain event shall happen, that he can be made to take before the event happens, and without regard to the fact whether it may happen or not. At the same time, in the converse case, where a testator has declared that a party shall take in remainder until a certain event happens * (thus giving him an estate, *955] not to vest on the happening of the event as a precedent condition, but determinable on the happening of the event), there is still less reason, considering the anxiety of the law to make estates vested, to say that the remainder-man shall take, not a vested estate, but a contingent one. What object could the law have in rendering it contingent?

It is clear that, were it not for the power which a tenant in tail has of destroying the determinable quality of the estate, the point of the contingency, any more than the point of new interests, would never have been raised in the principal case; since, on the devolution of the earldom on the late earl, the estate tail of the plaintiff in error would have ceased, and these points would have become of no practical consequence. But this cannot influence the decision of the Court. It must be presumed that this power is lodged in a tenant in tail for wise reasons; and it was for the testator, if he had intended it, to frame, as he might readily have done, the limitations in such a way as to have prevented the exercise of this power. The Court, in considering the form of the remainders laid before it, and in determining whether vested or contingent remainders would be created, will discard from view the trust for preserving contingent remainders, and the point as to recoveries, and look at the case as if the tenant for life had, after the birth of a son, made a feoffment or levied a fine for the purpose of destroying the remainders as being contingent, and the point had been whether he could succeed in effecting this object, or whether the son could not take advantage of the forfeiture; so that, should the earldom not devolve in the lifetime of the tenant for life, the son might enjoy the estate according to the testator's will.

It cannot be necessary to observe, with reference to the case put, at the conclusion of (12), to prove that the form of words cannot influence the legal result, that the words "if B. survive" are, in that particular case, rejected as of no force, simply because, in the particular case, they are considered to have no meaning. They are rejected, too, in favour of creating a vested estate, instead of a contingent one.

The defendant in error professes (11) not to contend that the word "if" is to be introduced into the form: if so, there was no necessity for his suggesting two forms, one with the word "if" expressly introduced, and the other in different language, but that too accompanied with explanations. The attempt was to evade the natural construction of the words used.

The passage in the paper III., commented upon in IV. (8), referred to the case of a set of limitations by way of remainder, each limitation being made separately determinable according to the form quousque, submitted by the plaintiff in error, without a further common proviso of cesser and gift over, but with a declaration superadded, that the sons, *956] on their births, should take vested estates. That the testator's intention, in the principal case, was to create vested estates, is clear: indeed, this is admitted on the other side; for it is allowed that the remainders limited by the will were vested, subject however to be devested by way of executory devise or shifting use. But there is no necessity to resort to the doctrine of executory devise or shifting use, in a case where the remainders limited are in tail, and not in fee. This is not a question of alternate or substituted limitations in fee, where, by necessity, either the remainders must be contingent, or the limitations over operate by way of executory devise or shifting use, on the common doctrine that the remainder cannot be limited expectant upon a fee. The difference between limitations in fee, and limitations in tail, is overlooked in the observations on the other side (7).

The matter under discussion is wholly independent of *Fearne's* point as to conditional limitations (Cont. Rem. p. 18). This point the other side must be understood to have abandoned, since *Newis v. Lark*, or *Scolastica's Case* (Plowd. 408), is not disputed by them.

The observations on the proviso, viewed as an independent proviso of cesser, and the

assertion that a simple though perfect clause of cesser, in the first case, would carry the estate to the heir at law, unless new uses were raised by implication, are, equally with the other observations as to the contingency of the remainders, opposed to the argument in the Court below (ante, p. 36). The authorities adduced in the argument show that a simple clause of cesser would be sufficient: but, if not, the only object of a clause of gift over, in cases like the present, is to obviate any doubt whether there might not be a resulting use to the heir-at-law, on the ground of the failure of the remainders by their losing their support by the cesser of the particular estates. In this view, to revert to the case put in argument, of an estate to a woman during her life, if she should so long continue a widow, and, after her decease or marriage, then with remainder over, the clause of cesser, in cases like the present, may be considered equivalent to the clause confining the estate for life to the widowhood; and the clause of gift over, equivalent to the provision that, upon the marriage, the remainder-man should take; but the clause of gift over is, in strictness, unnecessary; and, when particular estates are made to cease as if the parties were dead, &c., the limitations are in effect struck out of the will. With reference to the imperfection in the present clause, it can, in this view, make no difference whether the estates are made to cease expressly, or by implication. *Cwr. adv. vult.*

TINDAL, C. J., in Easter term following (May 10th, 1836,) delivered the judgment of the Court.

This case comes before us upon a writ of error from *the Court of [957] King's Bench. It is a case of great importance, not more on account of the large interests at stake between the contending parties, than from the nature of the legal questions which are involved in it; and it has been argued before us with a measure of learning and ability, on each side, corresponding with the importance of the case.

The special verdict finds, amongst other things, the seisin of Sir George Savile; that he duly made and published his will, bearing date the 18th of August, 1783, the material parts of which will are set out therein; and that, in January, 1784, he died seised without revoking or altering his will: that, after the death of Sir George Savile, Richard Lumley entered into possession of the premises in the declaration mentioned, having, in all respects, complied with the provisions contained in the will: that, in the month of September, 1807, the Earl of Scarborough died without issue male, and the title of the earl descended and came to Richard Lumley Savile; and, thereupon, the defendant below entered into possession of the premises in question, and in all respects complied with the provisions of the will; and that he still continued in possession. The special verdict further sets forth indentures of lease and release, dated the 27th and 28th of November, 1809, by which the defendant and his eldest son, then being of the age of twenty-one years, convey to George Tenant, for the joint lives of himself and the defendant, for the purpose of making him tenant of the freehold, in order that a common recovery might be suffered; and that such common recovery was accordingly suffered in the Michaelmas term next following, in which the defendant's eldest son, being tenant in tail, was vouched as first vouchee; the uses of which recovery *were, by a [958] subsequent deed, declared to be, to the defendant, for life with remainders over. And the special verdict then proceeds to set forth indentures of lease and release of the 1st and 2d of July, 1817, by which Frederick Lumley the elder, the father of the lessor of the plaintiff, and Frederick Lumley the younger, the lessor of the plaintiff, for the considerations therein mentioned, convey the premises therein described to certain trustees upon the same trusts as the uses which had been declared with respect to the common recovery, and enter into the several covenants therein contained. And, lastly, the special verdict finds the death of Frederick Lumley the elder, in September 1831, leaving the lessor of the plaintiff his only son; and that on the 17th of June, 1832, Richard Lumley, Earl of Scarborough, died, whereby the title of earl descended and came to the defendant; since whose death possession of the premises has been demanded from the defendant by the lessor of the plaintiff, and refused.

Upon the facts stated in this special verdict, it has been contended, on the

part of the plaintiff in error, the defendant below, that the judgment which has been given by the Court of King's Bench is erroneous, upon three distinct grounds:—

First, that, by the deeds of lease and release of the 1st and 2d of July 1817, all right and interest to the premises in question, which the lessor of the plaintiff could claim under the will of Sir George Savile, was conveyed by him and his father to the trustees named in the deed of release; or, if the interest of the lessor of the plaintiff was of such a nature as to be incapable of passing under a conveyance by way of lease and release, then that the covenants of the *959] lessor of the plaintiff *operated by way of estoppel against the plaintiff, so as to prevent his maintaining the present action.

Secondly, that, upon the proper construction of the clause in the will of Sir George Savile, by which he provided for the cesser and determination of the estates created by his will, upon the title of Earl of Scarborough descending or coming to any of the devisees mentioned in his will, and for the hereditaments going immediately over to the person or persons next in remainder, such clause of cesser and shifting of the estate applies only to the *first* devolution of the earldom; and that, having taken effect once upon the descent of the earldom to Richard it can have no effect or operation a second time on the descent of the earldom from Richard to the defendant below.

And, thirdly, that upon the proper construction of the whole will of Sir George Savile, the defendant below took such an estate as enabled him, under the events which have happened, to suffer the common recovery which has been suffered; and that such common recovery has barred and destroyed any estate which the lessor of the plaintiff would otherwise have taken under the said will.

It becomes unnecessary, in consequence of the opinion at which we have arrived on the last point, to state the view we entertain upon that which has been raised as to the effect and operation of the lease and release of the 1st and 2d of July, 1817: nor, indeed, for the same reason, will it be necessary to enter upon a separate and distinct consideration of the second question that has been raised; although, indeed, that question must incidentally come under discussion in considering the third and main ground of objection to the judgment *980] brought *under review. It will be sufficient to observe, as to these two questions, that, as at present advised, we see no reason to differ from the opinion which has been expressed upon them by the Court of King's Bench. But if, upon the whole of the will, such estates were taken by the plaintiff in error and his eldest son respectively, as enabled them to suffer a common recovery, and if the effect of such common recovery is to bar the estate and interest under which the lessor of the plaintiff claims, the plaintiff's right of action is of course gone; and the judgment which has been given for him must then be reversed.

It appears to us, therefore, that the whole of the controversy between the parties may be almost reduced to this single inquiry,—what is the legal construction, and what the legal consequences, of the proviso of cesser and determination before adverted to? If no such clause has been inserted in the will, it is obvious no question whatever could have arisen between the parties. Upon that supposition, the defendant below, being tenant of the freehold at the time the common recovery was suffered, was able to make a good tenant to the præcipe; and, John the son being tenant in tail next in remainder, and having been vouched by the tenant of the freehold, such recovery would upon the ordinary principles, bar the estates tail of John the son, and all other estates in remainder expectant thereon; amongst which, in the case above supposed, was the estate tail of Frederick the lessor of the plaintiff. For, as to the interposition of the estate to trustees to preserve contingent remainders, it has been properly admitted, in the course of the argument, that such interposition would have had no effect as to the operation of the recovery in barring the subsequent

*estates tail in remainder. It is, therefore, the insertion of the proviso, and that alone, which creates the difficulty in the case; and it is upon the meaning and construction of that clause, and the legal consequences attending it, that we think the decision of the present case must depend. [*961]

Now the argument on the part of the lessor of the plaintiff has been, that upon the face of the will, the intention of the testator is manifest, that the earldom, and the estates devised by the will, should never be united in the same person; and that the proviso is framed to carry such intention into effect, by declaring that, as often as it shall happen that the title of Earl of Scarborough shall descend or come to any of the persons named as remainder-men, or to any of their sons (within the period limited by the will), the estates which they respectively took should cease, determine, and become void; and that new estates for life and in tail should thereupon immediately be created, and vest in the person next in remainder to him to whom the earldom descended or came: and it is contended, that the proviso attached, in the event which has taken place, to the life-estate of John the father, and by reason thereof, the conditional limitation created by the proviso is not barred or destroyed by the common recovery. And, again, that the new estate tail so created by the proviso in Frederick the son, was not expectant upon the estate tail of John the son, but altogether independent of it, and substituted instead of the old estate created by the will; and, consequently, not barred or in any way affected by the common recovery. The defendant below, on the other hand, contends that there is no intention apparent upon the will that the shifting clause should operate more than *once, and that, having once had its operation in the case of the [*962] devolution of the title to John, it cannot have a second: that the proviso so is one of ceaser and determination only, and acceleration of the estates in remainder, and not a proviso which creates any new estates; and, consequently that the old remainder in tail in the lessor of the plaintiff, which was created by the will is barred.

Upon this state of the argument between the parties in error, one point, on which they are directly at variance, is whether the proviso in question operates only as a simple ceaser and avoidance of the old estate and acceleration of the remainder, or as the creation and substitution of new estates in remainder by way of shifting use: and as the determination of this question appears to us to go almost the whole length of deciding whether the common recovery did or did not bar the estate tail, under which the lessor of the plaintiff claimed at the trial, we think it entitled to the first consideration: and it is the more entitled to such consideration from the circumstance, that the substitution of a new estate in the place of the old remainder in tail, in the lessor of the plaintiff, appears to be the ground on which the Court below have relied, in giving their judgment in favor of the lessor of the plaintiff.

Now, before we come to the construction of this proviso, we cannot but observe, in the first place, that, whilst the intention of the testator ought to be our only guide to the interpretation of his will, it must be his intention to be collected from the words employed by himself in his will. No surmise or conjecture of any object which the testator may be supposed to have had in view can be allowed to have any weight in the construction *of his will, unless such object can be collected from the plain language of the will itself. [*963] With respect to the intention of the testator, to be collected from the will in question, it is observable that the will contains no devise by which the title and the estate are prevented altogether from becoming united in the same person, even within those periods of time during which he had the power by law of preventing such union: for many cases might be put, and some have been put in the course of argument, depending upon events of no improbable occurrence, in which, notwithstanding the provisions in the will, such union must necessarily take place. To mention one instance only, there is nothing in the will to prevent the union of the title and estate in a grandson of any of the

tenants for life, where the estate has descended to the grandson before the devolution of the title upon him. The question, therefore, does not turn upon any such *general* intention, for none such is expressed; but the question is, whether the testator has, by the proviso in his will, declared an intention and with sufficient clearness, to reach the case which has actually happened; and whether he has employed such machinery in his will as is capable of carrying such declared intention into effect.

In the second place, we hold it to be a necessary rule in the investigation of the intention of the testator, not only that we ought to look to the words of the will alone, to determine the operation and effect of the devise, but that we ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate, when such estate is once collected from the words of the will itself. In determining, therefore, whether the intention of the testator was in any *particular case to give the devisee an estate tail or for *964] life only, we cannot think it a sound or legitimate mode of reasoning, to import into the consideration of that question, that, if the estate is held to be an estate tail, the devisee will have the power of defeating the intention of the testator altogether by suffering a common recovery. For the power of a tenant in tail to bar the estate tail, and all remainders dependent thereon, by a common recovery, is a power which the law annexes to the nature of the estate of tenant in tail: and we have no right to assume that the testator was himself ignorant of such legal consequence and effect, or that he had not taken it into his calculation when he gave such estate tail to the devisee.

The only safe course is to look carefully for the intention of the testator, as it is to be derived from the words employed by him within the whole of the will, regardless alike of any general surmise or conjecture from without the will, or of any legal consequence annexed to the estate itself, when such estate is discovered within the will.

Now, looking at the proviso, upon the construction and legal operation of which it is agreed that the question before us entirely turns, we think, in the first place, it is open to some little doubt whether the proviso declares the intention of the testator with sufficient clearness, that the shifting of the estates created by the will shall take place more than once on the devolution of the title to a tenant in possession of the estate under the will; or, in other words, whether the proviso is not so worded as to have performed the full effect for which it is framed, and of which it is capable, when the title descended to Richard Lundley, *965] the first tenant *for life, and whether, therefore, it is not incapable of a second operation upon the devolution of the title to John Lumley, the defendant below, the next tenant for life in remainder: and, unless the proviso operates on the descent of the title to John Lumley, it is needless to observe that the remainder, under which the lessor of the plaintiff claims, must be barred by the common recovery which has been suffered.

But, waiving the further consideration of this question, as being one that may be subject to some doubt and uncertainty, and admitting, for the sake of argument, that the clause did operate upon every devolution of title within the limits prescribed in the will, we proceed to state the construction of the proviso in which we have all, upon the best consideration we can give the question, agreed. For we think this proviso is so framed as to be a proviso of ceaser and determination only of the old estates created by the will to which it applies, so as to accelerate and let in the enjoyment of the remainders over, and not a proviso which creates any new estates in remainder; and, consequently, that, by the common recovery suffered by John the father, the tenant for life, and John the son, the tenant in tail in remainder, the old remainder for life in Frederick the father, and the old remainder in tail in Frederick the son, which were expectant on the estate tail in John the son, were effectually barred; and that there are no new estates created and substituted in their stead under which Frederick can claim.

First, the proviso is, in its ordinary construction, one of cesser and determination only, thereby accelerating the old estates.

The words contained in the first branch of the proviso *itself, point to nothing else:—"The estate which he or they shall be entitled unto," [*966 "shall then cease, determine, and become void." These are the operative words of the proviso, words of express cesser and determination, in which there is the total absence of the expression of any intention to create a new estate.

The words contained in the second branch of the proviso are equally restrained. It continues thus:—"and the same manors and hereditaments shall immediately thereupon go to the person and persons who, under the limitations aforesaid, shall then be next in remainder," &c., "in the same manner as such person or persons so in remainder as aforesaid would take the same by virtue of this my will, in case he or they to whom the title of the said earl of Scarborough shall come and fall in possession as aforesaid was or were actually dead without issue." So that the words in this branch also are strictly confined to the estate of the person to whom the title descends. His estate is to cease, as if he were dead without issue; and all other estates to remain as they stand in the will: so that, if the title descends upon a tenant for life, the estate of such tenant for life, and the estates tail in remainder in all his sons, successively, cease by necessary implication; if it descends upon one of the sons, the tenants in tail, the estate tail in such son of the tenant for life fails only, and the manors go over to his next brother in tail. This latter branch of the proviso, therefore, contains no words indicative of any intention, that new estates should be created. The manors, &c., are to go over "to the person and persons who, under the limitations aforesaid, shall then be the next in remainder." This is only applicable to the estates in remainder already created by the limitations of the *will, not to new estates for the first time created by the proviso. [*967 The manors, &c., are to go over "*in the same manner* as such person or persons so in remainder as aforesaid would take the same by virtue of this my will, in case he or they to whom the title shall come," "was or were actually dead without issue." They are to take in the same manner as if the prior tenant for life or remainder-man, were "actually dead without issue;" that is, as if the prior estates had determined by the natural course of their determination, viz., the failure of issue: which provision points to the mere blotting out of the prior estates, and to the accelerating the old estates in remainder already created by the will, and not to the creating of new estates. From the beginning to the end of the proviso, there are no words of new devise over to the remainder-man upon the avoidance of the intermediate estates; but, on the contrary, a distinct reference to the vesting of the same estates in remainder which are already devised by the will.

Again, if the proviso should be construed to create *new estates*, this difficulty arises,—that there are no words in the proviso, which, upon a natural construction, expressly create any new estates beyond those which are to be taken by the person or persons *immediately next* in remainder: so that all new estates in remainder, subsequent to the first, after the devolution of the title takes place, if any such there are, must depend upon implication only. Whereas, upon the construction that the clause is one of cesser and determination, and no more, all the remainders, as they are now declared upon the face of the will, are simply accelerated and let into possession, in succession, one after the other, in the order in which they are so declared in the will.

*It has, indeed, been observed in argument, that the condition which follows the proviso, that the persons taking under the clause in question [*968 should perform and comply "with the condition or proviso hereinbefore contained for taking and using the surname, and quartering the arms of Savile as aforesaid," shew the intention that the estates in remainder, after the proviso was called into action, should be new estates; otherwise, it is said, what occasion was there to repeat the condition? But these words were probably inserted

pro majori cautela only; for, in either construction of the proviso, they are equally unnecessary; because the arms and name clause does, by its very terms, apply to every person who, *by virtue of the will*, should be entitled; which words there clearly mean, by virtue of any clause in the will: and those who take by the proviso, even supposing they take new estates, take in that way. This argument, therefore, as it appears to us, proves nothing.

But it is, on the other hand, not an unimportant argument, and appears a strong confirmation of the construction contended for by the plaintiff in error, that, if the proviso had the effect of creating new estates, in the event of every successive devolution of the estate, within the limits assigned, there are no words to be found in the proviso which expressly apply to the cesser or determination of these new estates created by the first devolution, upon a second or any subsequent devolution of title. The proviso refers in express terms to the estates which have been *already* created by the will. It declares the cesser and determination of the estates "which he or they shall *then* be entitled unto, in all and every the manors and hereditaments hereinbefore devised, under or by *969] virtue of this my will." No *reference whatever is made to the cesser or determination of a new set of estates, not expressly created by, or taken under, or by virtue of, the will; but which new estates are supposed to be taken under the conditional limitation itself, which conditional limitation can only take effect at a period subsequent to the making of the will, and when the event stated in such proviso takes place.

The lessor of the plaintiff reads the clause as if it had been framed so as, upon the descent of the title to the first tenant for life or tenant in tail, to determine and avoid their respective estates, and to create a new set of estates in remainder, in conformity with the succession marked out in the will. Again, upon a second descent of the title to the next tenant for life or his son, to determine and avoid the new estates which were created by the former descent; and, again, to create a new set of estates in remainder in the same order as before; and so, toties quoties. But, if such be the proper construction of the proviso, how is the first set of new estates to be determined? Not by any words inserted in the proviso itself, for there are none; but by importing into the new limitations a similar proviso, and so determining that new set of estates by the effect of such implied proviso; and so, on every subsequent creation of new limitations, a new proviso must be implied. And, further, if this difficulty be overcome, the effect of this construction would be, to give to each person in remainder, not two interests only, viz. the remainder in tail originally created by the limitations of the will, and one possibility created by the proviso, but the remainder in tail and an indefinite number of possibilities, according to the *970] number of devolutions of title which might *take place between the death of the testator and the expiration of twenty-one years after the death of the survivor of the sons of the first-named Earl of Scarborough. This construction appears to us so little warranted by any words of the will, and to lead necessarily to so much complication, that we have no difficulty in saying that we ought not to adopt it unless absolutely compelled to do so; but that, on the contrary, we are bound to adhere to the more simple and natural construction of the words contained in the clause. And it is not unimportant to observe, that no case has been cited at the bar, nor any authority of any text writer brought forward, in support of the position, that a proviso expressed in the same words or similar terms with the present has the effect of creating a succession of new estates.

But it was argued at the bar (see pp. 35, 36, ante,) that, even supposing the proviso not to have the operation of creating new estates, but that, on the devolution of the title, the old estates were simply accelerated,—still the estate which Frederick actually took, by way of conditional limitation or shifting use, is not a remainder expectant on the estate tail of John the son: for it is contended that it was not limited to commence where the preceding estates were,

by the nature and extent of their original limitation, to expire or determine ; but was limited so as to be altogether independent of the measure or extent originally given to those preceding estates ; and so as to take effect in possession on an event which might happen before the regular determination to which those estates were liable from the nature of their original limitations ; and so as, not to *wait for* the expiration of those estates, *which is the known essential description of a remainder, but to rescind them, and come in [971 by anticipation. It is argued, therefore, that the estate for life claimed by Frederick the father, and the remainder in tail claimed by Frederick the son, were estates springing up and vesting in enjoyment at the very moment the title devolved on John Lumley the defendant, during his estate for life, and anterior to the commencement of the estate tail of John Lumley the son. The recovery, therefore, cannot, as it is contended, bar *this* estate tail, so springing up, under the operation of the proviso, pending the estate of John the tenant for life.

But, supposing this argument to be correct, and that these limitations cannot be shaped or treated as remainders on the principle of *Scolastica's Case*, or *Newis v. Lark*, *Plowd.* 408, still it appears to us that the whole force and virtue of this argument depends upon the assumption, that the estate tail so springing up is not the same estate and interest as was originally limited in remainder, after the estate tail of John, but another and different interest. Whereas, for the reasons before given, we think this estate, so coming into possession by the operation of the proviso, is no other than the same identical interest which Frederick the son took under the limitations of the will, but vesting in enjoyment at a different time, and in a different mode, under the event which has happened ; such estate, when it vests in possession under the conditional limitation contained in the proviso, being by the express words of the proviso directed to go to the person or persons who under the limitations of the will shall then be next in remainder, "in the same manner *as such person or [972 persons so in remainder as aforesaid would take the same, by virtue" of the will, in case the last taker had been actually dead without issue. Even, therefore, admitting the estate to spring from the estate for life in John on the devolution of the title to him, it is no more than the old estate which has been already barred by the common recovery.

As the ground upon which we have come to our conclusion rests upon the construction of the proviso, on which construction we feel ourselves compelled to differ in opinion from the Court below, it becomes unnecessary to discuss the the other points which came under the consideration of that Court, or the cases cited by them in their judgment. One of those cases, that of *Roper v. Hallifax*, 8 *Taunt.* 845, *Ante*, p. 18, upon which considerable reliance was placed, may however be admitted to have been rightly decided, without weakening the ground upon which our judgment rests ; for it may be well held that the recovery suffered, in that case, by the tenant for life and the remainder-man in tail, should not extinguish a power which has attached to the estate of the trustee for preserving contingent remainders during the estate of the tenant for life, nor bar *the new estates* created by the exercise of that power ; and yet, at the same time, the recovery suffered in the present case, by the tenant for life in possession and the next remainder-man in tail, may be sufficient to bar *the old estates* expectant on such estate tail which continued unaltered by the proviso, except as to the time of enjoyment.

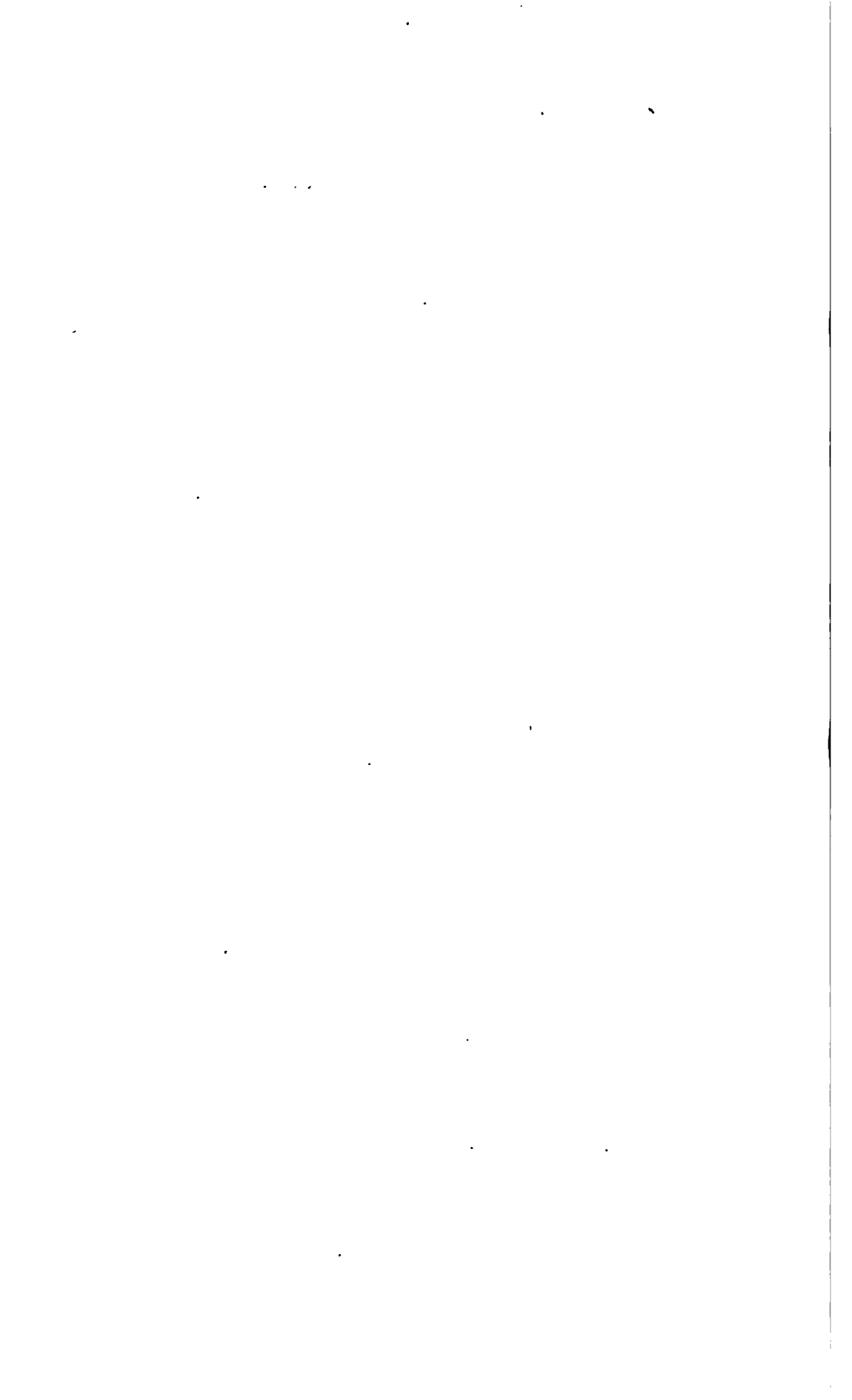
Upon the whole, the contention on the part of the lessor of the plaintiff is briefly this : that the estate tail of Frederick, arising under the proviso, upon the *descent of the title to John the father, is precedent in point of [973 limitation to the estate tail in John the son, the vouchee in the recovery, and consequently is not barred by such recovery.

But the defendant below denies that the proviso has any other force than that of blotting out and avoiding the estate of the preceding takers under the will,

as if they had been dead without issue, upon the event of the title descending to any one; thereby letting into possession the other remainders and interests; but in all other respects leaving them precisely as they were before. And that, as a common recovery was suffered by the father, then tenant for life, and the son, the tenant in tail in remainder, who by law had at the time the power to suffer it, such common recovery had its ordinary effect in barring and extinguishing all remainders and other interests of every nature subsequent to such estate tail; of which description, at that time, was the estate tail in Frederick the son: and that, the common recovery being good at the time it was suffered, no defeating of the estate for life or the estate tail by a condition subsequent, the event not happening until after the recovery has been actually suffered, can have the effect of avoiding any of its legal consequences, which have then actually taken place, one of which is, the extinguishing of the old remainders.

And, as we have arrived at the conclusion, that the old remainder in tail vested in Frederick under the limitations of the will was destroyed, and that he took no new estate under the proviso, we think the lessor of the plaintiff below had no title upon which he could maintain his ejectment; and that the judgment below must be reversed.

Judgment reversed.



AN

INDEX

TO

THE PRINCIPAL MATTERS.

ABUTTALS.

Description of. *Evidence*, XII 3. (2.)

ACCOUNTS.

County.

1. Inspection of, when it may be made. *Rate*, 1.
2. Allowance of, how to be made. *Rate*, 1.

ADMISSION.

Against interest. See *Evidence*, I.

ADVERSE POSSESSION.

1. What constitutes.
- L. R. died seised of freehold premises, leaving a widow, and a son (by her), R. R., his heir at law, twelve years old. The widow entered into receipt of the rents, and two years afterwards married again, and went to reside on the premises, which she occupied with her second husband during his life, and from his death until her own, the whole period of such occupation by her being more than fifty years. During her occupation she frequently said that the premises, after her death, belonged to R. R.; but she left a will devising the property to H., her son by her second husband, and describing it as having descended to her from her mother. After her death H., then in possession, promised that he would sign an agreement to rent the premises under R. R., but he never did sign it.

Held, that upon these facts, a jury was not bound to find an adverse possession by the widow during the fifty years. *Doe dem. Boffey v. Harbrow*, 67. (n.)

2. How far material under Statute 3 & 4 W. 4, c. 27. s. 17. (Limitation of Actions.) *Statute*, XXXI 1.
3. Who estopped from setting up. *Ejectment*, 3.

AFFIDAVITS.

After removal of action by Habeas Corpus, how to be intituled. *Habeas Corpus*, 1.

AGENT.

See *Principal and Agent*.

AGREEMENT.

1. What amounts to corrupt agreement under Stat 2 G. 2. c. 24. s. 7. (Bribery Act.) *Bribery*, 1.
2. What is sufficient memorandum in writing within Statute 29 Car. 2. c. 3. s. 4. *Statute*, V.

AMENDMENT.

1. Of errors in entry of judgment, when allowed. *Practice*, I. 2.
2. Of notice, previous to admission of attorney, when allowed. *Attorney*, I. 1. & I. 2.
3. Of record, what discharges bail. *Bail*, 2.
4. Of special case, when allowed. *Copyhold*, I.

ANCIENT LIGHTS.

Right of, how affected by alterations.

Plaintiff had a barn, in the side of which, adjoining defendant's premises, were apertures, by which, chiefly, the barn was lighted. Plaintiff converted the barn into a malt-house, and cut windows where the apertures had been in the barn. Defendant erected (on his own ground) a fence before the windows, which obstructed the access of light. In an action on the case for such obstruction, evidence was offered at the trial to shew that the mode of enjoying the light had been essentially altered by the plaintiff himself, in a manner prejudicial to the defendant. The Judge did not receive the evidence, but directed the jury, if they thought that the defendant had left the plaintiff less light than he enjoyed before the present windows were made, to give damages for such diminution:

Held, on motion for a new trial, that evidence of the above description was receivable, and that it might have appeared from

such evidence that the plaintiff had altogether lost his right to the easement in question. *Garritt v. Sharp*. 325

APPEARANCE.

Entering of, upon what affidavits order obtained. *Practice*, II. 2.

APPRENTICESHIP.

1. Settlement by. *Poor*, III.
2. Stamp on indenture. *Stamp*, I.

ARCHDEACON.

Mandamus to, to swear in churchwarden. *Mandamus*, I. 3.

ARREST.

1. Discharge from. *Practice*, III.
2. Taking out of Court money deposited in lieu of bail. *Statute*, XXV.

ASSAULT.

Judge's certificate as to costs. *Costs*, 3. (1.)

ASSETS.

1. What are. *Executor*, 2. (1.)
2. Stamp on probate, how far evidence of. *Evidence*, VI.

ASSIGNEE.

See *Assignment*.

ASSIGNMENT.

1. Effect of, in vesting term in assignee.

Where a termor assigns his goods, estate, and effects to trustees for the benefit of his creditors, *Quære*, whether the trustees have the same option of accepting or rejecting the term, with assignees of a bankrupt; and whether they can divest themselves of it without a formal disclaimer?

But, although the assignment be sufficient to vest the term in the trustees unless disclaimed, and they do not disclaim, assumpsit for use and occupation cannot be maintained against them without proof that they have actually occupied.

It is not sufficient for this purpose to prove that they placed persons temporarily upon the premises to take care of and sell goods which were part of the assigned property, and which were accordingly sold on the premises; and that, under a mistake of the law, they paid rent to the landlord for the half year in which the assignment took place. *How v. Kennett*. 659

2. On what possession assignee liable in assumpsit for use and occupation. *Ante*, I.
3. Assignment of possibility of estate, whether good at law.

ASSUMPSIT.

I. When maintainable.

1. For breach of warranty. *Warranty*.
2. For wages by servant improperly dismissed during term of engagement. *Principal and Agent*, 2.

II. Consideration.

Want of, how to be pleaded. *Pleading*, IV. 7. (2.)

III. Bill of exchange.

Want of consideration how to be pleaded. *Pleading*, IV. 7. (2.)

IV. Use and occupation.

What sufficient possession by assignee to make him liable. *Assignment*, I.

V. Money paid.

What may be recovered under. *Pleading*, III. 4. (1.)

VI. Money had and received.

1. What amounts to an admission of.

Defendant held land in trust to receive the rents and pay 50*l.* half-yearly to plaintiff's wife, and the residue, deducting for repairs, land tax, &c. to plaintiff. Defendant left word for plaintiff at a bank, where he had been accustomed to pay in such residue to plaintiff's use, that he would pay plaintiff 10*l.* on his giving defendant a receipt for 27*l.*; plaintiff did not offer the receipt, and the 10*l.* not being paid, he sued defendant for it as money had and received, and on an account stated. Defendant offered to prove that, at the time of his proposal to pay 10*l.*, he had laid out more than 27*l.* in repairs, but the evidence was rejected. Plaintiff having obtained a verdict for 10*l.*, and defendant moving to enter a nonsuit:

Held that, upon the evidence, defendant might be taken to have admitted a balance of 10*l.* in his hands to plaintiff's use; and if so, that he could not, in defence, either set up his character of trustee, or offer evidence to show that the balance did not exist. *Roper v. Holland*. 99

2. Against bailee without reward, for money represented to be lost.

Plaintiff employed defendant, without reward, to carry 45*l.* for him to a person at Liverpool. Defendant did not deliver it, and afterwards told plaintiff that he had lost it in a brothel, but would repay it to him. There was no other evidence how the loss had happened.

Plaintiff sued defendant for 45*l.* had and received to his use.

Held, that the action lay, independently of the promise, defendant not having paid over the money or returned it to plaintiff: that if a loss, in the manner alleged, had been proved, the action should have been for gross negligence, and not for money had and received; but that the defendant's assertion was not satisfactory proof of his own gross negligence. *Parry v. Roberts*. 118

VII. Account stated.

What is evidence of. *Pleading*, III. 4. (2.)

ATTACHMENT.

For non-attendance upon subpoena, when it lies. *Subpoena*.

ATTORNEY.

I. Notice previous to admission.

1. The clerk of an attorney in the country gave directions for putting up and entering his notices, pursuant to the rule, Trin. 31 G. 3, before Hilary term 1835, in order to his being admitted an attorney in Easter term following. The person employed gave notices, which were in all respects regular, except that they named the wrong person as the attorney to whom the clerk had been articulated.

On affidavit that the inaccuracy proceeded wholly from mistake and inadvertence, the Court allowed the notices to be amended in Easter term, and the party to be admitted in the term following. *Ex parte Clarke*, 72.

2. Amendment allowed in notice for ad-

mission of an attorney, by inserting his place of residence. *Ex parte Jones*, 74, (n.)

3. An attorney cannot be admitted, whose notices have not been affixed, nor entry made, till the third day of the term in which he applies.

Though the notices were affixed, and entry made, before the last term but three, such notices continued so affixed and entered during the whole of that term, purporting that the application would be made in the next ensuing term, which was not done. *In re Parsons*. 74 (n.)

4. An attorney, who was off the rolls from his agent having neglected to take out his certificate, gave notice to the stamp office, before Easter term, that he should move for re-admission in Trinity term, Trinity being mentioned in the notice by mistake for Easter. On affidavit of the fact, and by consent of the Stamp Office, the Court allowed the re-admission in Easter term. *Ex parte Nuttall*. 188

II. Certificate.

Neglect to renew, its effect.

An attorney, who after being examined, sworn, and admitted, neglects for a year to take out his certificate, is not unqualified person within stat. 22 G. 2, c. 46, s. 11; and, if he practice, without being re-admitted, in the name of another attorney, he is not, therefore, liable to imprisonment, nor the other attorney to be struck off the roll, under that statute; though the latter would be punishable under the general jurisdiction of the Court. *In re Hodgson and Eoss*. 224

See also ante, I. 4.

III. What Court will enforce on him by order.

Payment over of money received for the purpose.

This Court will not, in a summary way, compel an attorney of the Court to pay over money to a party entitled to it, though the attorney has received it from a client to be paid to such party, if the application is not made on behalf of the client. *In re Fenton*. 404

IV. Lien of, on damages and costs, recovered in an action, how affected by set-off of other parties. Costs, 7.

V. Power of attorney. See Power of Attorney.

AWARD.

1. What within arbitrator's authority.

Under the Rule of Court, Easter T., 2 G. 4, it is not sufficient to state in the rule nisi for setting aside an award, "that the arbitrator has exceeded his authority;" at least if there be no affidavit stating the particular excess. It must be shewn how the authority has been exceeded.

By an agreement of reference, reciting (among other matters of dispute) that there was a controversy between B. and D. respecting the property in a certain pump, and the right to use it, and also respecting the alleged removal by D. of a boundary hedge between his lands and those of B.; and reciting further, that B. had commenced an action against D. for alleged trespasses upon the said pump and hedge; the cause and all matters in difference were referred to an arbitrator, who was empowered to award how and by whom the said pump and hedge, and the ditch adjoining the said hedge,

should in future be enjoyed and occupied, "and who should have the care and management thereof."

The arbitrator awarded that B. was entitled to the pump as his sole and exclusive property, except that D. was entitled to the free use of water from it, in common with B. In a subsequent part of the award he directed that the pump should in future be considered as belonging jointly to B. and D., and be repaired at their joint expense. He further awarded, that the hedge should be kept in repair by D., who should be at liberty to use the mud of the ditch for repairing the hedge bank, but not otherwise; and that, subject to such privilege, the ditch should be considered as the property of B.:

Held, that the award, as to the property in, and use of, the pump, was sufficiently certain and final. And that the directions as to repairs were not an excess of the arbitrator's authority.

Where a cause and all matters in difference are referred to arbitration, with a direction, that the costs of the action, reference, and award, shall abide the event of such award, and be paid at such time as the arbitrator shall direct, and the arbitrator awards some things in favour of each party, so that the court cannot say upon the whole that the award is in favour of either, no order can be made as to any part of the costs; although the action was in trespass, and the arbitrator finds that trespasses were committed. *Boodle v. Davies*. 200

See also Post, 4.

2. Enlargements of time, how made rule of Court. Post, 4.

3. Who must join in making award.

A dispute was referred to the decision of three arbitrators, or any two of them. A proposed award was shewn at a meeting of the three, to which one of them objected, and he, after a discussion, declared that, if the other two would not alter their view, they must make the award by themselves, and he would not join in it. Afterwards a draft, different from that of the proposed award, was sent by mistake to the last-mentioned arbitrator, by the other two; and he returned it with comments and objections. The two others subsequently made an award corresponding with that originally proposed, without again submitting it to the third arbitrator. The Court set the award aside. *In re Pering and Keymer*. 245

4. When final.

An agreement containing several stipulations was entered into, and partly carried into execution; after which one of the parties filed a bill in Chancery, praying that it might be rescinded on certain terms; and the other party not answering, an injunction was granted, restraining him from proceeding to enforce the agreement until he should have answered, and the Court of Chancery should have made further order. The parties then referred the suit and all matters in difference between them to arbitration; and it was provided by the submission, that all proceedings in the suit should be stayed until the time for making the award, when, if none were made, either party might proceed; but that the injunction should have its full effect till dissolved.

The arbitrator awarded upon the matters of the agreement, and directed certain things to be done, the performance of which was to be taken in full satisfaction of all the matters in difference. He also awarded that each party should bear his own costs of the Chancery suit; but he made no further order as to the suit, nor did he direct that the agreement should be rescinded; and, upon motion to set aside the award for these omissions, it became a question whether or not the arbitrator had fully decided upon all the matters of the agreement:

Held, that the award was bad, inasmuch as it neither ordered the agreement to be rescinded, nor clearly determined all the matters of it; and as it did not put an end to the Chancery suit.

Orders of different judges, to the number of eleven, enlarging the time for making the above award, were made a rule of court by a single rule. *In re Tribe and Upperton.*

295

5. Setting aside, what is to be done in the rule. *Ante*, 1.

6. Costs of.

(1.) *Ante*, 1.

(2.) Parties in a cause referred all matter in difference to an arbitrator, with power to direct a verdict or nonsuit, and to order the defendant, although there should be a nonsuit or a verdict for him, to pay any money, or do any other act which should be just and equitable; the costs of the suit and the costs of the reference to abide and follow the event of the award. The arbitrator directed a nonsuit; but awarded that the defendant ought to pay the plaintiff 25*l.*, and ordered him to do so:

Held, that the defendant was entitled to his costs of the suit, and the plaintiff to those of the reference. *Chittenden v. Walker.*

691

BAIL.

1. Perfecting special bail, what amounts to. *Statute*, XXV.
2. How far discharged by amendments in record.

A declaration in *scire facias* on a recognisance of bail set forth the condition, which referred to a plea depending at the suit of the plaintiffs against the principal for 1200*l.* lent, 1200*l.* paid, 1200*l.* had and received, and 1200*l.* due on an account stated; and which condition was, in case the principal should not pay the damages and costs in the said plea, or render himself. The declaration then alleged that the plaintiff declared in the said plea on the four causes of action above stated, but had leave afterwards, by order of a judge, to amend, and did amend by substituting counts for 3000*l.* lent; the same paid; the same had and received; 500*l.* work and labour; 1000*l.* for interest; and 3000*l.* on an account stated: that the general issue and statute of limitations were pleaded, and the plaintiffs had a verdict for 2104*l.* in the whole; but for 1*l.* on the first and third counts, and for 1001*l.* on the second. That they obtained judgment for their damages, and 40*s.* costs, and 211*l.* costs of increase. That the sums of 1*l.* and that of 1001*l.*, were recovered on the promises mentioned in the recognisance;

and that no part of these, or of the costs, had been paid, nor the principal rendered.

The defendants pleaded, in substance, that the recognisance was entered into in an action commenced by original, different from that action in which the recovery was had. That the plaintiffs had paid a fine to the King upon an original writ for 1200*l.*, but not upon any writ for 3000*l.* That the order for amending was not consented to by the bail, nor made a rule of Court. That, after the trial of the cause, upon argument of a case reserved, the Court, without consent of the bail, gave leave to the plaintiffs to amend their continuance roll, so as to prevent their suit from being barred by the statute of limitations. That by the amendment additional costs were incurred, and the bail were subjected to an undivided sum for costs of increase on all the counts.

Held, that the declaration in *scire facias* was good: that the recovery was had in the plea in which the original was sued out, notwithstanding the amendment: that costs of increase form no integral part of the subject-matter of a suit, being awarded separately by the Court; and, therefore, that the addition to the responsibility of the bail, in respect of these costs, was no ground of discharge for them; their remedy, if aggrieved, being by application to the Court; and that the other objections raised by the pleas were not maintainable. *Taylor v. Wilkinson.*

784

3. Taking out of Court money deposited in lieu of bail. *Statute*, XXV.

4. Bailbond.

(1.) Proceedings upon.

When the defendant has been arrested and given bail to the sheriff, the plaintiff may declare *de bene esse*, at the expiration of eight days from the arrest, or at any time after, before special bail is perfected, and, therefore, if, without declaring, he take an assignment of the bail bond, and proceed upon it, and such proceedings be stayed upon special bail justifying, the bail bond will not be ordered to stand as a security.

If a defendant, on being arrested, give a bail bond to the sheriff, he cannot afterwards, by surrendering to the sheriff, vacate the bond; but after such surrender, and after the expiration of the eight days from the arrest, if special bail be not put in, proceedings may be had upon the bail bond. *Hodgson v. Mee.*

765

(2.) When to stand as a security. *Ante*, (1.)

(3.) Effect of surrender on bail bond. *Ante*, (1.)

BAILEE.

1. What amounts to a conversion by. *Trover*, 1.
2. Remedy against, for money represented to be lost. *Assumpsit*, VI. 2.

BANKRUPT.

1. Depositions taken before Commissioners, when evidence. *Evidence*, II.
2. Criterion, whether cause of action within st. 6 G. 4, c. 16.
 - (1.) What is. *Evidence*, II.
 - (2.) By whom to be determined. *Evidence*, II.

BARON.

Court. See *Court Baron*.

BARON AND FEME.

Surrender by wife of copyhold.

Husband's consent.

1. Proof of. *Copyhold*, 1.
2. How it may be shown. *Copyhold*, 1.
3. Custom as to, when good. *Copyhold*, 1.
4. Husband's interest. *Copyhold*, 1.

BILL OF EXCHANGE.

1. Notice of dishonour: what parties may take advantage of.

The holder of a bill is entitled to avail himself of notice of dishonour given by any party to the bill.

Therefore, an indorsee, who has indorsed over, and is not the holder at the time of the maturity and dishonour, may give notice at such time to an earlier party, and, upon afterwards taking up the bill and suing such party, may avail himself of such notice. *Chapman v. Keane*. 193

2. Want of consideration, how to be pleaded. *Pleading*, IV. 7. (2.)

BOND.

1. Condition of, how interpreted. *Condition*, 1.
2. Bail bond. See *Bail*, 4.

BRIBERY.

1. What constitutes, within st. 2 G. 2, c. 24, s. 7.

If A. give money to B. to induce B. to vote for a candidate at an election for a member of parliament, and B. agree to do so in consideration of the gift, A. is liable to the penalty of 500*l.* for corrupting B. to vote, within stat. 2 G. 2, c. 24, s. 7, though B. never gives the vote. A jury may infer the fact of the agreement from circumstances, although B., who is a witness, does not state that he ever intended to vote.

Where, in such a case, A.'s counsel and the judge, at the trial of an action against A. for the penalty, put the question merely on the credibility of the evidence, and the jury found against A., the Court refused to grant a new trial on the ground that the judge should have desired the jury to say, whether B. ever intended to give the vote.

Per Patteeon and Coleridge, Ja., in fact B. never did so intend, A.'s offence was complete by his giving the money for the purpose of inducing B. to vote, and by B.'s professedly accepting it on these terms. *Henslow v. Pawcett*. 51

2. What evidence of corrupt agreement necessary. *Ante*, 1.

BRIDGE.

1. What constitutes a bridge.

If a judge at Nisi Prius, being pressed to say whether, upon the evidence before him, a particular structure comes within the description of a bridge, gives his opinion on that point, as upon a question of fact, the alleged inaccuracy of such opinion is no ground for moving to set aside the verdict on account of misdirection.

Upon a question, whether a particular structure be a bridge or a culvert, the fact of its being without parapets is not decisive.

Nor the fact that it is built over water

flowing in a channel between banks; though nothing can be a bridge which is not built over such a flow of water. *Ree v. Whitney*. 69

2. Who is indictable, *ratione tenuræ*, for non-repair. *Infant*.

CAERNARVON.

Constable of. Exercise of office of mayor by, before being sworn. *Oath*, 1.

CANAL ACT.

Rating under. *Statute*, XLII.

CAPIAS AD SATISFACIENDUM.

What facts must be stated in it. *Sheriff*, 4.

CASE.

See *Special Case*.

CERTIFICATE.

1. Of Judge, as to costs.

(1.) Under stat. 43 Elis. c. 6, s. 2. *Costs*, 3. (1.)

(2.) Under stat. 22 & 23 Car. 2, c. 9. *Costs*, 3. (2.)

(3.) Under stat. 3 & 4 W. 4, c. 42. *Executor*, 1. (1.)

2. Of Speaker, for costs on election petition, when enforced. *Parliament*, 2. (1.)

CHURCHWARDEN.

Mandamus to official to swear in. *Mandamus*, 1. 3.

COLLECTOR.

Of land-tax, right to call in aid constable. *Constable*, 3.

COMMITMENT.

Power of, by justices, under st. 5 G. 4, c. 18, s. 2. *Statute*, XXI.

COMMITTEE.

Of House of Commons.

1. Right of petitioner to be present at. *Parliament*, 2. (1.)

2. Enforcing attendance of prisoner. *Parliament*, 2. (2.)

COMPENSATION.

Under railway act, who entitled to. *Statute*, XI.

CONDITION.

1. In bond, construction of.

By the condition of a bond for payment of 400*l.* it was recited, that the obligor was about to marry E. E., linen draper, and thereby to become possessed of a stock in trade, now hers, and that in consideration thereof it was agreed that he should execute a bond to the obligee to pay to the children of E. E. by her late husband 300*l.*, within twelve months next after E. E.'s death, in the event thereafter specified: and the condition, therefore, was, that if S., the obligor, shall within twelve months next after the decease of E. E., pay to her child or children, &c. 300*l.*, "if upon an account of the stock in trade and effects in the linen-draper's business, if then carried on by the said S.," the same "shall amount to the sum of 400*l.*, but in case, upon such account to be taken as aforesaid, the said stock in trade and effects shall amount to less than that sum, then if the said S." shall pay to the child or children, &c. 120*l.* within twelve

months next after the decease of E. E., the said obligation shall be void, &c. Plea, that E. E. died, and that, before her death, and ever since, S. had ceased to carry on the business, and that he had not, at or since the time of her death, any stock in trade, &c. Replication, that at the end of twelve months from E. E.'s decease, there were, and still are, children of E. E. by her late husband living:

Held, on demurrer, that, as the recited agreement was to pay in the event after specified, and the condition was to pay 300*l.* or 120*l.* according to an account to be taken of the business, *if then carried on*, the obligor might discharge himself by pleading that he had discontinued the business. *Bewick v. Swindelle.* 868

2. Precedent, what is.

A policy of assurance on a ship, contained, at the foot of it, a condition (among others) that all ships were to be inspected and approved of by a majority of the committee of the insurers before admission; that all ships should be well found, &c., and otherwise in a seaworthy state, as to the committee or their inspector should, from time to time, seem proper; that vessels should have a certain specified quantity of rope or chain cable according to their several burthens, "and all chain cables to be properly tested;" ships to be subject to survey by the committee or their inspector at specified times: and, in case of non-compliance with orders to repair, made by the committee or the inspector, the parties neglecting to be uninsured.

An action was brought on the policy, and for money had and received and on an account stated: and money was paid into Court on two counts, one of which was on the policy, averring generally a performance by the plaintiff of all things in the policy contained to be performed on his part, and a compliance with all the conditions, &c. thereby referred to, and thereto subjoined. Held,

(1.) That the testing of the chain cable was not by itself a condition precedent, but only a direction to the committee.

(2.) That, if it had been a condition precedent, the non-performance was in the nature of unseaworthiness, and was a question for the jury; and that the payment of money into Court waived any objection as to the non-performance. *Harrierson v. Douglas.* 396. (See remainder of placitum, *Payment into Court.*

CONDITIONAL LIMITATION.

Who is, and how affected by recovery. *Devise*, 3.

CONSIDERATION.

Want of, how to be pleaded. *Pleading*, IV. 7. (2.)

CONSTABLE.

1. Liability to serve office.

H. occupied a warehouse in Manchester, within the jurisdiction of the court leet, where he carried on his business, but did not reside; and he usually lodged and boarded in Manchester from Monday till Saturday. He had also premises in Haslingden, in

which township he slept when not at Manchester; and he did suit and service to the court leet of Haslingden: Held, by Lord Denman, C. J. and Littledale, J., and, semble, per Patteson and Williams, J., that H. was liable to be appointed a constable of the Manchester leet.

In 1808 fines of 100*l.* had been imposed (and submitted to) for refusing the office of constable in Manchester, the parties fined not claiming exemption; since that time the duties of the office had greatly increased, and the number of residents qualified to serve had diminished; and it was sworn that difficulty was expected in procuring persons to serve, unless considerable fines were imposed for refusing: Held that, under these circumstances, a fine of 300*l.* on a person merely refusing to serve by reason of an alleged exemption, was excessive. *Rez v. Mosley.* 458

2. Refusal to serve office: fine. *Ante*, 1.

3. Right of land-tax collector to call in aid.

A collector of the land-tax is not entitled, either under the provisions of stat. 33 G. 3. c. 5, s. 17, or under his general authority, to take a constable with him into the house of a person from whom he is demanding payment of the arrear of the land-tax. But if he has reasonable ground (from past or present circumstances) to apprehend violence from such person, he may call in constables to assist in keeping the peace, and such constables are justified in staying while the collector remains to be paid, as long as there is reason to expect violence; and, if the owner of the house use violence to remove them, he is indictable for assaulting a peace-officer in the execution of his duty. *Rez v. Clark.* 287

4. Of Caernarvon; exercise of office by. See *Oath*, 1.

CONTINGENCY.

In devise, effect of, in shifting estate. *Devise*, 3.

CONTRACT.

What representation sufficient evidence, of character in which party acts. *Principal and Agent*, 1.

CONVERSION.

In trover. See *Trover*, 1.

CONVICTION.

For unlawful detainer, what it must state. *Detainer*.

COPYHOLD.

Surrender by feme covert.

Husband's consent.

1. How it may be expressed.

(1.) A verdict was taken for plaintiff in ejectment, subject to a special case, which stated that it was "the custom in the manor" in which the premises in question, being copyhold lands, were, that where a copyholder, being a feme covert, surrendered, if the husband consented to the surrender, such consent should be expressed in the surrender and admission; and that without his consent the surrender was inoperative. Quære, whether upon this it must be understood that, if the husband were shown to

have consented in fact, but such consent was not expressed in the surrender, the surrender was imperative.

(2.) The custom so understood would not be had in law.

(3.) The Court refused to amend the case, at the instance of plaintiff alone, by the Judge's notes, so as to limit it to a mere statement that the common practice was to enter the consent in the surrender and admission.

(4.) Supposing such an entry indispensable, the Court, upon a case stated, will not, in default of evidence, assume the fact of the consent, in order to prevent the surrender from being invalidated, as against a party disputing the efficacy of the surrender and claiming as heir to the wife.

(5.) Nor will the Court so assume, upon proof that the husband had joined in a previous surrender of the copyholds to the use of a stranger for the wife's life, and was not entitled to curtesy, that he was present in the court at which the surrender in question took place; that the entry of the surrender in the court-roll was incomplete, but contained no entry of the consent; and that the surrenderee was admitted, but did not take possession.

(6.) And semble, that a jury ought not so to assume, on these facts alone.

(7.) The objection to the want of consent, or to its not being expressed in the surrender and admission, may be taken by a party claiming as heir to the wife.

(8.) The statement, in the case, of the necessity of the husband's consent, cannot be understood to apply to cases only where he has an interest at the time of the surrender.

(9.) A surrender expressed that S. "came by W. H. and R. J. his assignees duly appointed." Held to be no proof, against a party disputing the surrender, that S. had been a bankrupt, nor of W. H. and R. J. having been authorized by him to appear.

(10.) A surrender so expressed does not satisfy a custom, that a surrender may be made by attorney duly appointed, and that, when a surrender is so made, it is to be mentioned in the surrender that it was made by attorney duly appointed.

(11.) By a deed of January 1796, reciting S.'s bankruptcy, and the conveyance under it of land, belonging to S., to T. W., T. W. conveyed to B. for the purpose of making a tenant to the precept. B. was no party to this deed; but he, in February, 1796, by deed not referring expressly to the bankruptcy or the previous deed, conveyed the lands to a tenant to the precept, and declared the uses of the recovery to be to his mother for life, remainder to himself in fee: the parties to the intended recovery, named in this deed, were the same as those mentioned in the preceding: Held, that B., in a suit respecting other land, was not estopped from disputing S.'s bankruptcy.

(12.) If the husband of a woman who, in 1796, has a reversionary estate tail in copyhold lands in which there is no curtesy, be proved to have been a bankrupt in 1796, and the wife's estate tail afterwards vest in possession, and she surrender it in 1803, this is not *prima facie* proof, as against the son of

the two, claiming under the entail, that the husband had no interest at the time of the surrender.

(13.) Semble, that it would be such *prima facie* proof as against the husband. *Doe dem. Shelton v. Shelton.* 265

2. When necessary. *Ante*, 1.

3. When Court will assume consent. *Ante*, 1.

4. When jury may infer consent. *Ante*, 1.

5. Want of, who may take advantage of. *Ante*, 1.

6. Custom as to, when good. *Ante*, 1.

7. Who may appear for him. *Ante*, 1.

8. What interest he must have. *Ante*, 1.

9. What sufficient proof of his interest.

(1.) As against others. *Ante*, 1.

(2.) As against himself. *Ante*, 1.

COPYRIGHT.

What necessary for securing. *Statute*, XIV.

COSTS.

1. Of award, how determined. *Award*, 1, & 6.

2. Of prosecution, how recoverable. *Prosecution*, 2.

3. Judge's certificate.

(1.) Under stat. 43 Eliz. c. 6, s. 2.

To a declaration in trespass for assaulting and beating plaintiff, imprisoning him for a long time, and during that time tearing his clothes, defendant pleaded the general issue, and, as to the assaulting, beating, and tearing the clothes, a justification. Plaintiff replied, that the detention was longer, and the other trespasses committed with more violence, than was necessary for the purposes alleged in the plea. Issue was joined thereupon, and on this and the general issue plaintiff had a verdict for one shilling. The Judge certified to deprive of costs under stat. 43 Eliz. c. 6, s. 2, and did not certify under stat. 22 & 23 Car. 2, c. 9, s. 136, that a battery was proved: Held,

[1.] That as the action appeared to be for a battery, the Judge could not certify under stat. 43 Eliz.

[2.] That the battery was admitted on the record, and therefore the plaintiff was entitled to full costs without a certificate under stat. 22 & 23 Car. 2, c. 9. *Bone v. Daw*. 711.

(2.) Under stat. 22 & 23 Car. 2, s. 9. See *Ante*, (1.)

(3.) Under stat. 3 & 4 W. 4, c. 42, how far final. *Executor*, 1. (1.)

4. Under stat. 43 G. 3, c. 46, s. 8. How amount of verdict may be shown. *Practice*, XXIV. 2.

5. Of amending entry of judgment on record, who to pay. *Practice*, I. 2. (1.)

6. Increased costs caused by amendments, liability of bail to. *Bail*, 2.

7. Right of set-off, by different parties to action.

L. sued K. and R. in trespass; they severally in their defences, and appeared by different counsel and attorneys: the verdict was for L. against K., and for R. against L.: Held, that R.'s costs were to be set off against the damages and costs recovered by L. against K., and that the lien of L.'s attorney upon such damages and costs was so far defeated. *Lees v. Roffitt*, 707.

8. Lien of attorney on damages and costs recovered. *Ante*, 7.

9. Payment of, by executors. *Executor, 1.*
 10. Security for.

(1) When it may be obtained.

[1] In an action brought upon a bond, in the name of an obligee resident abroad, for the benefit of an assignee in this country, the defendant may claim security for costs from the nominal plaintiff: the assignee's written undertaking is not sufficient. *Youde v. Youde.* 311

[2] Since the rule Hil. 2 W. 4. I. 98, a defendant may, before issue joined, move to stay proceedings till security for costs be given, on account of the plaintiff's residence abroad, though he has pleaded after knowledge of that fact.

Held so, where plaintiff gave notice of action, describing himself as resident abroad, April 10th, served process May 12th, declared May 23d, and received plea May 27th, and the motion was made May 30th.

Where no application has been made to the plaintiff for security before moving, the Court, in granting such rule, will oblige the defendant to pay the costs of the motion. *Fletcher v. Lew.* 551

(2) Who to pay costs of application. *Ante, 10. (1.) [2.]*

11. On election petition, under stat. 9 G. 4. c. 22.

(1.) When taxable. *Parliament, 2. (1.)*

(2.) Speaker's certificate for, when it will be enforced. *Parliament, 2. (1.)*

COUNTY.

Accounts, allowance of. *Rate, 1.*

COURT OF ASSIZE.

Power to grant expenses of prosecution. *Prosecution, 2.*

COURT BARON.

Appointment of officers, how to be made. *Manor, 1.*

COURT, ECCLESIASTICAL.

See ECCLESIASTICAL COURT.

COURT, INFERIOR.

See INFERIOR COURT.

COURT OF KING'S BENCH.

Authority to review Judge's order. *Executor, 1. (1.)*

COURT LEET.

1. Time for holding. *Mandamus, I. 1.*
 2. Appointment of constable. *Constable, I.*

COVENANT.

1. When joint.

By indenture of lease, reciting that L. had agreed to take premises of C., and that it had also been agreed that R. should enter into the covenant after-mentioned for securing payment of the rent, it was witnessed that in consideration of the covenants after-mentioned on the part of C. to be performed, and particularly of the covenant thereinafter entered into by R., the said C., at the request of R., demised to L., &c. And L. and R. covenanted to C. that they would pay him the rent on the appointed days: and further, that L., his executors, &c., should and would keep the premises in repair.

There were other covenants similarly framed to this last, for matters to be performed by L., and a proviso for re-entry if the rent should be in arrear, or if L., his executors, &c., should not perform the covenants in the indenture contained, on his and their part to be performed: and there was a covenant by C. to L. for quiet enjoyment, L., his executors, &c., paying the rent and performing the covenants in the indenture before contained:

Held, that R. was jointly bound with L. by the covenant to repair, as well as the covenant to pay rent. *Copland v. Leports.* 517

2. How far covenanting party estopped from afterwards denying truth of allegations. *Evidence, IV. 1.*

CUSTOM.

1. As to surrender of copyhold by feme covert.

(1.) How construed. *Copyhold, 1.*

(2) When good. *Copyhold, 1.*

2. Of appointing officers in manor court, how far it legalizes subsequent appointments. *Manor, 1.*

3. To take profits in alieno solo.

(1.) To an action of trespass for taking away sand from the plaintiff's close, it was pleaded, that the close was contiguous to the sea shore, in Cornwall; that the sand had from time to time, before the times, &c., drifted and been carried by the wind from the sea-shore upon the said close, and been there deposited; that in the parish of E. there was a custom for all the inhabitants for the time being, occupying lands in E., to enter the close at seasonable times, and take therefrom reasonable quantities of all such sand as had so drifted, &c., for the purpose of manuring the lands in their occupation in the said county; and the defendant justified as an inhabitant and occupier, &c.:

Held, a bad plea; first, because the allegation of a custom was too vague; secondly, because the supposed custom was at all events void, inasmuch as the sand, when drifted upon a close, became part of it, and the claim therefore was to take a profit in alieno solo.

(2.) Issue being joined on a plea of prescription, pleaded to a declaration for trespass in G., if the plaintiff's witness be asked, in cross-examination, questions respecting the user in other places than G., and prove such user, the plaintiff in re-examination may shew an interruption of the user in such other places.

(3) If such witness, on cross-examination, voluntarily depose to such user, in answer to a question not relating to it, the plaintiff may still re-examine as above, unless the defendant apply to have such voluntary answer struck out of the Judge's notes.

(4.) Quare, whether there can exist contemporaneously, in respect to the same land, a prescription and a custom, entitling to the same easement, &c.?

(5.) Evidence which shews such a custom is not evidence of such a prescription, and vice versa.

(6.) In trespass quare clausum fregit defendant justified in several pleas alleging non-existing grants, by A., B., and C. re-

spectively, being seised in fee of the locus in quo, of profits & prendre therein, to several parties respectively seised in fee of other land, occupiers, &c., in respect thereof. The replication traversed the several grants, but not the estate of any grantor or grantee. The only evidence was of immemorial user by occupiers of the lands last mentioned: Held, that this did not support any of the pleas.

(7.) So if the pleas be of grants by persons seised in fee, to all the inhabitants of a parish, or county, and the grants only be traversed, and there be evidence only of immemorial user by the inhabitants.

(8.) On a plea that A. seised in fee granted a profit & prendre in his close to B. in respect of land of which B. was seised in fee, if issue be joined only on the grant: Quære, whether the plaintiff be estopped from disputing the seisin of A. and B.? *Blewitt v. Tregonning.* 554

4. How far prescription and custom can exist together. Ante, 3.
5. Evidence of. Ante, 3.
6. How custom to be pleaded. Ante, 3.

DEED.

1. Party to, how far bound by allegations in it. *Estoppel*, I. (2); *Evidence*, IV.
3. Stamp on. See Stamp.

DEMAND.

1. What constitutes demand and refusal. *Mandamus*, II. 1; *Rate*, I. (1).
2. Object of, when to be stated. *Mandamus*, II. 1, (2).

DETAINDER.

Proceedings on forcible detainer.

A conviction for an unlawful detainer is bad, if it only state that the prosecutor complained to the justices of an entry and unlawful expulsion and forcible detainer, and that they personally came and found the defendant forcibly detaining the premises, whereupon they convict him, &c. For the justices could not know, by their view, without evidence, that the detainer was unlawful, or that there had been an unlawful entry.

Semble, per Lord Denman, C. J., that the conviction should set out the facts from which the unlawfulness of the detainer is inferred.

Semble, that such conviction ought to shew that the defendant was summoned, or had otherwise an opportunity to defend himself.

At the time of the above conviction, the defendant tendered to the justices a traverse of the force complained of; and, a few days after, an inquisition was held before the magistrates for the purpose of trying the alleged force by a jury, who, after hearing evidence adduced by both parties, found the defendant guilty; and the magistrates then gave restitution. A return was made to this Court, on certiorari, of the conviction and inquisition. The latter was entitled an inquisition indented and taken, &c., by the oaths of twelve, &c., before, &c., who say, upon their oaths aforesaid, that, &c.: stating an unlawful entry and detainer, but not reciting any complaint made by the prosecutors.

Held, that the inquisition was founded on the conviction, and could not be sustained, the conviction being void: and that the in-

quisition, even if looked at alone, was bad, as it did not state any complaint, nor by what authority the jury was summoned.

Held, further, that the Court was bound to award a re-restitution, as a consequence of quashing the conviction, without inquiring into the legal or equitable claims of the respective parties.

The proceedings being returned by certiorari, and the conviction being, upon a concilium and argument, pronounced bad, the Court would not, as a consequence of that judgment, quash the inquisition also, but heard its validity separately discussed on motion. *Ree v. Wilson.* 817

DEVISE.

1. What words pass an estate in fee.

Tenant in fee simple devised land to his wife, her heirs and assigns, for ever, "with the intention that she may enjoy the same during her life, and by her will dispose of the same as she thinks proper." Held, that the wife took a fee; though in a later part of the will, the deviser limited lands in fee by using the words "heirs and assigns for ever," without any additional words. *Doe dem. Herbert v. Thomas.* 123

2. What words create an estate tail.

Testator, seised in fee of several estates, devised them to trustees in fee, upon trust to permit his sons and daughters respectively and severally to receive the rents and profits of the respective estates; with a clause for preserving contingent remainders. And from and immediately after the decease of any of his said children, the testator devised the estate limited to him or her for life unto or among his or her child or children living at his or her decease, for their natural lives as tenants in common, but with equal benefit of survivorship among the rest of the said children if more than one, and any one of them should die without leaving issue; the child or children of each son or daughter taking the rents and profits of his or her parent's estate only.

And from and after the decease of all the children of each of his sons and daughters without issue, he gave the estate or estates to them respectively limited, to and among all the issue of such child or children during their lives as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining.

And for default or in failure of issue of any of his said sons and daughters, he devised the estate limited to him or her dying without issue, to the survivors of his sons and daughters, for their respective lives, as tenants in common; and after their respective deaths to the children of the survivors of them during their respective lives as tenants in common, with such benefit of survivorship as aforesaid; and after the decease of all of them, to the issue of such children, in like manner as the testator had devised the original estate of each of the sons and daughters.

And for default or in failure of issue of all his sons and daughters but one, he devised all the estates to that one in fee.

Held that, under this devise, a son of the

testator did not take an immediate estate tail in the premises devised to him, but an estate for life, with remainder in tail to his children as tenants in common, remainder to himself in tail. *Doe dem. Gallini v. Gallini*. 340

3. Proviso for shifting estates, how construed, and when barrable by recovery.

(1.) Lands were devised to A. for life, remainder to his first and other sons successively in tail male; remainder to B., A.'s younger brother, for life; remainder to B.'s first and other sons successively in tail male; remainders to other younger brothers of A.; and remainders to their sons successively in tail male; remainders over. The will provided, first, that every person who should become under the will entitled to possession of certain premises, being part of lands devised, should take the name, &c. of S. in a certain time; and, in default thereof (such default being made during certain lives in being, or within twenty-one years after the survivor's decease), that the devise to such person should become void, and the lands should go to the person next in remainder, as if the person making default were dead, if tenant for life, or dead without male issue, if tenant in tail; secondly, that if the title to a certain earldom should descend upon A. or any of his younger brothers, or any of his or their sons during the life of A. or of any of his younger brothers, or within twenty-one years after the survivor's decease, the estate of such person, to whom the title should come, should cease, and the lands should go to the person next in remainder expectant upon the decease and failure of issue male of the person to whom the title should come, in the same manner as if the person on whom the title descended were dead without issue, such person next in remainder taking the name, &c., of S. as aforesaid.

Held, first, that the proviso for shifting the estate in case of the descent of the title, was not confined to A.'s estate, but attached to all the estates created by the will, as they should successively vest in possession.

Secondly, that on the title descending to any tenant for life, the estates were to go, not to his issue, but to the next branch of the family.

A., being in possession, a common recovery was suffered, in which the lands were conveyed (by lease and release by A. and his eldest son) to a tenant to the praepipe, during the joint lives of such tenant and A.; and A.'s eldest son was vouched ever, but A. was not vouched; afterwards the title descended upon A.

Held, first, that such recovery destroyed all remainders expectant upon the natural determination of the estate tail of A.'s son, and the proviso for shifting the estates in the event of the title descending, so far as it was attached to that estate tail, and all remainders or subsequent estates limited to come into possession on the descent of the title upon A.'s son, grandson, &c.

But, secondly, that B. was entitled to claim by virtue of the proviso, not merely as defeating or determining the estate tail, but as operating antecedently to that estate;

and that such antecedent claim was not barred by the recovery.

While A. was in possession, B. and his eldest son, by deed truly reciting the facts, released their interest to trustees: Admitted that, this being a release of a possibility to a party not privy in the estate, and the whole truth appearing by the deed, no legal interest passed either by way of conveyance of interest or by way of estoppel. *Doe dem. Lumley v. Earl of Scarborough*. 2

(2.) Lands were devised to R. for life; remainder to trustees to preserve contingent remainders: remainder to R.'s first and other sons successively in tail male: remainder to J., R.'s younger brother, for life; remainder to trustees to preserve, &c.; remainder to J.'s first and other sons successively in tail male; remainder to F., another younger brother of R.; remainder to trustees to preserve, &c.; remainder to F.'s first and other sons successively in tail male: remainders to other younger brothers of R.; and (after remainders to preserve, &c.) remainders respectively to their sons successively in tail male: remainders over.

The will contained two provisos.

First, that every person or persons who, by virtue of the will, should become entitled to certain premises, being part of the lands devised, should, within two years after he and they should severally become so entitled, take upon himself and themselves the surname of S., jointly with any dignity or title which might be vested in him or them, and quarter the arms of S. with his or their own family arms, and take such means as might be requisite to enable him or them respectively so to do; and, in case any such person or persons should refuse or neglect so to do, then the limitation to him or them (such neglect, &c., being made during the lives of R. or of any of his younger brothers, living at the devisor's decease, or within twenty-one years after the survivor's decease) should cease, determine, and become utterly void; and the lands should immediately go to the person next in remainder under the will, in the same manner as if such person or persons so neglecting, &c., being tenant or tenants for life, was or were dead, or, being tenant or tenants in tail, was or were dead without issue male, without prejudice to such jointures, portions, terms, &c., as, by virtue of powers afterwards contained in the will, should have been limited, &c., before such ceasing or determination of the estate of the person or persons so neglecting, &c.

Secondly, that, if the title to a certain earldom (which was the only dignity or title shewn to exist in the family) should descend to any of them the said R., J., F., &c., or to any of their sons (within any of the lives, &c., as before,) then, and in such case, and as and when the title should come to him or them, the estate which he or they should then be entitled to in the lands, under or by virtue of the will, should cease, determine, and become void; and the lands should immediately go the person and persons who, under the limitations aforesaid, should then be next in remainder expectant on the decease and failure of issue male of the person

to whom the title should so come, in the same manner as such person or persons so in remainder would take the same by virtue of the will, in case he or they to whom the title should come was or were actually dead without issue; such person and persons so in remainder complying with the first proviso: provided that any such cesser of the estate of the person or persons to whom the title should come should not prejudice, &c. (as before, for preserving jointures, &c.)

The title descended to R., while in possession of the lands, whereupon J. took possession, and assumed the name and arms of S.

J. being in possession, a common recovery was suffered, in which the lands were conveyed (by lease and release by J. and his eldest son) to a tenant to the precise for the joint lives of such tenant and J., and J.'s eldest son was vouched over, but J. was not vouched; and the uses of the recovery were declared to be to J. for life, remainder over.

While J. was in possession, F. and his eldest son, by deed truly reciting the facts, released their interest to trustees, who were strangers in interest, habendum to and to the use of the trustees in fee, upon such trusts as should correspond with the uses and trusts which had been declared of the recovery; and F. and his eldest son covenanted with the trustees that they had not encumbered or impeached, and for further assurance.

Afterwards the title descended to J.

F. having died, and his eldest son having brought ejectment against J.: Held,

(Assuming, first, that the second proviso was capable of operating more than once, and was not at an end upon the descent of the title to R.:

Assuming, secondly, that the proviso, upon the title coming to a tenant for life, determined the estate both of such tenant for life and of all his sons:

Assuming, thirdly, that the plaintiff was not barred or estopped by the release to the trustees, or by the above-mentioned covenants:)

That the second proviso created no new estate on the descent of the title; that the lessor of the plaintiff could claim only by virtue of the limitation expectant upon the estate tail of J.'s eldest son; and the recovery defeated such a limitation, and was therefore a bar to the ejectment. *Earl of Scarborough v. Doe dem. Savile.* 259

4. On what obligations of deviser devisee liable.

(1.) B., as surety for J. became party to an indenture whereby A. leased land to J., at a rent payable by J., for a term determinable on A.'s death; and B. and J. covenanted jointly and severally for themselves and their heirs that B. and J., or one of them, or their heirs, executors, &c., should pay the rent reserved, and also a further rent, as liquidated damages, if the land were formed contrary to the covenants of the lease. After B.'s death, rents of both kinds became due: Held, that B.'s devisees were not liable, under stat. 3 & 4 W. & M. c. 14, to an action of debt for any of the sum due.

(2.) In the above action, the declaration stated that, during the term, to wit, the 1st

of August, 1823, B. died, and that the rents became due on days named, which appeared by the dates, but were not alleged, to be later than that day. Plea, that B. died before any part of the debt became due, concluding to the Court. On special demurrer to the plea, for not traversing or denying, or confessing and avoiding, and for putting in issue matter of law: Held, that if the declaration did not shew a debt in B.'s lifetime, it was bad; and that, if it did, the plea traversed it; and that the conclusion to the Court, if bad at all, should have been specially objected to by the demurrer.

(3.) In order to induce the Court to exempt an executor, who has failed in an action brought by him in that character, from costs, under stat. 3 & 4 W. 4, c. 42, s. 31, it is not sufficient that the action has been brought bona fide, under counsel's advice, and that it has been defeated on a difficult point of law, unless there be improper conduct on the part of the defendant. Unnecessary prolixity in the pleadings is not such conduct. Nor omitting to give the plaintiff information which might have prevented his proceeding with the action, if the plaintiff did not apply for the information. *Farley v. Briant.* 839

DEVISEE.

See DEVISE.

DISCLAIMER.

How far assignees bound to disclaim acceptance of term. *Assignment, 1.*

DISTRESS.

1. Proceedings necessary before issuing of warrant.

(1.) By a local act commissioners were empowered to make paving rates, and to hear and relieve parties complaining of such rates. The act also gave an appeal from the commissioners to the sessions. And it provided that, on nonpayment of rates for seven days after personal demand, it should be lawful for certain justices, upon proof on oath of such demand and non-payment, to issue a distress warrant. Justices, being applied to for such warrant, refused to grant it, but stated they would do so if a proper information were sworn, and the party summoned before them.

The Court refused a mandamus to compel the justices to issue a warrant without summoning the party.

Supposing that the act authorized the justices to grant a warrant without summons, held, nevertheless, that they acted rightly in not so granting it. *Rez v. Hughes.* 425

(2.) By statute establishing a gas light company, it was enacted, that if any person should refuse or neglect, for ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company or their clerk by warrant of any justice of peace for the town, &c., and it should be lawful for the company, or their clerk, or any person acting under their authority, with such warrant, to levy the sum so due by distress and sale of the goods of the party so neglecting or refusing to pay, or the same might be recovered by action, &c.

Held, that a warrant so issued by a justice, without previously summoning and hearing the party to be distrained upon, was illegal, though a summons and hearing were not in terms required by the act.

Where a magistrate grants a warrant in the nature of execution, he is bound first to summon and hear the parties, unless the statute under which he acts clearly renders the discharge of that function ministerial only, or in some other manner dispenses with the summons and hearing.

In trover for distraining plaintiff's goods, the company justified under the above warrant, and stated that it was issued on the complaint of their collector, and that he, by virtue of it and under their authority, seized the plaintiff's goods for the purpose of levying a sum owing by him to them, and duly demanded according to the act.

Held, that the warrant, although it would have protected the clerk or an officer, was no justification to the company, they not having acted in obedience to it, but having put it in force as parties. *Painter v. Liverpool Gas Company*. 438. See also *Statute, XXXVII*.

2. Who may justify under illegal warrant. *Ante*, 1, (2.); *Post*, 3.
3. Suspension of execution of warrant.

Two justices allowed the accounts of overseers going out of office. By a subsequent warrant, reciting that on the accounts a certain balance appeared to be in the hands of one of the overseers, which he had neglected and refused to pay, they required the succeeding overseers to distrain for the balance on his goods, under stat. 50 G. 3, c. 49, s. 1. Afterwards, a doubt being raised whether the balance was correctly ascertained, they signed an order to the overseers to suspend, and not execute, the warrant of distress. This was delivered to one of the overseers, who nevertheless distrained. An action of trespass being brought against him.

Held, that the justices had no power to suspend the order on account of a doubt as to the correctness of the balance; that the defendant, therefore, was acting under a legal warrant, and was entitled to a demand of a copy of the warrant, under stat. 24 G. 2, c. 44, s. 6.

Quære, whether the justices who issued the warrant could have suspended it under any circumstances, as, for instance, upon discovering that the balance had been paid before the warrant was issued. *Barons v. Luscombe*. 589

4. Demand of copy of warrant. *Ante*, 3.

EASEMENT.

See ANCIENT LIGHTS.

ECOLESTIASTICAL COURT.

When court of K. B. will interfere with, by prohibition. *Mandamus*, II. 3.

EJECTMENT.

1. When barred by stat. 3 & 4 W. 4, c. 27, s. 17. *Statute, XXXI* 1.
2. What constitutes adverse possession. *Adverse Possession*, 1.
3. Who estopped from contesting title.
Lessor of the plaintiff being in possession of a house and premises, defendant asked leave to get vegetables in the garden; and,

having obtained the keys for this purpose, fraudulently took possession of the house, and set up a claim of title: Held, that, having entered by leave of the party in possession, she could not defend an ejectment, but was bound to deliver up the premises before she proceeded to contest the title.

A mere licensee is, in this respect, on the same footing as a tenant. *Doe dem. Johnson v. Baytop*. 188

ELECTION.

Of member of parliament; what constitutes bribery. *Bribery*, 1.

ELEGIT.

Inquisition under; truth whether examinable by Court on motion. *Practice*, X.

ENTRY.

Forcible entry and detainer. See *Detainer*.

ESCAPE.

Sheriff's return of writ, how far conclusive evidence. *Sheriff*, 1.

ESTATE.

1. Fee, what words pass. *Devise*, 1.
2. Tail.
(1.) What words create. *Devise*, 2.
(2.) Proviso for shifting estate, how construed; how affected by recovery. *Devise*, 3.
3. For life, what proof satisfies allegation of. *Evidence*, XII. 1. (2.)

ESTOPPEL.

1. Party to deed, how far bound by allegations in it.

(1.) See *Evidence*, IV.
(2.) By a deed of January, 1796, reciting S.'s bankruptcy, and the conveyance under it of land, belonging to S., to T. W., T. W. conveyed to B. for the purpose of making a tenant to the præcipe. B. was no party to this deed; but he, in February, 1796, by deed not referring expressly to the bankruptcy or previous deed, conveyed the land to a tenant to the præcipe, and declared the uses of the recovery to be to his mother for life, remainder in fee: the parties to the intended recovery, named in this deed, were the same as those mentioned in the preceding: Held, that B., in a suit respecting other land, was not estopped from disputing S.'s bankruptcy.

If the husband of a woman who, in 1796, has a reversionary estate tail in copyhold lands in which there is no courtesy, be proved to have been a bankrupt in 1796, and the wife's estate tail afterwards vest in possession, and she surrender it in 1803, this is not prima facie proof, as against the son of the two, claiming under the entail, that the husband had no interest at the time of the surrender.

Semble, that it would be such prima facie proof as against the husband. *Doe dem. Shelton v. Shelton*, 265. (See whole placitum, *Copyhold*, 1.)

2. How far party who traverses grant is estopped from disputing seisin of grantor. *Evidence*, X.
3. How far release and assignment of possibility of estate, with covenants against incumbrances, and for further assurance, operates at law by way of estoppel. *Devise*, 8.

EVIDENCE.

I. Admissions.

1. Offer to pay money, how far an admission of party having received it. *Assumpsit*, VI. 1.
2. Payment of money into court, what it admits. *Payment into Court*.

II. Depositions.

Under the Bankrupt Act, 6 G. 4, c. 16, s. 92, the depositions taken before the commissioner are evidence of the petitioning creditor's debt, the trading, and the act of bankruptcy, in an action of trover brought by the assignees, though the declaration states a conversion in the time of the assignees only, if the cause of action be one for which the bankrupt himself might have sued.

For ascertaining whether or not the case is within sect. 92, the criterion is, whether the bankruptcy be only a formal step in the evidence, or whether it be so essentially a part of the ground of action that, without proof of it, no party could recover in respect of the alleged cause.

This is to be decided by the Judge, upon the opening of evidence at the trial. *Kitchener and others v. Power*. 232

III. Written entries.

1. Judge's notes, when sufficient to prove amount of verdict. *Practice*, XXIV. 2.
2. Minute book, to prove term of servant's engagement by master. *Principal and Agent*, 2.

IV. Deed how far conclusive.

1. As against party to it.

In ejectment by grantee of an annuity against the grantor, for premises on which the annuity was secured, it appeared that no memorial had been enrolled. The lessor of the plaintiff contended that none was necessary, by sect. 10 of the Annuity Act, 53 G. 3, c. 141, the premises being of greater value than the annuity, in proof of which he relied on a clause in the annuity deed, wherein the defendant covenanted that the premises were of more than sufficient value to answer and pay the annuity. The defendant offered evidence to prove that the premises were not of such value when the annuity was granted.

Quære, whether a covenant, as above, is a declaration which estops the party making it from afterwards disputing in an action the fact covenanted for. But, assuming that it were so in other cases,

Held, that it could not preclude a party from giving proof that the annuity was granted in contravention of the statute. *Doe dem. Chandler v. Ford*. 649

2. As against persons claiming under it, but not parties to it.

An indenture of mortgage, of 1817, recited that, by a former indenture, of 1815, A., in consideration of 200*l.* conveyed the premises, of which he was tenant in fee, to C. and H. for 1000 years, subject to a proviso of redemption; that P., at the request of A., had paid C. and H. the 200*l.* and advanced a further sum to A., and that, in consideration thereof, C. and H., at A.'s request, did assign, and A. did grant, &c., to P. the premises comprised in the original mortgage, from thenceforth for all the residue of the said term of 1000 years, subject to

a new proviso of redemption. In ejectment brought by the representatives of A. against those of A.,

Held, that the deed of 1817 (with proof of A.'s seisin in fee) was sufficient evidence of title in P., without production of the deed of 1815: that, if the recital of the former deed were admissible, it must be taken altogether, and shewed a right in C. and H. to assign the term; and, if it were rejected, nothing appeared to prevent A., as tenant in fee, from granting a term to P.

That, if the recital of the deed of 1817 were rejected as proof of a right in C. and H. to assign, it might still be looked to for the purpose of ascertaining what term was intended to pass by the deed. And that from the whole of this deed it might be collected that the residue of a term of 1000 years, commencing in 1815, was granted to P. from 1817. *Doe dem. Rogers v. Brooks*. 513

V. Secondary evidence of written documents.

1. Contents of.

Where a document is proved to have come into the hands of one party to a cause, the opposite party cannot entitle himself to give secondary evidence of its contents by shewing that it has been since lost or destroyed, unless he has served notice to produce.

Defendant in ejectment relied on a will devising all the testator's property except a pecuniary legacy. In answer, plaintiff proved that, after the execution of such will, a document, which he alleged to have been a will, was signed by the testator, and delivered to a woman whom the defendant afterwards married, since which the witness, who prepared it, had heard nothing of it. It was then asked, on behalf of the plaintiff, whether the deceased had declared that paper to be his will, and whether the witness and others had signed it in his presence: Held, that the questions could not be put, no notice having been given to produce the last mentioned document. *Doe dem. Phillips v. Morris*. 46

2. Proper execution of. *Ante*, 1.

VI. Stamp on probate how far evidence of assets.

Upon issue joined on a plea by an executor of plene administravit, the amount of the stamp upon the probate is admissible in evidence.

Per Littledale, J. It does not, of itself, furnish prima facie evidence of the amount of effects which have come to the executor's hands.

Per Lord Denman, C. J. If there be evidence of a long acquiescence by the executor, without re-demanding any of the duty, it is prima facie evidence of such amount; but it is not of itself evidence of such amount.

Per Patteson, J. It is not such prima facie evidence, even if a long acquiescence is shewn. *Mann v. Lang*. 699

VII. How far party may allege his own wrongful act in answer to action. *Assumpsit*, VI. 2; *Trover*, 1.

VIII. What is sufficient evidence of corrupt agreement under stat. 2 G. 2, c. 24, s. 7. (*Bribery Act*.) *Bribery*, 1.

IX. Criterion whether cause of action within 6 G. 4, c. 16, s. 92 (*Bankrupt Act*).

1. What is. *Ante*, II.
2. By whom to be determined, *Ante*, II.

X. Evidence, which shows custom, how far evidence of prescription.

1. To an action of trespass for taking away sand from the plaintiff's close, it was pleaded, that the close was contiguous to the sea shore, in Cornwall; that the sand had from time to time, before the times, &c., drifted and been carried by the wind from the sea-shore upon the said close, and been there deposited; that in the parish of E. there was a custom for all the inhabitants for the time being, occupying lands in E., to enter the close at reasonable times, and take therefrom reasonable quantities of all such sand as had so drifted, &c., for the purpose of manuring the lands in their occupation in the said county; and the defendant justified, as an inhabitant and occupier, &c.: Held, a bad plea; first, because the allegation of a custom was too vague; secondly, because the supposed custom was at all events void, inasmuch as the sand, when drifted upon a close, became part of it, and the claim, therefore, was to take a profit in alieno solo.

2. Issue being joined on a plea of prescription, pleaded to a declaration for trespass in G., if the plaintiff's witness be asked, in cross-examination, questions respecting the user in other places than G., and prove such user, the plaintiff in re-examination may show an interruption of the user in such other places.

3. If such witness, on cross-examination, voluntarily depose to such user in answer to a question not relating to it, the plaintiff may still re-examine as above, unless the defendant apply to have such voluntary answer struck out of the Judge's notes.

4. Quære, whether there can exist contemporaneously, in respect to the same land, a prescription and a custom, entitling to the same easement, &c.?

5. Evidence which shows such a custom is not evidence of such a prescription, and vice versa.

6. In trespass quare clausum fregit, defendant justified in several pleas alleging non-existing grants, by A., B., and C. respectively, being seised in fee of the locus in quo, of profits a prendre therein, to several parties respectively seised in fee of other land, occupiers, &c., in respect thereof. The replication traversed the several grants, but not the estate of any grantor or grantee. The only evidence was of immemorial user by occupiers of the land last mentioned: Held, that this did not support any of the pleas.

7. So if the pleas be of grants by persons seised in fee, to all the inhabitants of a parish or county, and the grants only be traversed, and there be evidence only of immemorial user by the inhabitants.

8. On a plea that A. seised in fee granted a profit a prendre in his close to B., in respect of land of which B. was seised in fee, if issue be joined only on the grant: Quære, whether the plaintiff be estopped from disputing the seisin of A. and B.? *Blewitt v. Trevening*. 554

XI. Non-existing grant.

1. How far proved by evidence of immemorial user. Ante, X.

2. Traverse of, what it puts in issue. Ante, X.

XII. Evidence, how applicable to the remainder.

1. Variance between pleading and evidence.
(1.) Terms of agreement.

Where the record alleged an agreement that work was to be done "within a fortnight" before a given day, and the evidence was of an oral agreement that it should be done "a fortnight before that day: Held, that a jury were justified in finding a variance. *Thomas v. Lambert*, 61. (See also *Principal and Agent*, 2.)

(2.) Designation of interest in estate.

An allegation that A. is tenant for the life of M., is supported by proof that A. and B., being joint-tenants for the life of M., conveyed their estate by lease and release to A., without an intermediate party. *Acery v. Cheslyn*, 75. (See whole placitum *Misdirection*, 1.)

2. Facts immaterial to the issue, examination as to. Ante, X.

3. In particular actions.

(1.) Assumpsit.

[1.] Use and occupation.

What sufficient evidence against assignees of a term. *Assignment*, 1.

[2.] Account stated.

A promise made by defendant after action brought, to give a cognovit, is no evidence of an account stated before action brought. *Spencer v. Parry*, 381. (See whole placitum *Pleading*, III. 4. (1.)

(2.) Trespass.

What strictness of proof necessary as to locus in quo described by abutments.

Declaration, in trespass, described the locus in quo by abutments on the north, east, south, and west, severally: and it was said to abut, on the south and west, "towards" certain places named. The defendant pleaded only a justification, in respect of his seisin of the locus in quo which he averred to be parcel of the manor of H., and to have been demised to him by copy of court roll. The plaintiff denied that it was parcel, &c. On the trial, the plaintiff applied his evidence to a triangular piece of land, not contiguous on all sides to the places mentioned in the abutments, but situated within their limits:

Held, first, that the statement of abutments could not be objected to, on the trial, as insufficient in itself.

Secondly, that the plaintiff might apply it, though not with strict correctness, to the triangular piece of land.

Thirdly, that the defendant could not prove his justification in respect of another piece of land, also situated within the limits of the several places named in the abutments, but not contiguous to them on all sides. *Lempriere v. Humphrey*. 181

(3.) Trover.

What is evidence of conversion. *Trover*, 1.

XIII. Payment of money into court, what it admits. *Condition*, 2. *Payment into court*.

XIV. Examination of witnesses.

How far one party may examine as to immaterial facts after examination by the other. Ante, X.

EXECUTION.

1. Proceedings where sheriff interested. *Sherriff*, 4.

2. Person in custody of marshal how to be charged in execution.

If a party, in custody of the marshal, at the suit of M., be charged in custody in execution at the suit of A., by a side-bar rule, without habeas corpus, such proceeding is wholly void, and the party will be discharged out of custody at the suit of A., at any distance of time from his having been charged in that custody.

Although a commitment at the suit of A. be entered on the roll, the defendant may shew that the commitment was by a side-bar rule, and not by habeas corpus, the form of entry being the same in both cases.

And if, after the expiration of a year and a day from the judgment at the suit of A., the party be brought up by habeas corpus and charged in execution at the suit of A., before he applies for his discharge on the above objection, it lies on A. to show that the judgment at his suit has been revived by scire facias, otherwise the objection is not answered. *Smith v. Sandys.* 693

EXECUTOR.

1. Payment of costs.

(1.) In an action brought by an executor, if the defendant has obtained a verdict, and the judge who tried the cause has, upon summons, but without hearing any affidavit, certified to deprive the defendant of costs under stat. 3 & 4 W. 4, c. 42, s. 31, the Court will not review his order.

Quære, whether they have authority to do so. *Maddock v. Phillips.* 198

(2.) In order to induce the Court to exempt an executor, who has failed in an action brought by him in that character, from costs, under stat. 3 & 4 W. 4, c. 42, s. 31, it is not sufficient that the action has been brought bona fide, under counsel's advice, and that it has been defeated on a difficult point of law, unless there be improper conduct on the part of the defendant. Unnecessary prolixity in the pleadings is not such conduct. Nor omitting to give the plaintiff information which might have prevented his proceeding with the action, if the plaintiff did not apply for the information. *Farley v. Briant*, 839. (See whole placitum, *De-vise*, 4.)

2. Liability to contribution under Building Act.

Under stat. 14 G. 3, c. 78, (Building Act) s. 41, where a party wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises, is liable to contribution out of such rent, though he be no otherwise owner than as an executor or administrator.

And this, although there be a judgment outstanding of a date prior to the pulling down of the wall, and no sufficient assets to meet it.

For the portion of the rent claimable in respect of such contribution is not assets. *Thacker v. Wilson.* 142

3. Assets.

(1.) What are. *Ante*, 2.
(2.) Stamp on probate, how far evidence of. *Evidence*, VI.

EXPENSES.

Of prosecution, how recoverable. *Prosecution*, 2.

FEE.

What words pass an estate in fee. *Devise*, 1.

FINE.

Excessive, what amounts to. *Constable*, 1.

FORCIBLE DETAINER.

See DETAINER.

FRAUDS.

Statute of. See *Statute*, V.

GRANT.

Non-existing.

1. How far shown by evidence of immemorial user. *Evidence*, X.

2. Traverse of, in pleading, what it puts in issue. *Evidence*, X.

GUARDIAN.

In socage, when indictable, *ratione tenuræ*, for repair of bridge. *Infant*.

HABEAS CORPUS.

1. After proceedings in inferior court.

A defendant in actual custody of the sheriff of a county upon process of an inferior court, having removed himself into this Court by habeas corpus cum causa directed and delivered to the sheriff only, and having been thereupon committed to the custody of the marshal, moved to be discharged on affidavit entitled as of the cause in this Court. Held that the affidavit was rightly entitled though no step in the cause had been taken in this Court.

The defendant was arrested in Gloucestershire, in an action of debt instituted in the Court of the Chancellor of the University of Oxford, and on a warrant, issuing from that court, and reciting that the plaintiff had sworn that the defendant was a member of the university, was suspected of flight, and, as deponent believed, would not appear, but would withdraw himself out of the precincts of the university. Nothing further appeared as to the defendant's residence, either by the warrant, or other proceedings in the Chancellor's Court, or by the affidavits and sheriff's return to the habeas corpus in this Court: Held, that the defendant was entitled to his discharge, for want of proof of residence, and this, independently of the question whether or not the process of the Chancellor's Court could be executed at the place in question.

After the arrest, the defendant had appeared in the Chancellor's Court, waived the objection to the jurisdiction, and entered into the merits; upon which a decree was given that he should pay the debt, and remain in custody till he paid it, which was sworn to be conformable (as the deponent believed) to the practice of the court. After this the habeas corpus issued: Held, that the habeas corpus was not too late; and that the defendant might still insist before this Court on the want of jurisdiction. *Perrin v. West.* 405

2. To obtain attendance of prisoner before Committee of House of Commons. *Parliament*, 2, (2.)
3. To charge in execution person in custody of marshal. *Execution*, 2.
4. Affidavits, how to be intitled. *Ante*, 1.
5. Right of subsequent action for malicious arrest, how affected by removal of cause by defendant. *Pleading*, II.

HIRING.

Settlement by. See *Poor*, IV.

HOUSE OF COMMONS.

See *PARLIAMENT*.

INDENTURE.

Of apprenticeship.

1. Settlement by. See *Poor*, III.

2. Stamp on. *Stamp*, 1.

INDICTMENT.

1. Defendant on, when entitled to particulars intended to be proved.

An indictment for a nuisance contained twelve counts, describing the nuisance in different ways, and charging it to have been committed in different parishes and counties within the jurisdiction of the Central Criminal Court. This Court, on reading the indictment only (which had been removed by certiorari,) and without affidavit, ordered the prosecutor to give the defendant a note of the several acts of nuisance which he intended to prove. *Rez v. Curwood*. 815

2. Who chargeable, *ratione tenuræ*, for non-repair of bridge. *Infant*.

INFANT.

Whether indictable for non-repair of bridge.

An infant, eleven years old, inherited land charged with repair of a bridge. His guardian in socage resided on the property; the infant did not, except on occasional visits: Held,

1. That although the infant was actually seised, yet, being so by the possession of his guardian, he was not such owner or occupier of the land, as to be chargeable by indictment for non-repair of the bridge.

2. That the guardian was such an owner and occupier.

Seemle, that infancy would not exempt a party, liable in other respects, from indictment for such non-repair, if there were no other person against whom performance of the repairs could be enforced.

Quære, whether an owner, who is not the occupier, of lands charged with repair of a bridge, be indictable for non-repair. *Rez v. Sutton*. 597

INFERIOR COURT.

1. When cause of action sufficiently alleged on pleadings to be within jurisdiction. *Pleading*, IV. 4.

2. Power of Court of K. B. to direct alteration in Record of Inferior Court. *Mandamus*, II., 4.

INQUISITION.

1. On elegit, truth of, how examinable. *Practice*, X.

2. On conviction for unlawful detainer, proceedings on. *Detainer*.

INSANE.

See *LUNATIC*.

INSURANCE.

1. Conditions in policy, what are precedent. *Condition*, 2.

2. Execution of policy after loss.

A policy of insurance on a ship, lost or not lost, is good, the ship having been accepted for insurance, and the premium paid,

before loss, although the policy was not actually executed and stamped till loss had happened, and both insurer and assured knew it.

By the rules of a mutual insurance society, with which the above insurance was effected, the insurance on a ship was to commence on the day of her being accepted as insurable, and to continue in force twelve months. A member of the society gave a power of attorney to his agent, to insure ships for him under the terms, restrictions, and regulations by which the society might be governed: Held, that the power (though it did not refer to the case of a vessel being lost, and though such a case was not expressly provided for in the regulations of the society) was special enough to warrant the agent in executing the above-mentioned policy for the principal as insurer, after a loss had happened within the knowledge of all the parties, as before stated. *Mead v. Davison*. 303

INTEREST.

Release and assignment of possibility of estate, effect of at law. *Devise*, 3.

INTERPLEADER.

Appearance under the act, how to be made. *Practice*, II. 1.

INTERROGATORIES.

Examination by commission: oath how far necessary. *Oath*, 2.

JUDGE.

1. Certificate of, as to costs. See *Executor*, 1, (1); *Costs*, 3.

2. Misdirection at trial.

(1.) What amounts to. *Misdirection*, 1.
(2.) What sufficient ground to set aside verdict. *Bridge*, 1.

3. Notes of, when sufficient to show amount of verdict. *Practice*, XXIV. 2.

4. Order of.

(1.) Abandonment of. *Practice*, XIV. 2.
(2.) For stay of proceedings. *Practice*, XXII.

5. Power to direct nonsuit in absence of parties. *Nonsuit*.

JUDGMENT.

Entering up; what errors may be amended. *Practice*, I. 2.

JURISDICTION.

Of Chancellor of University of Oxford. *Habeas Corpus*, 1.

JURY.

1. Right of, to find general verdict. *Verdict*, 1.

2. Course to be pursued by Judge on disagreement as to verdict. *Nonsuit*.

JUSTICES.

Order of.

(1.) Form of adjudication. *Poor*, II.

(2.) What expenses in maintenance of pauper it may include. *Poor*, II.

2. Allowance of county accounts, how to be made. *Rate*, 1, (1.)

3. Power of enforcing payment by master of servant's wages. *Statute*, XXI.

4. Distress warrant.

- (1.) Previous proceedings necessary. *Distress*, 1.
- (2.) Not compellable to issue, when parties have another remedy. *Statute*, XXXVII.
- (3.) Power of suspending execution. *Distress*, 3.

5. Proceedings before, on unlawful detainer. *Detainer*.

6. Mandamus to. See *Mandamus*, II. 5.

LACHES.

What laches will prevent assumpit for breach of warranty. *Warranty*.

LANDLORD AND TENANT.

How far party in possession under license considered tenant. *Ejectment*, 3.

LAND-TAX.

Right of collector to call in aid constable. *Constable*, 3.

LEET.

Court. See *Court Leet*.

LETTERS.

When they may be connected with terms of a previous contract, so as to constitute a signing within Statute of Frauds. *Statute*, V.

LIEN.

Of attorney, on damages and costs. *Costs*, 7.

LIMITATION.

1. Of action.

- (1.) Under stat. 21 Jac. 1, c. 16. *Trover*, 1.
- (2.) Under stat. 3 & 4 W. 4, c. 27. *Statute*, XXXI.

2. Of estates to shift upon a contingency, how construed; how affected by recovery. *Devise*, 3.

LOCAL ACT.

See *Statute*, XXXIV.—XLIII.

LUNATIC.

1. Adjudication of lunacy, how to be made. *Poor*, II.
2. Order for maintenance of, what it may include. *Poor*, II.

MANDAMUS.

I. When it lies.

1. To lord to hold court leet.

On motion in Michaelmas term, 1834, (made more than a month after old Michaelmas day,) for a mandamus to compel the lord of a hundred to hold a court leet *forthwith*, to appoint officers, the lord contended that he could hold it only in October; and it appeared that the court had, as far as was remembered, been held in every October until the October preceding the application, when no court was held. It was not shewn whether the leet was by charter or prescription, nor did any party swear to his belief that the leet could be held only in October. The Court, in the absence of such evidence, granted the mandamus, in Easter term, 1835, twenty-two days after Easter Sunday. *Rex v. Lord of Hundred of Milverton*. 284

2. To trustees under local act, to audit their accounts. *Post*, III.

3. To official, to swear in churchwarden.

(1.) The Court will grant a rule absolute in the first instance for a mandamus to the archdeacon, to swear in a party as churchwarden, on affidavit of due election, demand, and refusal, and of notice to the archdeacon of the application to the Court; the ground of refusal not appearing by the affidavit in support of the rule. *Ex parte Winfield*. 614

(2.) A rule nisi having been obtained for a mandamus to an archdeacon and surrogate, to swear in certain persons as churchwardens and sidesmen of a parish, it appeared by affidavit that the parties were colourably elected, but that the validity of the election was disputed; that there was an usage in the archdeaconry to swear in the parties elected, on a certain day subsequent to the election, appointed annually by the archdeacon; and that the surrogate, being applied to immediately after the election to swear in the parties, had said that they must wait till the day appointed, but that he would not disobey a mandamus from this Court: Held, that this was a refusal, and that the usage, if a good one, should be returned to the mandamus; and the Court made the rule absolute, without entering into the question of the validity of the election. *Rex v. Archdeacon of Middlesex*. 615

(3.) The Court will grant a mandamus by rule in the first instance, to compel the official to administer the oath or declaration to a party claiming to have been elected as chapelwarden of a chapel (under a local act, conferring upon the officer elected the power of a churchwarden for the purposes of the chapel,) though other parties claim to have been elected. *Ex parte Duffield*. 617

L. When it does not lie.

1. When there has not been a demand and refusal.

(1.) By an act establishing a canal company, it was provided, that certain land owners might call upon them by notice, as directed in the act, to execute certain works, communicating with the company's canal and railways; and that, if the company should refuse for six months after such request, the applicants might themselves perform the works in the same manner as the company might have done them.

An application being made to the company under this clause, they answered that they would do the works themselves; but they delayed proceeding and, on remonstrance, gave as a reason, that the proposed operation would interfere with the property of other parties, who were likely, if so disturbed, to bring an action. The company offered nevertheless to proceed if indemnified. The applicants, in answer, stated that they considered the excuse insufficient, and did not understand how they could be expected to indemnify. Six months had at this time elapsed since the original application. The works not being done, a mandamus was applied for:

Held, that the writ could not issue, it not appearing from the above facts that, after the consent given by the company to execute the works, there had been any express demand and refusal of performance, or any conduct on the company's part equivalent to

such refusal. *Rea v. Brecknock and Aber-gavenny Canal.* 217

(2.) By statute, incorporating a canal company, the affairs of the company were to be managed by a committee, who were authorised to appoint a clerk for the better carrying into execution the purposes of the act. The committee were required to enter in books an account of their disbursements, receipts, and transactions, and the books were to be open at all seasonable times to the inspection of the proprietors. A proprietor applied to the clerk for an inspection of the books which were under his charge. The clerk said he would refer the demand to the committee. The proprietor attended the committee, and there repeated his request; and the chairman said they would take time to consider it. Ten days afterwards the proprietor applied again to the clerk, who refused the inspection. On motion for a mandamus to the company to allow inspection of the books:

Held, that there had been no sufficient refusal by the committee to warrant the application.

Semble, that a party applying for a mandamus to give inspection of such documents, ought to shew that, when he demanded the inspection, he stated the object for which he wanted it. *Rea v. Wilts. and Berks. Canal.* 477

(3.) See *Rate*, 1. (1.)

2. To treasurer of district to pay expenses of prosecution. *Prosecution*, 2.

3. To Privy Council to receive a petition for rehearing appeal.

Where a cause has been brought before the Judicial Committee of the Privy Council on an appeal from the Court of Arches, and the Judicial Committee has decided in favour of the appeal, at the same time retaining the principal cause, and ordering the unsuccessful party to appear absolutely, subject to the approbation of the King in Council, which approbation has been afterwards given, this Court cannot, on a suggestion of error in the decision, issue a mandamus to the Privy Council to receive a petition for a rehearing of the appeal.

Nor will the Court issue a prohibition to the Committee, on a complaint that they have exceeded their jurisdiction in ordering the party to appear absolutely; it not being shewn that they have either transgressed the general law of the land, or interfered in any matter not of ecclesiastical cognisance. *Ex parte Smyth.* 719

4. To inferior court to alter a record.

This Court will not issue a mandamus to a court of criminal jurisdiction, to alter the minutes of a verdict according to the fact, or to cancel an alteration in such minutes, on a representation that the verdict was erroneously entered at the trial.

As where a jury at sessions, on an indictment for poisoning horses, found a verdict of "Guilty by mischance," and were then told by the chairman that they must say either guilty or not guilty, whereupon they brought the defendant guilty, and recommended him to mercy on the ground that he had no malicious intent but administered the material to benefit the condition of the horses; upon which finding and explanation

a verdict of guilty was entered. *Rea v. Hewes.* 125

5. To justices.

(1.) To grant distress warrant without summons. *Distress*, 1. (1.)

(2.) To allow inspection of county accounts after demand at improper times. *Rate*, 1. (1.)

(3.) To do an act, which may subject them to an action, where parties have another remedy. *Statute*, XXXVII.

III. What it must state.

A mandamus to account before auditors under the Vestry Act, 1 & 2 W. 4, c. 66, recited that the auditors "duly appointed and acting under and by virtue of an act," &c. "in exercise of the powers given to them by the act," had summoned the parties to account. Held that, in a mandamus for this purpose, it was not necessary to state more fully the adoption of the act by the parish, and the due appointment of the auditors.

The statute enacts that the auditors "shall meet twice at least in each year, at the board room of the vestry, and (a majority of the said auditors being present at such meetings)" shall audit the accounts of such vestry; and the vestry are required, "at every such meeting," to produce a true account in writing, &c. And the auditors are to have the same power of examining the accounts of certain other boards, and are to audit them in the same manner. A mandamus issued calling upon a board to attend with, and produce to the auditors, their accounts, at such time and place, or at such times and places, as a majority of the auditors might appoint, and then and there give such information as to the accounts as they might be enabled to give, according to the directions of the act.

On return to such mandamus, and concilium obtained on the part of the Crown: Held, that the mandamus exceeded the authority given by the act; and that the Court could not in part enforce it, by a peremptory mandamus limited as to the place of meeting. And the Court quashed the mandamus.

The Court will, for the purposes of justice, mould the rule for a mandamus; but will not mould the writ itself, on application for a peremptory mandamus.

When a return to a mandamus is made, and a concilium obtained, the counsel objecting to the return must be heard first, though the opposite counsel take an objection to the form of the mandamus. *Rea v. Church Trustees of St. Pancras.* 535

IV. Whether it may be amended. *Ante*, III.

V. Whether it may be enforced in part. *Ante*, III.

VI. Return to, what it must state.

A statute directed that a sum of money should be paid to certain commissioners, who were therewith to execute all such works, &c. as should from time to time be deemed necessary, proper, or expedient for putting certain banks and bridges in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable, upon one uniform system.

By mandamus, reciting this clause, and that the money had been paid to the com-

missioners, they were ordered to proceed to put the banks forthwith in a permanent state of stability and security, and to construct the forelands and slopes of the banks, as far as practicable, upon one uniform system.

Return, that the commissioners had from time to time, at all times from the passing of the act hitherto, proceeded to execute all such works "as should be, or were, from time to time deemed necessary, proper, or expedient for putting the banks in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable, upon one uniform system."

Held an insufficient return, and a peremptory mandamus awarded. *Rea v. Ouse Bank Commissioners.* 544

VII. On return, which party entitled to be heard first. *Ante*, III.

MANOR.

Appointment of officers.

1. By Court Baron.

The manor of B. was one of five manors within the town of F., which town was co-extensive with the parish of F. The homage of the court baron of B. appointed a pinder for the town of F. for a year, who executed the office accordingly for a year, residing in F.: Held, that he gained no settlement in F. under stat. 3 W. & M. c. 11, s. 6, though there were several instances of appointments by the homage in the rolls of the court; and though the inhabitants of F. enjoyed right of common in B. *Rea v. Newmarket St. Mary.* 151

2. By court leet. *Constable*, 1.

MARSHAL.

Person in custody of, how to be charged in execution. *Execution*, 2.

MASTER AND SERVANT.

See PRINCIPAL AND AGENT; STATUTE, XXI.

MEMORANDA.

Bosanquet, J., 1.
Campbell, Sir J., A. G., 1.
Follett, Sir W. W., 1.
Lyndhurst, Lord, 1.
Montague, B., K. C., 339.
Pepys, Sir C. C., 1.
Pollock, Sir F., 1.
Rolfe, R. M., S. G., 1.
Shadwell, Sir L., 1.

MISDIRECTION.

Of judge at trial.

1. What amounts to.

An allegation that A. is tenant for the life of M., is supported by proof that A. and B., being joint tenants for the life of M., conveyed their estate by lease and release to A., without an intermediate party.

Issue being joined on an allegation by plaintiff that a cornice was fixed to, and not of right removable from, the freehold, the judge desired the jury to find for defendant if they considered that the cornice was ornamental merely, fixed during the tenancy, capable of removal without substantial injury to the freehold, and so removed in fact during the tenancy. The jury found for the plaintiff. Held no misdirection. *Avery v. Cheslyn.* 75

2. What sufficient to set aside verdict. *Bridge*, 1.

MONEY.

1. Payment into court. See *Payment into Court*.

2. Taking out of court. *Statute*, XXV.

MORTGAGE.

Stamp on, when additional sum secured and release of fee. *Stamp*, 2.

NEGLIGENCE.

See ASSUMPSIT, VI. 2.

NEW TRIAL.

See TRIAL, NEW.

NONSUIT.

Consent of parties how far necessary.

At the close of plaintiff's case leave was reserved for defendant to move to enter a nonsuit. Defendant offered evidence, and the jury retired, and were unable to agree upon their verdict. The judge, being pressed to discharge them, no counsel on either side being present, directed a nonsuit on the point which had been reserved.

On motion by plaintiff for a new trial: Held, that the nonsuit was irregular, and that defendant, in shewing cause, could not argue the point reserved at the close of plaintiff's case. *Devar v. Purday.* 166

NOTICE.

1. Of dishonour of bill. See *Bill of Exchange*, 1.

2. Previous to admission of Attorney. See *Attorney*, 1.

3. To produce, when necessary. *Evidence*, V. 1.

4. Of trial. See *Practice*, XXIII. 1.

NUISANCE.

Obstructing ancient lights. See *Ancient lights*.

OATH.

1. Exercise of office, before being sworn.

By the charter of the borough of Caernarvon, the constable of the castle of C. for the time being was to be mayor of the borough, sworn to the king and burgesses, and who having first taken oath to preserve the king's rights, should swear to the burgesses to preserve their liberties, and faithfully do the things appertaining to the office of mayoralty.

Before stat. 57 G. 3, c. 45, (continuing civil and military offices, held of the Crown during pleasure, after the death of George III. at the pleasure of his successors,) the King granted to A., by letters-patent, the office of constable, to be exercised by himself or deputy, during the King's pleasure. A. took the oaths, and held the office till the death of George IV. and during the six months granted by st. 6 Ann. c. 7, s. 8, and also till a second grant by letters-patent of the King, made after the expiration of those six months, but before the expiration of the additional six months given by stat. 1 W. 4, c. 6. The second grant recited the former grant, and that the King was pleased to renew the appointment, and continue A. in the office, and then granted as before; and A. took the oaths again.

After the first grant, and before the

second, A. appointed the defendant his deputy; and, after the second grant, but before A. had taken the oaths a second time, A. again appointed and continued him as his deputy:

Held, that A. could not exercise the office of constable till he was sworn; that the second grant to A. was not a confirmation, but a new appointment; and that consequently, it was necessary that A. should be sworn again, before he could exercise the office; and that (supposing A. to have the power of appointing a deputy at all) the defendant, not having been re-appointed deputy after A. had taken the oaths a second time, was not entitled to hold that office. *Rez v. Roberts.* 771

2. Commission for examining witnesses, oath how far necessary.

A commission having issued to examine witnesses at Hamburg, certain witnesses there refused to appear. On motion in this Court, it was shewn that the Court of Commerce at Hamburg would compel the attendance of the witnesses before themselves, upon request made by this Court, and would conduct the examination, allowing commissioners named by this Court to be present, and to make suggestions; but that the members of the Court of Commerce would not take a special oath as commissioners of this Court; and that they would not compel the attendance of witnesses before any but themselves; and that there were no means of compelling such attendance.

This Court ordered a commission to issue for the examination of the witnesses, directed to the members of the Court of Commerce, without the usual clause requiring the Commissioners to be sworn: *Littledale, J., dubitante.* *Clay v. Stephenson.* 807

OFFICE.

1. Settlement by serving. *Poor, V.; Manor, 1.*
2. Exercise of, before taking oaths. *Oath, 1.*

ORDER.

- I. Of Judge.
 1. Abandonment of, by party obtaining it. *Practice, XV. 2.*
 2. For stay of proceedings, when obtained. *Practice, XXII.*
- II. Of Justices.
 1. Form of adjudication. *Poor, II. 1.*
 2. What expenses in maintenance of pauper it may include. *Poor, II. 1.*

OUZE BANK.

Commissioners; insufficient return to mandamus. *Mandamus, VI.*

OVERSEERS.

Duty of: vaccination.

The small-pox having broken out in a parish, an overseer became party to an agreement with a medical man that the latter should vaccinate the paupers. The overseer subsequently refused to carry the agreement into effect; after which all the paupers caught the disease, and one of them died of it.

The Court refused to grant a criminal information against the overseer.

It is no part of the duty imposed on overseers by law, to cause paupers to be vacci-

nated. *In Re ———, Overseer of ———.* 333

OXFORD.

Jurisdiction of Chancellor's Court. *Hobbs Corpus, 1.*

PARLIAMENT.

1. Election of members: what constitutes bribery. *Bribery, 1.*
2. Committee on election petition.

(1.) Proceedings on.

The appointment of a committee to try the merits of a return to parliament, under stat. 9 Geo. 4, c. 22, ss. 18, 30, cannot legally take place if the petitioner be not present in person, or by his counsel or agent.

If such committee nevertheless be formed, and proceed to declare the petition frivolous and vexatious, the costs of opposing the petition cannot legally be taxed under sect. 60.

And, if the Speaker under such circumstances directs a taxation, and makes his certificate according to sect. 60, this Court, if applied to to put the certificate in force pursuant to sect. 63, will notice the irregularity of the proceedings on the petition, if brought before them by affidavit, and refuse to enter up judgment. *Brugeres v. Halcoun.* 381

- (2.) Enforcing attendance of prisoner to give evidence.

This Court granted a rule nisi for a habeas corpus to bring up a prisoner, in custody upon a charge of felonious embezzlement, to give evidence before an election committee of the House of Commons, the rule directing notice to be first given to the Attorney General, to the committing magistrates, to the constable who apprehended the prisoner, and to all persons at whose suit he might be detained on civil process. *In re Pilgrim.* 483

3. Costs of opposing petition, when taxable. *Ante, 2, (1.)*
4. Speaker's certificate, when it will be enforced by Court. *Ante, 2, (1.)*

PARTICULARS.

When defendant, on indictment, entitled to particulars intended to be proved. *Indictment, 1.*

PAYMENT INTO COURT.

What it admits.

A policy declared that certain rules should be deemed a component part of the policy. By one of the rules, the assured was not entitled to be paid, in case of a loss, till a period which was made contingent upon certain events. The evidence shewed that this period had not arrived before the action was brought; but left it uncertain whether the whole payment was to be made at once, or by instalments. Held,

1. That the payment of money into Court admitted that something was due to the plaintiff on the policy at the time of the action brought, and was so far a waiver of the objection that the action was brought too soon. And,

2. That it lay on the defendant to prove that a part of the sum recoverable on the loss could be claimable by the plaintiff, with-

out the whole being due; and that, therefore, in the absence of such proof, the objection was waived as to the whole sum. *Harrison v. Douglas*, 396. (See remainder of placitum, *Condition*, 2.)

PINDER.

Appointment of, by whom to be made. *Manor*, 1.

PLEADING.

I. Form of action.

1. By one party to a contract, which has been broken by the other party. *Principal and Agent*, 2.
2. Assumpsit for breach of warranty, when it may be maintained. *Warranty*.
3. Case for malicious arrest, whether it lies on determination of original suit after removal of it by habeas corpus. *Post*, II.

II. Commencement of action.

In actions commenced in any of the superior courts, the plaintiff may, since the rule, *Hil. 2 W. 4, L. c. 35*, declare at any time before the end of a year from the return of the writ, unless the defendant shall have signed judgment of non-pros. for want of the plaintiff's declaring before the end of the second term; and this, whether the action be commenced by serviceable or bailable process. This applies also to causes removed by the defendant from inferior courts by habeas corpus (though the cause was commenced below, and removed, before the rule came into operation,) except that, as judgment of non-pros. cannot be signed in such causes, the plaintiff cannot be out of court till the expiration of the year.

And, consequently, an action for malicious arrest cannot be commenced in any of the above cases till a year has elapsed from the return of the writ.

Quere, whether such action lies, where the suit alleged to have determined has been removed by habeas corpus at the instance of the defendant. *Norris v. Richards*. 738

III. Declaration.

1. Time for declaring. *Ante*, II.
2. Cause of action. When sufficiently alleged to be within jurisdiction of inferior court. *Post*, IV. 4.
3. Time when material, how to be alleged. *Devise*, 4.
4. Assumpsit.

(1.) Money paid to defendant's use.

What may be recovered under.

Tenant, by a written agreement under which he took the premises, engaged to pay taxes which, by statute, were due from the landlord. He made default; and the landlord, having been obliged to pay, sued him for the amount, as money paid to his use: Held that, as the landlord was originally liable for the taxes, and exempted from them only by agreement with the tenant, he should have declared specially on such agreement, and could not recover on the indebitatus assumpsit.

A promise, made by defendant after action brought, to give a cognovit, is no evidence of an account stated before action brought. *Spencer v. Parry*. 331

(2.) Account stated.

What proof will support. *Ante*, (1).

5. Trespass.

When insufficiency of description of place by abutments may be taken advantage of. *Evidence*, XII. 3. (2.)

IV. Plea.

1. How it must traverse, or confess and avoid. *Devise*, 4.
2. What constitutes a plea to a whole declaration. *Post*, 7. (1.)
3. To declaration generally how far considered a separate plea to each count. *Post*, V. 1.
4. Plurality of pleas, in court not of record; how to be taken advantage of.

To an action of debt in a court not of record, the defendant pleaded two distinct pleas, one concluding to the country, the other with a verification. The plaintiff replied to the first, and took no notice of the other. The cause was tried, and the plaintiff had a verdict and judgment. Upon writ of false judgment:

Held, that the judgment below was right, for that the plaintiff might take issue upon the first plea, and treat the second as surplusage.

Declaration stated that defendant was indebted to plaintiff within the jurisdiction of the county court for the wages of and due and owing to plaintiff within the jurisdiction, as the servant of the defendant.

Admitted, that this was a sufficient allegation of the cause of action having accrued within the jurisdiction. *Chitty v. Dendy*. 319

5. How custom shall be pleaded. *Custom*, 3.
6. Statute of limitations (3 & 4 W. 4, c. 27,) to what cause of action good. *Practices*, XVI.
7. Assumpsit.

(1.) Promissory note, what may be pleaded to as.

By an instrument in writing, the two defendants jointly and separately promised to pay to plaintiff, or order, 50*l.* by instalments for value received; and it was declared that it was intended, by the receivers and givers of that note of hand, that all instalments should cease at plaintiff's death. Plaintiff declared in assumpsit, the first count being on the instrument, and calling it, in the declaration, an agreement or instrument in writing, except where the above language of the instrument itself was set out in the declaration. Defendants pleaded that they did not make the promissory note mentioned in the first count, as there alleged: Held, that the instrument was not a promissory note, as it created only a contingent liability; that the language used in the declaration did not authorize the defendants to call it a promissory note; and, consequently, that the plea was bad on special demurrer.

There was a second count on an account stated. The defendants pleaded first as above, without commencing the plea by actionem non, or expressly confining it to the first count (except by the language of the traverse, as above); and they also pleaded to the last count expressly. *Semble*, per *Littledale* and *Patteson*, Js., that the first plea was in form pleaded to the whole declaration.

ration, and was therefore had for not answering the second count. *Worley v. Harrison*. 669

(2.) Want of consideration, how to be pleaded.

[1.] A plea, to assumpsit by drawer against acceptor of a bill of exchange, "that defendant received no good or sufficient consideration from plaintiff for accepting the bill" is bad on demurrer, though the plea be not specially demurred to for that defect. *Graham v. Pitman*. 521

[2.] A plea to assumpsit by indorsee of B. against a prior indorser, that defendant had no consideration for indorsing, and that B. indorsed to plaintiff *without any consideration*, and that plaintiff had always held without any consideration, is bad in substance. *Trinder v. Smedley*. 522

8. Trover.
Who may justify under illegal warrant. *Distress*, 1. (2.)

9. Case.

What may be given in evidence under general issue.

In an action for maliciously indicting the plaintiff without probable cause, the defendant may give evidence of probable cause under the general issue; and if, in addition to the plea of not guilty, he pleads specially that he had probable cause, the Court will order such plea to be struck out. *Cotton v. Browne*. 312

V. Replication.

I. How far it may divide plea and give separate answers to parts.

The first count of a declaration in trespass was for breaking plaintiff's close, and damaging certain chattels, on divers days, &c. The second was for damaging certain chattels, and destroying others, on one day.

The first plea, to both counts, gave colour to plaintiff, and made title in defendant under a demise from the owner of the fee, as to the close mentioned in the first count, and justified his entry, and the trespass to the chattels as encumbering the close, not averring identity of chattels in the two counts. The second plea, to the second count, alleged possession by defendant of a close, and justified the trespass to the chattels encumbering it.

The replication to the first plea, so far as it related to the first count, traversed the demise; and, so far as the plea related to certain of the chattels mentioned in the second count, replied de injuria; and, so far as it related to other of them, replied excess. The replication to the second plea, so far as it related to certain of the chattels mentioned in the second count, replied de injuria; and, so far as it related to certain other of them, replied excess. There were separate formal conclusions to all the distinct parts of the replication.

(1.) Held, on demurrer to the replication to each plea for putting several matters in issue, that the plaintiff might treat the first plea, with respect to the chattels, as pleaded separately to each count.

(2.) That the plaintiff was entitled to divide each plea, and to reply severally as to the different parts of each, and as to different chattels covered by each.

(3.) But that de injuria could not be re-

plied, as to any chattels, to the first plea, which alleged title in the close.

(4.) That de injuria might be replied as to the chattels, to the second plea, which alleged only possession of the close.

(5.) The replication was dated before the first day of Easter term, 1834, when the rules Hil. 4 W. 4, came into effect; the replication to the first plea, and that to the second plea, each commenced in form as a replication to the whole plea; in each, the part replying excess contained no prayer of judgment, but only a verification followed by an &c.: Held bad on special demurrer.

(6.) Semble, that it would not have been bad, if the replication had been subsequent to the taking effect of the rules Hil. 4 W. 4.

(7.) But held, that the above facts did not make the replication bad as to the whole; and judgment was given for the plaintiff as to such parts of the replication as were good, and for the defendant as to the rest. *Vernon v. Jenkins*. 741

2. When de injuria may be replied. *Ante*, I. VI. Prayer of judgment, effect of omission of *Ante*, V. 1.

VII. Non-existing grants.

1. Traverse of, what it puts in issue. *Evidence*, X.

2. Plea of, how far supported by evidence of immemorial user. *Evidence*, X.

VIII. How custom shall be pleaded. *Custom*, 3.

IX. Variance between pleading and evidence.

1. Terms of agreement. *Principal and Agent*, 2; *Evidence*, XII. 1. (1.)

2. Designation of interest in estate. *Evidence*, XII. 1. (2.)

X. Repleader.

By what Court it may be awarded. *Practice*, XVI.

XI. Conviction for unlawful detainer, what it must state. *Detainer*.

POOR.

I. Rate.

Under local act, how to be made. *Statute*, XLII.

II. Maintenance of.

1. Adjudication of lunacy, how to be made.

An order of justices upon parish officers, for removing a person of unsound mind (not chargeable) to a house of reception for such persons, under stat. 9 G. 4, c. 40, ss. 38 & 44, is good, although it state that the justices have adjudged (and not do adjudge) the settlement of such person to be in the parish of, &c.

Such order is correct if it recites that the person is "so far disordered in his senses that it is dangerous for him to be permitted to go abroad," though the form given by the schedule to stat. 9 G. 4, c. 40, and referred to by sects. 38 & 44, (which provide for the making of such order,) speaks only of a person being "lunatic, insane, or a dangerous idiot."

An order upon the overseers of the parish in which the lunatic is found to be settled, for the expense of his maintenance, &c., at such house of reception, must be prospective only. If it be retrospective in part, such part will be quashed. *Re v. St. Nicholas, Leicester*.

2. For what expenses order may be made. Ante, 1.
3. Overseers not compellable to vaccinate. Overseers.

III. Settlement by apprenticeship.

Power of overseers as to binding.

Under stat. 43 Elis. c. 2, s. 5, and before stat. 56 G. 3, c. 139, parish officers had power to bind apprentice the child of a person settled in, and receiving relief from, the parish, the child being also settled in the parish, though such child, at the time of the binding, resided out of the parish, and was not a party to the indenture; and though the child at the time of such binding was not a burthen to the parish. And the binding was good under the former statute, though the master was neither an inhabitant nor occupier within the parish, provided he became a party to the indenture. *Ree v. St. George, Exeter.* 373

IV. Settlement by hiring and service. Exceptive hiring.

A question arising at sessions, as to an alleged settlement by hiring and service in a third parish, the sessions quashed the order of removal, subject to a case, in which the contract of hiring was set out, and the question for this Court was stated to be, whether the pauper gained a settlement by hiring and service in the third parish: Held, that this left the question, whether the contract of hiring was exceptive or not, open to this Court.

Pauper was hired to work for a year at 6s. a week, to work ten hours a day, from five in the morning till six in the evening; and afterwards it was agreed that he should receive additional pay for over-work: Held to be an exceptive hiring; though the pauper never in fact refused to work over-hours when requested. *Ree v. Norton Bavant.* 161

V. Settlement by serving office.

1. Where appointment to office not legally made. *Manor, 1.*
2. Office not for a year.

An office, to confer a settlement under stat. 3 W. & M. c. 11, s. 6, must be annual in its nature.

Therefore where an act of parliament authorized justices to appoint constables for such period as they should judge expedient, at a salary not exceeding 20l. per annum, it was held, that the person appointed gained no settlement, whether the appointment was or was not in fact for a year. *Ree v. Middlewich.* 156

VI. Derivative settlement.

On appeal against a removal, the respondents proved that the pauper was born in the appellant's parish; the appellant proved that his mother's maiden settlement was in a different parish; but neither side gave any evidence of the father's settlement, or of any attempt made to ascertain it:

Held that, as against the birth settlement relied upon by the respondents, proof of the mother's maiden settlement was sufficient to invalidate the order. *Ree v. St. Mary, Leicester.* 644

POSSIBILITY.

Of estate, whether it can be released, or assigned at law. *Devise, 3.*

POWER OF ATTORNEY.

What it authorizes. *Insurance, 2.*

PRACTICE.

I. Amendment.

1. Of mandamus. *Mandamus, III.*
2. Of entry of judgment.
- (1.) What allowed.

The following variances in entering up a judgment, viz. that the plaintiff as to certain "counts," (instead of "issues") take nothing by his "bill," (instead of "writ," and that the "defendant," (instead of "defendants,") recover costs, &c., are clerical errors, which, when ascertained by comparison with the record of proceedings in the cause, the Court will amend, though the judgment be of a past term, and though a writ of error be pending in which these and other errors are assigned.

The Court refused to make such a rule absolute in the first instance.

The party moving must pay the adverse party his costs of such amendment. *Paddon v. Bartlett.* 887 (n.)

- (2.) Costs of. Ante, (1.)
3. Of notice previous to admission of attorney. *Attorney, I 1; I 2.*

II. Appearance.

1. Under Interpleader Act, how to be made.

A third party called upon by an interpleader rule under stat. 1 & 2 W. 4, c. 58, to appear and state the nature and particulars of his claim to property seized by the sheriff, must make such statement by affidavit. It is not sufficient that he appears by counsel, and that, upon affidavits put in by other parties, it appears that he has given formal notice of his claim to the sheriff. *Powell v. Lock.* 315

2. Entry of, upon what affidavits order may be obtained.

To obtain an order for entering an appearance under stat. 2 W. 4, c. 39, s. 3, it is not sufficient to state on affidavit that "diligent inquiry" has been made to find the defendant and his property; but the way in which inquiry has been made must be described, to satisfy the Court that proper means have been used to serve and execute the writ. *Copeland v. Nevill.* 658

III. Arrest.

Discharge from.

The Court will not discharge a defendant out of custody on mesne process, on the ground merely that the arrest was against good faith. As where the plaintiff agreed to accept payment of his debt by instalments, and, without further communication, arrested the defendant before any instalment was due. *Udall v. Nelson.* 215

IV. Attachment for non-attendance upon subpoena, when it lies. *Subpoena.*

V. Attorney.

1. Admission of. *Attorney, I 1; I 2.*
2. Compelling payment over of money. *Attorney, III.*

VI. Award.

Making enlargements of time a rule of Court. *Award, 4.*

VII. Bail.

1. When discharged. *Bail, 2.*
2. Taking out of Court money deposited in lieu of bail. *Statute, XXV.*

3. Bail bond.

- (1.) Proceedings upon. *Bail*, 4.
- (2.) When to stand as security. *Bail*, 4.
- (3.) Effect of surrender on. *Bail*, 4.

VIII. Costs.

1. Security for. *Costs*, 10.
2. Of election committee, when enforced. *Parliament*, 2. (1.)
3. Of amendment in entry of judgment. *Ante*, I. 2.

IX. Declaration.

1. Time for declaring.

In actions commenced in any of the superior courts, the plaintiff may, since the Rule, Hil. 2 W. 4, I. 35, declare at any time before the end of a year from the return of the writ, unless the defendant shall have signed judgment of non-pros, for want of the plaintiff's declaring before the end of the second term; and this, whether the action be commenced by serviceable or bailable process. This applies also to causes removed by the defendant from inferior courts by habeas corpus, (though the cause was commenced below, and removed, before the Rule came into operation,) except that, as judgment of non-pros. cannot be signed in such causes, the plaintiff cannot be out of court till the expiration of the year.

And, consequently, an action for malicious arrest cannot be commenced in any of the above cases, till a year has elapsed from the return of the writ.

Quere, whether such action lies, where the suit alleged to have determined, has been removed by habeas corpus at the instance of the defendant. *Norriah v. Richards*. 733

2. Declaration de bene esse, when it may be. *Bail*, 4. (1.)

X. Elegg.

Inquisition on.

What examinable by Court on motion.

By inquisition, taken under an elegit, it was stated that G., the defendant, was possessed of a term in lands as mortgagee. The term had been bequeathed by words, upon which a question arose, whether such term were vested in G. or in the executrix. The Court refused to decide, on motion, at the instance of the mortgagor or of the executrix, whether G. had an interest of the nature described in the inquisition, and liable to be extended. *Cooper v. Gardner*. 211

XI. Execution.

1. Process where sheriff interested. *Sheriff*, 4.
2. Charging in execution person in custody of marshal. *Execution*, 2.

XII. Habeas Corpus.

Obtaining attendance of prisoner before Committee of House of Commons. *Parliament*, 2.

XIII. Indictment.

When defendant entitled to particulars intended to be proved. *Indictment*, 1.

XIV. Interpleader Act, appearance under. *Ante*, II. 1.

XV. Judge's order.

1. For stay of proceedings. *Post*, XXII.
2. Abandonment of.

A party taking out a summons for an order to be made by a Judge at chambers, may abandon the order when made. Therefore, where a Judge at chambers had indorsed on the summons the minutes of an order, and

the party taking out the summons refused to draw up the order, or to deliver up the indorsed summons, the Court refused to compel him to do either, or to direct the Judge's clerk to draw up the order from the minutes of counsel. *M'Dougall v. Nicholls*. 813

XVI. Judgment, entry of.

In an action of debt, for twenty years' rent, commenced July 22d, 1833, on an indenture of demise, the defendants pleaded, 1. Non est factum. 2. (under stat. 3 & 4 W. 4, c. 27, s. 42.) That no cause of action accrued within six years; which the plaintiff reversed. 3. and 4. As to seventeen years' and three quarters' rent, that on, &c. the plaintiff assigned over all his interest in the premises, and that no part of that rent became due before such assignment. To the last two pleas, the plaintiff pleaded non est factum. The jury found the first two issues for the plaintiff, without damages, and on the last two for the defendants. Judgment was entered up for the defendants:

Held, on error, by Tindal, C. J., and Lord Abinger, C. B., that, on this record, assuming the plea founded on the statute to be available, the plaintiff was entitled to judgment for two years and a quarter's rent.

But, held by the whole Court of Error, that the plea was not available, for that stat. 3 & 4 W. 4, c. 27, s. 42, as to actions for arrears of rent, is not retrospective.

Quere, whether the above action, in so far as it limits the bringing of actions for rent to six years after such rent becomes due, &c. be repealed by stat. 3 & 4 W. 4, c. 42, s. 3?

Quere, whether the Court of Error in the Exchequer Chamber can grant a repleader? *Paddon v. Bartlett*. 884

XVII. Mandamus.

1. Amendment of. *Mandamus*, III.
2. Return to, which party entitled to be heard first. *Mandamus*, III.

XVIII. Money, taking out of court. *Statute*, XXV.XIX. Plea, striking out unnecessary. *Pleading*, IV. 2.XX. Repleader, by what Court awarded. *Ante*, XVI.XXI. *Scire facias*, to revive judgment, when necessary. *Scire facias*, 1.

XXII. Stay of proceedings, order when granted.

An interlocutory judgment having been set aside, with costs against the plaintiff, by a Judge at chambers, and an attachment having issued for the non-payment, another Judge at chambers ordered that the defendant should have three days to rejoin, after the plaintiff should have purged his contempt. The Court refused to set this order aside, it not appearing that the plaintiff was in custody, or had paid the costs, or was unable to pay them. *Wenham v. Downes*. 450

XXIII. Trial.

1. Short notice of.

When the defendant in a country cause had obtained time to plead, on the usual condition of taking "short notice of trial if necessary;" and the plaintiff delivered a replication tendering issue, with notice of trial, to the defendant's agent in London, after post-time on the 27th of February, for the

3rd of March, the commission day of the assizes, and on that day the trial took place, the defendant not being ready, or appearing; the Court, under special circumstances shewn by affidavit, held itself not precluded by the General Rule, Hil. 2 W. 4. I. 58, from granting a new trial. *Pound v. Penfold.* 655

2. New trial, what points may be argued on motion for. *Nonsuit.*

XXIV. Verdict.

1. When nonsuit may be entered. *Nonsuit.*

2. How amount may be shewn.

On a motion for costs under stat. 43 G. 3, c. 46, s. 3, it is not necessary that the amount of the verdict should be stated in the affidavits, but it may be shewn by the Judge's notes. *Van Nysel v. Hunter.* 243

See further, *Affidavit, Capias ad Satisfaciendum, Certificate, Mandamus, Subpoena.*

PRESCRIPTION.

1. Whether prescription and custom, entitling to same easement, can exist together. *Custom, 3.*

2. How far evidence which shews custom is evidence of prescription. *Custom, 3.*

PRINCIPAL AND AGENT.

1. What is evidence of relation of.

In an action for use and occupation of lands by the sufferance and permission of the plaintiffs, it appeared that the lands were let by auction by the plaintiffs, E. and T., who were auctioneers, to the defendant, under conditions which stated the letting to be "By E. and T., auctioneers." One of the conditions was, "The rent is to be paid into the hands of E. or T., auctioneers, or to their order, at two payments," &c. At the foot of the document was written, "Approved by me, David Jones." Jones was the tenant at the time of the sale. Nothing else appeared in the conditions to shew on whose behalf the letting was. The plaintiffs gave evidence to shew that Jones, being indebted to them, had authorised them to let the lands as above, pay the rent due to Jones's landlord, and retain any surplus in satisfaction of their own debt. Evidence to a contrary effect was given for the defendant. The Judge, in summing up, left it to the jury, whether the plaintiffs had let the lands on their own behalf and as creditors of Jones, or merely as his agents. The jury found a letting by the plaintiffs on their own behalf:

Held, that the conditions imported a letting by Jones, E. and T. acting as his agents; and that the document ought to have been so explained to the jury. And the Judge not having so explained it, a new trial was granted. *Evans v. Evans.* 132

2. Salary recoverable by agent on dismissal.

A servant, discharged for improper conduct, cannot recover any part of the salary current from the last pay day at the time of his dismissal.

A master, who has dismissed a servant, may justify the dismissal by shewing that at the time of the dismissal he knew the servant to have committed an act which justified it; and a jury ought not to be asked whether the master was induced to dismiss him by that act or by some other cause.

A clerk employed by a company to enter

proceedings in their minute book, entered on the margin of the minute book a protest in his own name against a summons for appointing a successor to himself: Held, that a jury were justified in finding this to be a sufficient cause of dismissal.

A plaintiff declared that the defendants, a company, had employed him at a quarterly salary; the minute book of his appointment shewed an annual salary only, but several quarterly payments were proved, and no annual one. Semble, that no variance appeared.

Quære, per Coleridge, J., whether, if a servant, hired for a year, be improperly dismissed in the middle of a year he can sue in assumpsit for the wages, for that year, or is confined to a special action for an improper dismissal. *Ridgway v. Hungerford Market.* 171

3. What sufficient grounds of dismissal of agent. *Ante, 2.*

4. How far jury may inquire as to actual grounds of dismissal. *Ante, 2.*

5. Term of engagement, what evidence of. *Ante, 2.*

6. For what wages assumpsit maintainable. *Ante, 2.*

PRIVY COUNCIL.

When Court of K. B. will interfere with, by mandamus. *Mandamus, II. 3.*

PROBATE.

Stamp on, how far evidence of assets. *Evidence, VI.*

PROHIBITION.

When Court will interfere with Ecclesiastical Court. *Mandamus, II. 3.*

PROMISSORY NOTE.

What constitutes. *Pleading, IV. 7. (1.)*
See further, *Bill of Exchange; Pleading, IV. 7. (2.)*

PROMOTIONS.

See MEMORANDA.

PROSECUTION.

1. When defendant entitled to particulars intended to be proved. *Indictment, 1.*

2. Expenses of, how recoverable.

The Court will not grant a mandamus to compel the treasurer of a district to pay the expenses of a prosecution for misdemeanor, in obedience to the order of the Court of Assize, under stat. 7 G. 4, c. 64, s. 23; the proper remedy is to indict the treasurer, if he refuse to pay.

Where a prosecutor is not bound over to prosecute at the assizes, quære, whether the Court of Assize has power to grant his expenses under the above section.

But, in such a case, if the witnesses be subpoenaed, the Court of Assize may grant their expenses under the same section. Per Lord Denman, C. J., and Littledale, J. *Rez v. Jeyes.* 416

PROVISO.

For shifting of estate upon contingency.

1. How it operates. *Devise, 3.*

2. How affected by recovery. *Devise, 3.*

QUO WARRANTO.

When it lies.

1. A local act created a corporation, consisting of sworn commissioners, with summary powers of seizure of goods and imprisonment of the person, and of preventing and removing obstructions and nuisances in the streets; powers for paving, cleansing, and lighting; powers of appointing and paying officers, of determining the number of watchmen; of regulating them; and of dismissing, paying, or pensioning them; of possessing property in materials required under the act; of instituting prosecutions; of imposing rates; of appointing and removing treasurers, to whom penalties, imposed by the act, were to be paid for the purposes of the act; and of hearing appeals in certain cases brought by parties complaining of things done under the act: Held, that an information in the nature of a quo warranto would lie against persons claiming to be commissioners.

A part of the commissioners were elected by rated inhabitants, M. and T. having been candidates; and M. having been declared elected, and sworn in, and a rule nisi having been obtained, upon affidavits that T. had the legal majority, for a mandamus to certify T.'s election, and swear him in, the Court discharged it with costs, and at the same time granted a rule to shew cause why there should not be an information in the nature of a quo warranto against M. *Rez v. Beedle*. 467

2. Held, by Littledale and Patteson, J., Lord Denman, C. J., dubitante, that a quo warranto information does not lie for the office of governor and director, elected annually by rated inhabitants, under a local act for the government of the poor, and the maintenance of the nightly watch; and having power to make orders to regulate the poor and the watching; to determine how much money shall be raised for the poor and the watch (for which amount the inhabitants are to make rates, subject to a power in the governors to rectify omissions or mistakes, and to an appeal at quarter sessions); to purchase and hold real and personal property, including all the money raised under the act; to erect buildings; to borrow money on the credit of the rates, for the purposes of the act; to appoint and remove treasurers, and salaried clerks, collectors, and other officers, who are to account to them; to appoint watchmen and beadle, who are to be sworn in as constables before a justice, and to be under their control; to name sixteen persons, from whom the justices are to select four overseers; and to sue and be sued in the name of one of themselves, or of their clerk. *Rez v. Ramaden*. 456

3. Held, per Lord Tenterden, C. J., Taunton and Patteson, J., (Parke, J., dissentiente,) that a quo warranto information does not lie for the office of trustees under a public local act, elected as vacancies occur, by occupiers in the parish, and taking an oath of office, with power to appoint salaried treasurers, collectors, &c., of moneys raised under the act, accountable to themselves; to pass bye-laws with penalties; to impose rates, in case of certain other functionaries

not doing so; to supply omissions in the rates, and to relieve parties aggrieved or incompetent to pay; to appoint salaried watchmen; to purchase, hold, and manage certain property for the purposes of the act; to contract for the supply of the poor, remove nuisances, and apprehend for certain specified nuisances; to maintain the highways and prevent encroachments thereon; to superintend the lighting, paving, watching, and cleaning of the streets, &c., and to remove dangerous buildings, on complaint upon oath (which they were to administer); and to sue in the name of their clerk, or of one of themselves. *Rez v. Hanley*. 463 (a.)

RAILWAY.

Power to make, under local act. *Statute*, XLIII.

RATE.

1. County, accounts charged upon.

(1.) Allowance of.

The stat. 4 & 5 W. 4, c. 48, s. 1, does not entitle rate-payers to take part in the allowance at sessions of accounts charged upon the county rate, nor to inspect the items at the time of such allowance; the statute not altering the nature of the authority by which the allowance is to be made, but merely directing that the business shall be transacted in public.

And the Court will not grant a mandamus for such inspection, on affidavit by a rate-payer, suggesting that the accounts had been examined by the justices at a private meeting, previously to the examination in open court, and alleging that the applicant demanded an inspection of the accounts at the sessions, and offered evidence to shew the impropriety of some of the charges, but was not allowed to interfere; and adding that he could now impugn the charges, if allowed the inspection. *Rez v. Justices of Nottingham*. 560

(2.) Inspection of, by rate-payers. *Ante* (1.)

2. Paving, recovery of, under Metropolis Paving Act. *Statute*, XXXVII.

3. Poor, rating under Local Act. *Statute*, XLII.

4. Sewage, who liable to.

Under the statutes of sewers, every person, whose property derives benefit from the works of the commissioners, is liable to be rated, although the benefit be not immediate.

Thus, where a case stated that the eastern wing of Somerset House was drained by the Board of Works, and had no communication with the common sewer running under the body of Somerset House, and being under the jurisdiction of the commissioners, and that the buildings derived no benefit from that sewer, except the general advantage of being accessible and of the approaches and neighbouring public ways being properly drained and cleaned: it was held that the occupiers of the eastern wing were rateable for the common sewer.

Semble, that in an action of trespass against the commissioners for levying a rate, if it appeared that they had jurisdiction, the Court would not inquire whether the rate was proportioned to the benefit received from the sewage by the party rated.

Under the Sewers' Act, 52 G. 3, c. xlviii. (local and personal, public) s. 7, the party rated to the poor as the occupier of premises, is to be considered as the occupier for the purpose of assessment to the sewers' rate, although, in point of fact, the occupancy is questioned. *Soady v. Wilson*. 248

5. How far Court will inquire as to proper apportionment of rate. *Ante*, 4.

RECITAL.

In a deed.

1. Who bound by. *Estoppel*, I. *Evidence*, IV.
2. How far evidence against a person claiming through a party to deed. *Evidence*, IV.

RECORD.

Amendment of.

1. In entry of judgment. *Practice*, I. 2, (1.)
2. When bail discharged by. *Bail*, 2.

RECOVERY.

Effect of, upon proviso for shifting estates. *Devises*, 3.

REFUSAL.

What amounts to demand and refusal. *Mandamus*, I. 3, & II. 1. *Rate*, 1, (1)

RELEASE.

Of possibility of estate, effect of at law. *Devises*, 3.

REMAINDER.

In what order remainders limited in devise take effect; how construed; when barable by recovery.

REPLEADER.

What Court can award. *Practice*, XVI.

RULE OF COURT.

1. Trin. 31 G. 3. Admission of Attorney. *Attorney*, I. 1.
2. East. 2 G. 4. Setting aside Award. *Award*, 1.
3. Hil. 2 W. 4.
 - (1). s. I. 35. Time for declaring. *Practice*, IX. 1.
 - (2). s. I. 58. Short notice of trial. *Practice*, XXXIII. 1.
 - (3). s. I. 95. Charging in execution. *Seizure*, 4.
 - (4). s. I. 98. Security for costs. *Costs*, 10, (1), (2).
 - (5). s. V. Bailbond standing as security. *Bail*, 4, (1.)
4. Mic. 3 W. 4, s. 11. Declaring de bene esse. *Bail*, 4, (1.)
5. Hil. 4 W. 4, s. 9. Prayer of judgment. *Pleading*, V. 1.

SALE.

Interpretation of conditions.

The purchaser of lands by auction signed a memorandum of the contract, indorsed on the particulars and conditions of sale, and referring to them. Afterwards he wrote to the vendor, complaining of a defect in the title, referring to the contract expressly, and renouncing it. The vendor wrote and signed several letters, mentioning the property sold,

the names of the parties, and some of the conditions of sale, insisting on one of them as curing the defect, and demanding the execution of the contract: Held, that these letters might be connected with the particulars and conditions of sale, so as to constitute a memorandum in writing, binding the vendor under stat. 29 Car. 2, c. 3, s. 4, although neither the original conditions and particulars, nor the memorandum signed by the purchaser, mentioned, or were signed by the vendor.

On a sale of a leasehold interest of lands, described in the particulars as held for a term of twenty-three years, at a rent of 55*l*., and as comprising a yard, one of the conditions was, that if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made, to be settled by arbitration. The yard was not, in fact, comprehended in the property held for the term at 55*l*., but was held by the vendor from year to year, at an additional rent. It was essential to the enjoyment of the property leased for the twenty-three years. It did not appear that the vendor knew of the defect. Held, that this defect avoided the sale, and was not a mistake to be compensated for under the above condition; although, after the day named in the conditions for completing the purchase, and before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, and offered it to him. *Dobell v. Hutchinson*, 355. (See whole placitum, *Statute*, V.) See also *Principal and Agent*, 1.

SCIRE FACIAS.

1. To revive judgment, when necessary.

It is not necessary to revive a judgment by scire facias for the purpose of issuing execution after a year and a day, where the execution has been suspended by agreement of the parties.

Such agreement sufficiently appears where the judgment is upon a warrant of attorney dated June, 1824, empowering the plaintiff to enter up judgment at his pleasure, but stating, in the defeasance, that the warrant of attorney is given to secure payment of a certain sum, with costs of judgment if signed, on the 5th of December, 1825. *Hiscocks v. Kemp*. 676
2. Declaration in, against bail, how far it must correspond with writ in original suit. *Bail*, 2.

SERVANT.

See *PRINCIPAL AND AGENT*; *STATUTE*, XXI.

SESSIONS.

1. Case sent from, what it leaves for determination of Court of K. B. *Poor*, IV.
2. Allowance of county accounts, what publicity necessary. *Rate*, 1.

SET OFF.

Right of, as to damages and costs recovered by different parties to action. *Costs*, 7.

SETTLEMENT.

Of Poor. See *Poor*.

SEWERS.

See *Ratz*, 4.

SHERIFF.

1. Return of, how far conclusive.

In an action against a sheriff for escape of a prisoner arrested on mesne process, the plaintiff proved the arrest by producing the sheriff's return of *cepi corpus et paratum habeo*: Held, that the latter words of the return produced by the plaintiff did not conclude him from proving the escape by parol evidence that the prisoner was at large after the return, and no bail bond lodged with the sheriff. *Neck v. Humphrey*. 130

2. Assignment of the bail bond. *Bail*, 4, (1.)3. Effect of surrender on bail bond. *Bail*, 4, (1.)

4. Process, where sheriff interested.

Defendant being in the custody of the keeper of the prison of the sheriff of D., the keeper returned to a habeas corpus, that defendant was in his custody on a ca. sa. directed to the coroner of D., at the suit of plaintiff, which ca. sa. was set out in the return, with a certificate by the coroner that it was a true copy. It appeared by affidavit that the plaintiff was sheriff of D., but this did not appear in the ca. sa. or return, nor did it appear that there was any entry on the roll suggesting the fact. On motion to discharge the defendant for irregularity: Held, that it was not requisite that the ca. sa. should mention the fact of the plaintiff being sheriff; and that a suggestion might at any time have been made on the record, if it had been necessary, since the rule Hil. 2 W. 4, s. 95.

It appeared by affidavit that the defendant being in the sheriff's custody at the suit of S., the ca. sa. at the suit of B., the now plaintiff, was lodged with the keeper of the gaol; but no facts were deposed to otherwise connecting the coroner with the keeper. Held, that the defendant was regularly charged at the suit of B.; for that it would be intended that the writ came to the coroner's hands, and it was not necessary that he should make a formal warrant to the keeper.

The Court refused to discharge the defendant. *Bastard v. Trutch*. 451

SHIFTING USE.

What is; how affected by recovery. *Devise*, 3.

SPEAKER.

Of House of Commons, Certificate of, for costs, when it will be enforced. *Parliament*, 2.

SPECIAL CASE.

1. When Court will amend. *Copyhold*, 1.
2. What facts, not stated, Court will assume. *Copyhold*, 1.
3. Sent from Session; what it leaves for determination of court of K. B. *Poor*, IV.

STAMP.

1. On indenture of apprenticeship.

The language of stat. 37 G. 3, c. 111, s. 3, exempting from a certain duty any indenture of apprenticeship, "where a sum or value not exceeding 10*l*. shall be given or contracted with or in relation to the apprentice," did not apply to cases where no sum or value was given or contracted for. *Re v. Inhabitants of Mabe*. 531

2. On Mortgage.

C. being seized in fee, granted to R. a term of 1000 years as security for a loan of 150*l*. After st. 3 G. 4, c. 117, came into operation, R., in consideration of W.'s paying him 150*l*., and C., in consideration of the premises, and of W.'s advancing 200*l*. additional to C., assigned, by the same deed, the term to a trustee for W., to secure the 350*l*.; and C., by the same deed, released the fee and the reversion to W., to secure the same 350*l*.

Held, that this deed was not liable to stamp duty as a transfer, nor to a progressive duty of 1*l*. 5*s*. on every 1080 words after the first 1080, but was liable under the above statute and st. 55 G. 3, c. 184, sched. part 1, Mortgage, to an ad valorem duty (2*l*.), on the 200*l*., and a progressive duty of 1*l*.: And that it was not liable to stamp duty as a fresh mortgage for 350*l*. by reason of the conveyance of the fee.

Quære, whether a common deed stamp was necessary. *Doe dem. Bartley v. Gray*. 89

3. On probate, how far evidence of assets. *Evidence*, VI.

STATUTE.

FIRST. Decisions on particular public statutes.

I. 43 Elis. c. 2, s. 5, (Poor.) Power of overseers as to binding parish apprentices. *Poor*, III.

II. 43 Elis. c. 6, s. 2, (Costs.) When Judge may certify under. *Costs*, 3, (1.)

III. 21 Jac. 1, c. 16. (Limitation of actions.) Evidence to support plea. *Trover*, 1.

IV. 22 & 23 Car. 2, c. 9, (Costs.) Judge's certificate under. *Costs*, 3, (1.)

V. 29 Car. 2, c. 3, (Frauds) Memorandum in writing within s. 4.

Where a contract in writing, or note, exists, which binds one party to a contract, under the statute of Frauds, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, and refers to any writing which contains them.

The purchaser of lands by auction signed a memorandum of the contract, indorsed on the particulars and conditions of sale, and referring to them. Afterwards he wrote to the vendor, complaining of a defect in the title, referring to the contract expressly, and renouncing it. The vendor wrote and signed several letters, mentioning the property sold, the names of the parties, and some of the conditions of sale, insisting on one of them as curing the defect, and demanding the execution of the contract: Held, that these letters might be connected with the particulars and conditions of sale so as to constitute a memorandum in writing, binding the vendor under stat. 29 Car. 2, c. 3, s. 4, although neither the original conditions and particulars, nor the memorandum sign-

ed by the purchaser, mentioned, or were signed by, the vendor.

On a sale of a leasehold interest of lands, described in the particulars as held for a term of twenty-three years, at a rent of 55*l.*, and as comprising a yard, one of the conditions was, that if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made, to be settled by arbitration. The yard was not, in fact, comprehended in the property held for the term at 55*l.*, but was held by the vendor from year to year, at an additional rent. It was essential to the enjoyment of the property leased for the twenty-three years. It did not appear that the vendor knew of the defect. Held, that this defect avoided the sale, and was not a mistake to be compensated for under the above condition; although, after the day named in the condition for completing the purchase, and before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, and offered it to him. *Dobell v. Hutchinson.* 355

VI. 3 W. & M. c. 11, s. 6. Settlement by serving office. *Manor*, 1. *Poor*, V. 2.

VII. 3 & 4 W. & M. c. 14. (Fraudulent Devices.) On what obligations of divisor devisee liable. *Devise*, 4.

VIII. 2 G. 2, c. 24. (Bribery.) What constitutes offence under. *Bribery*, 1.

IX. 8 G. 2, c. 13, s. 1. (Copyright.) How far it controls. *Stat.* 17 G. 3, c. 57. *Post*, XIV.

X. 20 G. 2, c. 19. Enforcing payment by master of servants' wages. *Post*, XXI.

XI. 22 G. 2, c. 46, s. 11. Non-renewal of Certificate by attorney. *Attorney*, II.

XII. 24 G. 2, c. 44, s. 6. (Justices) Demand of copy of distress warrant. *Distress*, 3.

XIII. 14 G. 3, c. 78, s. 41. (Building Act.) Liability of Executor to contribute to repairs of party-wall. *Executor*, 2.

XIV. 17 G. 3, c. 57. (Copyright.) What necessary for securing copyright.

The proprietor of a print cannot sue for an invasion of his copyright in it, under stat. 17 G. 3, c. 57, unless the date of publication be engraved upon it, pursuant to stat. 8 G. 2, c. 13, s. 1. *Brookes v. Cook.* 138

XV. 37 G. 3, c. 111. (Stamp.) Stamp on Indenture of apprenticeship. *Stamp*, 1.

XVI. 38 G. 3, c. 5, s. 17. (Land-tax.) Power to call in aid constable. *Constable*, 3.

XVII. 43 G. 3, c. 46, s. 3. (Frivolous arrests) Costs under; how amount of verdict may be shewn. *Practice*, XXIV. 2.

XVIII. 55 G. 3, c. 184. (Stamp.) Stamp on mortgage, when additional sum secured and release of fee. *Stamp*, 2.

XIX. 56 G. 3, c. 139. (Poor.) Binding parish apprentice. *Poor*, III.

XX. 3 G. 4, c. 117. (Stamp.) Stamp on mortgage. *Stamp*, 2.

XXI. 4 G. 4, c. 34. (Master and Servant.) Enforcing payment of servants' wages.

Quære, whether, under stats. 20 G. 2, c. 19, and 4 G. 4, c. 34, justices have power to order payment on an information stating that a sum is due to the complainant "for wages for labour as a carpenter."

The stat. 5 G. 4, c. 18, s. 2, does not em-

power justices to commit in default of distress, for non-payment of wages. *Wiles v. Cooper.* 524

XXII. 5 G. 4, c. 18. (Recovery of penalties.) Commitment under. *Ante*, XXI.

XXIII. 6 G. 4, c. 16. (Bankrupts.) 1. Depositions, when evidence. *Evidence*, II.

2. Criterion whether cause of action within statute.

(1) What is. *Evidence*, II.

(2) Who to determine. *Evidence*, II.

XXIV. 7 G. 4, c. 64. (Criminal Justice.) Expenses of prosecution, how recoverable. *Prosecution*, 2.

XXV. 7 & 8 G. 4, c. 71, s. 3. (Arrests.) Taking out of court money deposited in lieu of bail.

Where the friend of a party arrested makes a deposit of his own money on the defendant's behalf, in lieu of bail, and the sum is afterwards paid into Court to abide the event of the suit, and the defendant then renders, the owner of the money may have it restored to him on motion, under stat. 7 & 8 G. 4, c. 71, s. 3, if the defendant appears in court and assents.

For this purpose the render is equivalent to putting in and perfecting special bail. *Douglas v. Stanbrough.* 316

XXVI. 9 G. 4, c. 22. (Return of members to parliament.)

1. Committee how to be held. *Parliament*, 2.

2. Costs under. *Parliament*, 2, (1.)

XXVII. 9 G. 4, c. 40. (Lunatics.) What is sufficient description of insane person within schedule. *Poor*, II.

XXVIII. 1 & 3 W. 4, c. 58. (Interpleader.) Appearance how to be made. *Practice*, II. 1.

XXIX. 1 & 2 W. 4, c. 60. (Vestry.) Appointment under, how to be stated in mandamus. *Mandamus*, III.

XXX. 2 W. 4, c. 39, s. 3. (Uniformity of process.) Entering appearance, upon what affidavits order obtained. *Practice*, II. 2.

XXXI. 3 & 4 W. 4, c. 27. (Limitation of actions.)

1. Sec. 17. Operation of.

A feme sole, seised in fee, married, and she and her husband ceased to be in possession or enjoyment of the land, and went to reside at a distance from it. They both died at times which were not shown to be within forty years from their ceasing to occupy. The wife's heir-at-law brought ejectment against the person in possession within twenty years of the husband's death, and within five years of the passing of stat. 3 & 4 W. 4, c. 27, but more than forty years after the husband and wife ceased to occupy: Held, that the heir-at-law was barred by the seventeenth section of the statute, though it did not appear when or how the defendant came into possession, and though proof was offered that the wife had levied no fine. *Doe dem. Corbyn v. Bramston.* 63

2. Sec. 42.

(1) Whether retrospective.

Held by the whole Court of Error in the Exchequer Chamber, that stat. 3 & 4 W. 4, c. 27, s. 42, as to actions for arrears of rent, is not retrospective.

Quære, whether the above section, in so

far as it limits the bringing of actions for rent to six years after such rent becomes due, &c., be repealed by stat. 3 & 4 W. 4, c. 42, s. 3? *Paddon v. Barlett*, 884. (See whole *placitum Practice*, XVI.)

(2) Whether repealed by stat. 3 & 4 W. 4, c. 42, s. 3. *Ante*, (1.)

XXXII. 3 & 4 W. 4, c. 42. (Amendment of law.)

1. Sec. 3. Whether it repeals stat. 3 & 4 W. 4, c. 27, s. 42. *Ante*, XXXI. 2. 2. Sec. 31.

(1) Payment of costs by executors. *Executor*, 1.

(2) Judge's certificate under, how far final. *Executor*, 1, (1.)

XXXIII. 4 & 5 W. 4, c. 48. (County rate.)

Allowance of accounts, how to be made. *Rate*, 1.

SECONDLY: Decisions on particular *local and personal statutes*.

XXXIV. 23 G. 3, c. 90. (St. Martin's in the Fields, Paving.) Recovery of rates, how far controlled by 57 G. 3, c. xxix. *Post*, XXXVII.

XXXV. 33 G. 3, c. 96. (Canal Act.) What constitutes a demand and refusal. *Mandamus*, II. 1.

XXXVI. 52 G. 3, c. xlviii. s. 7. (Sewers.) What constitutes occupation. *Rate*, 4.

XXXVII. 57 G. 3, c. xxix.

(Paving of Metropolis.)

Recovery of rates under.

By an act for paving and lighting a parish, a certain committee was empowered to distress for rates, and to sue for the amount, *if there was no sufficient distress*. The Metropolis Paving Act, 57 G. 3, c. xxix., subsequently passed, by sect. 38, enable any persons, having the control of the pavements of any parochial or other district within the jurisdiction of the act (of which districts the above parish was one), to sue for the recovery of the paving rates, and it imposes no condition as to previous distress. It further provides, that former paving acts shall not be repealed, but that commissioners under such acts shall retain and may exercise all the powers and authorities thereby conferred, and may act upon all and every the provisions, clauses, powers, and authorities of such acts, or of this act, as they shall find expedient.

Held, that the general power of suing given by the Metropolis Paving Act was extended to the committee established under the local act, and consequently that, in bringing actions, they were no longer restricted to the case in which no sufficient distress could be found. *Re v. Halle*. 494

XXXVIII. 4 G. 4, xxxix. (Gas.) Proceedings on distress under. *Distress*, 1, (2.)

XXXIX. 11 G. 4, c. xlv. (Paving.) Proceedings previous to distress. *Distress*, 1, (1.)

XL. 11 G. 4, and 1 W. 4, c. lix. (Railway.) Compensation under.

A railway company were empowered, by statute, to enter upon and use lands for the railway, and to purchase and hold lands; they were also bound to make such alterations as were necessary for the enjoyment of the railways then in use for a coal mine belonging to L, over the works of which the

railway was to pass: the act was not to give them the mines under any land purchased by them; but the mine-owners might work them, doing no damage to the works of the company, or making good the same: the company was to compensate any party interested for any damage or inconvenience sustained by the execution of any of the works authorised by the act; such compensation to be assessed, if necessary, by a jury, which the company were required from time to time to summon, and which should assess compensation for damages already sustained, and for future temporary perpetual or recurring damages.

L, being owner of land over the said coal mine, and which land was leased to B, sold the land to the company, the coal mine not being taken into account. Afterwards B, in working the coal mine, damaged the railway, and was unable to work so profitably as he otherwise could, lest he should do further damage: Held, that B. was not entitled to compensation, either for the sum which it cost him to repair the damage done, or for the interruption to the working of his mine. *Re v. Leeds and Selby Railway*. 683

XLI. 1 & 2 W. 4, c. lxxiii. (Ouse Bank.) Insufficient return to mandamus. *Mandamus*, VI.

XLII. Monmouthshire Canal Act.

Rating under.

1. By a canal act (passed in 1792, when tolls were considered rateable *per se*), a company was incorporated, and authorised to take lands, and to take and erect buildings, for the purpose of constructing a canal and railways, and to take tolls; and it was provided that *the tolls should not*, at any time or times thereafter, *be subject to taxes or rates*, and that the company should, from time to time, be rated in respect of the lands and grounds to be taken, and the buildings to be erected by them, in the same proportion as, and not at any higher value or improved rent than, other lands, grounds, and buildings adjacent *were or should*, *for the time being, be rated, and as the lands, grounds, and buildings, to be taken and erected by them, would have been rateable, in case they had continued in their former state, and not been used for the purpose of the undertaking*. The adjacent lands and buildings improved in value, from the time of the commencement of the undertaking, partly in consequence of the undertaking being carried into effect, partly from independent causes: Held, that the lands and buildings used for the canal were to be rated at the value which the adjacent lands, &c., bore at the time of the rate; and not at the value which these latter bore at the commencement of the undertaking, nor at that which they would have borne at the time of the rate if the undertaking had not been carried into effect. Although, from the passing of the act to the time of the question being raised (forty years), the rate had always been made according to the original value of the lands adjacent.

2. A subsequent statute authorised the company to extend the canal, and to purchase lands for that purpose; and it provided, that they might take the like tolls on the new canal, &c. as under the former act,

and have the like powers and remedies for recovering them. And that the clauses, powers, authorities, provisions, orders, rules, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions contained in the former act, should, so far as the same should apply and the case would admit, extend to the new canal, &c. and should take effect, operate, be put in execution, used, and exercised by the company, and be applied and enforced in respect of making, maintaining, and using the new canal, &c. and regulating the navigation thereon, for punishing offences relating thereto, for purchasing lands and assessing damages, and with respect to all matters in any wise touching the new canal, &c. in the same manner to all intents and purposes as if the same clauses, &c., had been inserted, repeated, and enacted, at full length, by the subsequent act, and as if the new canal, &c. had been a part of the canal authorised to be made by the former act: Held, that the provision as to rating the original canal extended to the new part.

8. By a third statute, a tramroad company was incorporated, and it and the canal company were authorised to make railways, and to take such tolls on these railways as the canal company might take by the first statute; and it was provided, that the clauses, powers, authorities, regulations, &c. (as in the second statute,) of the first statute, should extend (in the same terms as in the second) to the railways last-mentioned, and to regulating the carriage or conveyance of goods thereon, as if these railways had been authorised to be made by the first statute, and the tramroad company had been therein named instead of the canal company: Held, the provision as to rating the original canal extended to these railways. *Rez v. Monmouthshire Canal.* 619

XLIII. Sirhowy Tramroad Act.

Power to make railways.

An act of Parliament empowered a canal company to construct certain canals and railroads, paying compensation to the owners of lands used; and also to make railroads to iron works, &c. within eight miles of the canals or railroads first mentioned; and it provided that, if the owners of certain species of property situate within eight miles from any part of the canals or railways before particularly described and authorised to be made, should think it expedient that railways should be made through the lands of other persons, for the purpose of conveying goods from the canals or railways before particularly described, and if the company should refuse to make such railways under the powers given them by the act, such owners might, at their own cost, make the railways, paying compensation to the proprietors of the lands over which they were to be made; and that the railways so made should be open to the public, on payment of such tolls as the company could demand.

A subsequent act incorporated a tramroad company, and gave them, or the canal company, power to make certain railways, and to take thereon the tolls authorised by the former act; and it provided, that the companies should have the same powers for recovering the tolls as were given by the first

act; and that the several clauses, powers, authorities, regulations, limitations, exemptions, restrictions, privileges, penalties, forfeitures, punishments, and provisions therein contained, should, as far as the same would apply and the case would admit, extend to the works constructed under the new act, and should take effect, operate, and be put in execution and used and exercised, and be applied and enforced, in respect of the making, maintaining, and using the said works, and regulating the conveyances of goods thereon for punishing offences relating thereto, and for purchasing and selling lands and ascertaining the value thereof, and determining and assessing damages, and with respect to all matters whatsoever in any wise concerning the works made under the new act, as fully and effectually, to all intents and purposes, as if the same clauses, &c. had been repeated and enacted in the new act, and as if the works authorised by the new act had been part of the undertaking authorised by the first act, and as if the tramroad company had been therein named instead of the canal company:

Held, that this did not authorize owners of the specified kind of property within eight miles of the new works (unless authorised by the first act) to make railways, &c. from their property to the new works. *Sirhowy Tramroad Company v. Jones.* 640 (n.)

STATUTE OF FRAUDS.

See STATUTE, V.

STATUTE OF LIMITATIONS.

See STATUTE, III. & XXXI.

SUBPENA.

Attachment for non-attendance upon, when it lies.

A witness subpoenaed to give evidence, on an indictment tried December 11th, made default: Held, that it was too late to move for an attachment in Easter term following.

If a cause be called on, quære, whether a witness can be attached for contempt in not attending, who has not been regularly called on his subpoena. *Rez v. Stretch.* 503

SURRENDER.

Of copyhold. Husband's consent to wife's surrender. *See* Copyhold, 1.

SURROGATE.

Of Archdeacon, mandamus to swear in churchwarden. *Mandamus*, I. 3.

TAIL.

Estate. *See* Estate, 2.

TAXATION.

Costs of election petition, when taxable. *Parliament*, 2. (1.)

TOLLS.

How to be rated under local act. *Statute*, XLII.

TRIAL.

New.

1. When granted.

On non-appearance by one of parties at trial after short notice of trial. *Practice*, XXIII.

2. Not sufficient ground for, that Judge on

trial of action for penalty, under st. G. 2, c. 24, did not direct jury to find intention of party receiving money. *Bribery*, 1. (See also *Misdirection*.)

TROVER.

1. What is evidence of conversion.

To an action of trover for wine, commenced, October, 1823, the statute of limitations was pleaded. The wine, in pipe, had been deposited by C. for the plaintiff, in the defendant's cellar, by her leave. C. became bankrupt, and, his assignees claiming the wine, the plaintiff's solicitors warned the defendant, by letter, in December, 1826, not to give it up to any person unauthorised by them. The defendant kept the wine, and bottled part of it at, or soon after, the end of 1826, at which time it was becoming injured by remaining in the wood. Afterwards, but it did not appear when she consumed part of the wine so bottled. In November, 1827, the plaintiff's solicitors again wrote to the defendant, saying that they were instructed to proceed at law against her, and referring to a demand of the wine, stated in the letter to have been made upon her by them in the preceding March, but of which there was no further evidence. They also offered to indemnify her against the claim of any other person, if she would deliver the wine within a week; in default of which they stated that the proceedings would be commenced. The application was not noticed. A subsequent demand and refusal were proved. The jury having found for the plaintiff:

Held, on motion to enter a nonsuit, that on this evidence the jury were not bound to conclude either that there had been a demand and refusal more than six years before action brought: or that the defendant had bottled the wine with intent to convert it to her own use.

Semble, by Patteson and Coleridge, Js., that if a bailee of wine draws off and converts part of it without the owner's knowledge, and at the end of six years is sued in trover for the whole quantity, he cannot set up his conversion of part as a conversion of the whole, to support a plea of the Statute of Limitations. *Philpott v. Kelley*. 106

2. Whether party can set up his own wrongful act to support plea of Statute of Limitations. *Ante*, 1.

UNIVERSITY.

Oxford, jurisdiction of Chancellor's court. *Habeas Corpus*, 1.

USE.

Shifting, what is; how affected by recovery. *Devise*, 3.

USER.

Immemorial, how far evidence of it supports allegation of non-existing grant. *Evidence*, X.

VARIANCE.

1. Between pleading and evidence. See *Evidence*, XII. 1.

2. Between declaration in scire facias and writ in original suit. *Bail*, 2.
3. Between entry of judgment and other parts of record. *Practice*, I. 2, (1.)

VENDOR AND VENDEE.

1. Evidence of character in which vendor acts. *Principal and Agent*, 1.
2. Interpretation of conditions of sale. *Sale*.
3. What sufficient memorandum in writing by parties within Statute of Frauds. *Statute*, V.

VERDICT.

1. Right of jury to give general verdict.

It is the privilege of a jury to decline finding any other than a general verdict; and, therefore, if the judge explains to them, and they clearly understand, that, in the absence of a particular fact, the plaintiff's right to recover will depend on a doubtful legal question, and the judge requests them to find that fact, if satisfied of its existence, but they, nevertheless, give a verdict for the plaintiff generally, and, on being pressed, refuse to find the particular fact, the Court will not set aside the verdict. *Mayor of Devizes v. Clark*. 506

2. How verdict may be shewn on application for costs under st. 46 G. 3, c. 46, s. 3. *Practice*, XXIV. 2.3. How far Court of K. B. will amend entry of erroneous verdict by inferior Court. *Mandamus*, II. 4.

See also *Nonsuit*.

VESTRY.

Act. See *Mandamus*, III.

WAGES.

Enforcing payment by master. *Statute*, XXI.

WARRANT.

1. Of attorney, terms of how construed. *Scire facias*, 1.

II. Of distress.

1. Proceedings necessary before issuing of warrant. *Distress*, 1.2. Who may justify under illegal warrant. *Distress*, 1, (2,) and 3.3. Power of justices to suspend execution. *Distress*, 3.

WARRANTY.

Assumpsit for breach of.

The buyer of a horse warranted sound may recover in a special action of assumpsit for a breach of the warranty, though he never returned the horse, and though he neglected to inform the defendant of the unsoundness for several months after it was discovered. *Pateshall v. Tranter*. 103

WITNESSES.

Examination of, in a foreign country, how far necessary that commissioners be sworn. *Oath*, 2.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Common Pleas,

AND

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AND IN THE

KING'S BENCH.

CONTAINING CASES FROM HILARY TERM, 3 WILLIAM IV., 1833, TO
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Sir WILLIAM ELIAS TAUNTON, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
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COMMON PLEAS.

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A

TABLE

OF THE

NAMES OF CASES

CONTAINED IN THIS VOLUME.

A.	
Abbott v. Burbage	660
Adey, Rex v.	582
Alexander, Pack v.	526
Allan v. Kenning	489
Anonymous	505
Archer, Gosbell v.	526
Arden v. Garry	591
Armstrong v. Lewis	629
Ashton v. Naull	539
Ashlin v. Langton	501
Atkinson v. Brindall	567
Atkinson v. Brindall	642

B.	
Balls v. Stafford	648
Banbury v. Harper	494
Bartlett, Paddon v.	577
Bank of England, Cotter v.	499
Barham v. Lee	553
Basingstoke Canal Company, Pontet v.	656
Batchelor v. Vyse	565
Beare v. Pinkus	617
Bird v. Relph	619
Bliss, Cooper v.	528
Bootle, def. Cheek, plff.	559
Braithwaite v. Coleman	602
Brazier v. Bryant	534
Briggs, Hollingworth v.	673
Brindall, Atkinson v.	642
Brittlebank, Doe d. v. Roe	566

Brown, Williams v.	509
— v. Granville	556
Bryant, Brazier v.	534
Brydes v. Fisher	559
Burbage, Abbott v.	660
Burn v. Carvalho	622
Burt v. Jackson	520
Byles, Jay v.	489

C.	
Carlton, High Dale, Inhab. of, Rex v.	576
Carvalho, Burn v.	622
Cheek, plff. Bootle, def.	559
Clark v. Gilbert	649
— v. Marner	551
Clarke v. Pedley	553
Clayton v. Gregson	600
— v. Simpson	664
Clements v. Williams	677
Clothier v. Ess	508
Coleman, Braithwaite v.	602
Collins v. Gwynne	639
Colson, Hunt v.	527
Cooper v. Bliss	528
— Simpson v.	678
Cotter v. Bank of England	499
Coombs v. Dod	533
Corry v. Wharton	648
— v. —	663
Cox v. Peacock	625
Cumberland, Justices of, Rex v.	582
Curtis v. Curtis	533

D.		
Dale v. Gordon	517	Haines v. Disney 627
Dansey, Dem.	518	Hall v. Middleton 582
Day v. Robinson	619	Hankey, Royston v. 518
Dicas v. Warne	561	Harris, Tenant; Williams, Dem. . 558
Dick, Moody v.	581	Harper, Banbury v. 494
Disney, Haines v.	627	Hawkins v. Hawkins 510
Dod, Coombs v.	533	Hayward v. Priest 520
Dodson v. Mackey	580	Henning v. Samuel 533
Doe dem. Brittlebank v. Roe . . 566		Hollingworth v. Briggs 673
— Douglass v. Lock 605		Holmes v. Edwards 680
— Fry v. Roe 518		Horne v. Took 551
— Milburn v. Edgar 670		Hornidge v. Eyland 641
— Potter v. Roe 647		Huber v. Steiner 554
— Somerville v. Roe 568		Hughes, Tenant 646
— Thompson v. Roe 626		Hunt v. Colson 527
— Tucker v. Roe 550		
Duear v. Macintosh 496		I.
Dumsday, Dem.; Hughes, Ten. . 646		Ines v. Levi 620
E.		In re Lord 625
Eaton, Irving v. 675		Irving v. Eaton, ... 675
Edgar, Doe dem. Milburn v. . . 670		Izon, Turner v. 657
Edwards, Holmes v. 680		
Eicke v. Nokes, ... 567		J.
Emery v. Mucklow 552		Jackson, Burt v. 520
Ess, Clothier v. 508		Jay v. Byles 489
Ex parte Inhab. of Carlton High Dale 576		Johnston v. Woolf 644
— Quick 628		— v. Kennedy 647
— Thomas 556		Justices of Kent, Rex v. . . . 575
Eyland, Hornidge v. 641		
F.		K.
Ferguson, Upton v. 490		Kennedy, Johnston v. 647
Filmer v. Lynn 597		Kenning, Allen v. 489
Fisher, Brydges v. 559		King, Smith v. 529
Flower, Reynold v. 530		Kirby v. Siggers 563
Fownes v. Stokes 632		Kymer, Perring v. 591
Freeman v. Paganini 550		
Frost, Wood v. 568		L.
G.		Langton, Ashlin v. 567
Garry, Arden v. 629		Lane, Skipper v. 553
Gilbert, Clark v. 649		Laxton, Shinfeld v. 552
Gordon, Dale v. 517		Lee, Barham v. 553
Gosbell v. Archer 591		Leeson v. Smith, ... 575
Granville, Brown v. 556		Leighton, Taylor v. 510
Gregson, Clayton v. 600		Lemon v. Lemon 649
Guthrie, Leslie v. 638		Leslie v. Guthrie 638
Gwynne, Collins v. 639		Levi, Innes v. 630
H.		Lewis, Armstrong v. 539
Haigh, Sykes v. 632		—, Pound v. 505
		Llanfihangel-Abercowin, Inhab. of, Rex v. 582
		Lock, Doe dem., Douglass v. . . 605
		Lord, In re 625

Lyng v. Sutton 558
 Lynn, Filmer v. 597

M.

Mackey, Dodson v. 580
 Mackintosh, Duear v. 496
 Manser v. Piercy 520
 Marner, Clark v. 551
 Marshall v. Thomas 493
 Maskell, Watson v. 560
 Middleton, Hall v. 582
 Milburn, Doe dem. v. Edgar 670
 Miles, Wainwright v. 506
 Millard v. Millman 489
 Millman, Millard v. 489
 Mills, Rex v. 573
 Moody v. Dick 581
 Moore v. Thomas 532
 Mucklow, Emery v. 552

N.

Naull, Ashton v. 501
 Neale, Rex v. 618
 Nokes, Eicke v. 567

P.

Pack v. Alexander 526
 Paddon v. Bartlett 577
 Paganini, Freeman v. 550
 Patterson v. Powell 505
 Peacock, Cox v. 625
 Pedley, Clark v. 553
 Perring v. Kymer 591
 Pettifer, Whitbourne v. 551
 Piercy, Manser v. 520
 Pinkus, Beare v. 617
 Plumridge, Williams v. 676
 Potter doe d. v. Roe 647
 ——— v. Lewis 505
 Pontet v. Basingstoke Canal Company 656
 ——— v. Patterson 505
 Priest Hayward v. 520
 Purser, Staples v. 530

Q.

Quick, Ex parte 628

R.

Redfern, Rex v. 574
 Reece v. Taylor 590
 Relph, Bird v. 619
 Rex v. Adey 582
 ——— v. Inhab. Llanfihangel-Abercowin 582
 ——— v. Justices of Cumberland 582

Rex v. Justices of Kent 575
 ——— v. Justices of Somersetshire 584
 ——— v. Mills 573
 ——— v. Neale 618
 ——— v. Redfern 574
 ——— v. Sheriff of Essex 535, 552
 ——— v. Younghusband 618
 Reynolds v. Flower 530
 Roberts, Ruppell v. 574
 Robinson, Day v. 619
 Ross, Henry and Joseph Hodgson, In
 the matter of, ... 604
 Royston v. Hankey 518
 Ruppell v. Roberts 574

S.

Samuel, Henning v. 533
 Sansom, Siggers v. 504
 Sheriff of Essex, Rex v. 535, 552
 Shinfield v. Laxton 552
 Siggers v. Sansom 504
 ———, Kirby v. 562
 Simpson v. Clayton 664
 ——— v. Cooper 678
 Skipper v. Lane 553
 Smith v. King 529
 ———, Leeson v. 575
 ——— v. Wigley 496
 Somersetshire, Justices of, Rex v. 584
 Stafford, Balls v. 648
 Staples v. Purser 530
 Steiner, Huber v. 554
 Steward, Wolveridge v. 521
 Stone, Swaine v. 567
 Storr v. Watson 679
 Strokes, Fownes v. 632
 Sutton, Lyng v. 558
 Swaine v. Stone 567
 Sykes v. Haigh 632

T.

Taylor v. Leighton 520
 Taylor, Reece v. 590
 ——— v. Slater 677
 Thomas, Ex parte 556
 Thomas, Marshall v. 493
 Thomas, Moore v. 532
 Thompson v. Thompson 634
 Took, Horne v. 551
 Trimmingham v. Trimmingham 604
 Turner v. Izon 657

U.

Upton v. Fergusson 490

V.		Wigley, Smith v.	496
Vyse, Batchelor v.	565	Williams v. Brown	509
		———, Clements v.	677
		———, demandant	558
		——— v. Plumridge	676
W.		Wolveridge v. Steward	531
Wainwright v. Miles	506	Wood v. Frost	568
Warne, Dica v.	561	Woolf, Johnston v.	644
Warren, Wright v.	495	Wright v. Warren	496
Wharton, Corry v.	648, 663		
Watson v. Maskell	560		
———, Storr v.	679		
Whitbourne v. Pettifer	551		
		Y.	
		Yeunghusband, Rex v.	618

TABLE

OF

THE CASES REPORTED

In the Third and Fourth volumes of Moore and Scott's Reports, C. P.—the fourth volume of Neville and Manning's Reports, K. B.—and the second volume of Scott's Reports, C. P., which are omitted here, having already appeared in former volumes of this work, as reported by Bingham, C. P., and Adolphus and Ellis, K. B.

	3 M. & S.	E. C. L.		3 M. & S.	E. C. L.
Aireton v. Davis . . .	138	23 448	Clark, Cook v. . . .	371	25 16
Aldridge v. Harper . . .	518	25 53	Clarke, Munk v. . . .	463	25 45
Allen v. Kenning . . .	89	23 401	Clegg v. Laffer . . .	727	25 120
Anthony, Sylvester v. . .	191	23 451	Cocks v. Nash . . .	164	23 300
Apperley v. Bishop of Here-					439
ford	102	23 419	Cook v. Clark . . .	371	25 16
Archbold, Sweet v. . . .	299	25 60	Cooke, Hartley v. . .	230	23 442
Arden, Mallam v. . . .	783	25 140	Corbyn v. Leader . . .	751	25 131
Armisted, De Begnis v. . .	511	25 47			268
Aspinall v. Wake . . .	423	25 25	Corpe v. Overton . . .	738	25 121
			Cowan, Groves v. . . .	352	25 12
Balme v. Hutton	1	23 338	Cowper v. Godmond . .	219	23 451
Bardons v. Selby	280	23 455	Creighton, Birchman v. .	345	25 12
Barnard, Newman v. . . .	748	25 130	Crockford, Easley v. . .	700	25 116
Basset v. Dodgin	417	23 409	Curlinge v. Johnson . .	496	25 38
Beaumont, Williams v. . .	705	25 124			
Belcher v. Lloyd	822	25 145	Davis, Aireton v. . . .	138	23 448
Birchman v. Creighton . .	345	25 12	De Begins v. Armistead .	511	25 47
Bird, Holland v.	363	25 14	Denew, Cannan v. . . .	761	25 139
Birnie, Morgan v.	76	23 414	Dewes, Gobbey v. . . .	556	25 50
Boad, Smith v.	528	25 56	Dodgin, Basset v. . . .	417	23 409
Bowman, Goodburne v. . .	69	23 413			25 21
		269	Doe dem. Winter v. Perratt .	586	25 92
Bowyear, dem. Bowyear, ten.	65	23 414			
Boyne, Nicoll v.	812	25 158	Easley v. Crockford . . .	700	25 116
Byfield v. Street	406	25 18	Eyre, Parrott v. . . .	857	25 135
Cadell v. Palmer	571	25 64	Fenton v. Logan, ...	82	23 416
Cannan v. Denew	761	25 139	Fielder, Smith v. . . .	853	25 143
Chapman v. Walton	289	25 28	Gobbey v. Dewes	556	25 50

	3 M. & S.	E. C. L.		3 M. & S.	E. C. L.
Godmond, Cowper v.	219	23 451	Nash, Vausandau v.	834	25 154
Goodburne v. Bowman	69	63 369	Newman v. Barnard	748	25 130
		413	Nicoll v. Boyne	812	25 158
Griffin, Hall v.	732	25 118	Nockells v. Lucas	627	25 71
Grottich v. Phillips	132. 135	23 438			
Grooves v. Cowan	352	25 12	Overton, Corpe v.	738	25 121
Harper, Aldridge v.	518	25 53	Palmer, Cadell v.	571	25 64
Harris, Price v.	838	25 155	Parrott v. Eyre	857	25 135
Hartley v. Cooke	230	23 442	Patteson v. Powell	195	23 403
Henshall, Plevin v.	403	23 419	Perratt, d. dem., Winter v.	586	25 92
Hereford, Bis. of, Apperley v.	102	23 419	Perryman v. Steggall	93	23 418
Hodges v. Lord Litchfield	201	23 134	Phillips, Grottick v.	132. 135	23 438
		434	Plevin v. Henshall	403	25 17
Hoepfner, Latriell v.	800	25 157	Powell, Paterson v.	195	23 403
Holl v. Griffin	732	26 118	Price v. Harris	838	25 155
Holland v. Bird	363	25 14			
Holland, Williams v.	540	35 50	Reynard v. Robinson	127	23 436
Hutton, Balme v.	1	23 338	Richards v. Stuart	774. 778	25 150
			Riddell v. Jenner	673	25 19
Ingleby v. Mousley & Swift	489	25 36	Robinson, Reynard v.	127	23 436
Isaac v. Spilsbury	341	25 12			
			Selby, Bardons v.	280	23 455
Jenner, Riddell v.	673	25 19	Sheppard, Maberley v.	436	25 43
Johnson, Curling v.	496	25 38	Sloper, Woolley v.	248	23 454
——, Venafr v.	847	25 141	Smith v. Bond	528	25 56
		277	—— v. Fielder	853	25 143
Jones, Tenny v.	472	25 32	—— Keys v.	338	25 11
Jones v. Wingfield	846	25 145	Smyth v. Latham	251	23 424
			Spilsbury, Isaac v.	341	25 12
Kenning, Allan v.	80	23 401	Spires, dem. Morris, ten. 118. 124	23 422	
Keys v. Smith	338	25 11	Stammers v. Yearaley	410	25 19
			Steggall, Perryman v.	93	23 418
Laffer, Clegg v.	727	25 120	Street v. Byfield	406	25 18
Latham, Smyth v.	251	23 424	Stuart, Richards v.	774. 778	25 150
Latreille v. Hoepfner	800	25 157	Sweet v. Archbold	299	25 66
Leader, Corbyn v.	751	25 130	Sylvester v. Anthony	191	23 451
Litchfield, Lord, Hodges v.	201	23 134			
		434	Tenny v. Jones	472	25 32
Lloyd, Belcher v.	822	25 145	Thomas, Mather v.	684	25 23
Logan, Fenton v.	82	23 416	Twynning, dem. Lowndes, ten. 443	25 31	
Lowndes, ten. Twynning, dem. 443	25 31				
Lucas v. Nockells	627	25 71	Vausandau v. Nash	837	25 154
			Vanafr v. Johnson	847	25 141
					277
Maberly v. Sheppard	436	25 43	Wake, Aspinal v.	423	25 25
Machado, Mendizabel v.	841	25 365	Wakefield, Wettenhall v.	805	25 135
Mallam v. Arden	793	25 140	Walton, Chapman v.	389	25 28
Mather v. Thomas	684	25 23	Wettenhall v. Wakefield, ...	805	25 135
Mendizabel v. Machado	841	25 365	Williams v. Beaumont	705	25 124
Morgan v. Birnie	76	23 414	—— v. Holland	540	25 261
Morris, ten. Spires, dem. 118. 124	23 422		Wingfield, Jones v.	846	25 145
Mousely & Swift, Ingelby v.	488	25 36	Winter v. doe d. Perratt	586	25 92
Munk v. Clarke	463	25 45	Woolley v. Sloper	248	23 454
Nash, Cocks v.	164	23 439	Yearaley, Stammers v.	410	25 19
		25 329			

TABLE OF CASES.

481

	4 M. & S.	E. C. L.		4 M. & S.	E. C. L.
Acebal v. Levy . . .	. 217	25 170	Furnival v. Stringer . . .	578, 582	27 312
Adams, M'Andrew v. . .	. 517	27 297			
		385	Garland v. Carlisle . . .	. 24	25 192
Alchin v. Hopkins . . .	. 615	27 320	Gibbeson, Greenham v. . .	. 198	25 163
Allen, Kendall v. . .	. 319	25 189	Gilbert v. Towns . . .	. 735	27 346
— v. Wood . . .	. 510	27 288	Gooding, Fleming v. . .	. 455	25 239
Atkinson, Ex parte . . .	. 160	25 181	Gostling, Baker v. . .	. 539	27 292
			Greenham v. Gibbeson . . .	. 198	25 163
Baker v. Gostling . . .	. 539	27 292	Gregg, Betham v. . .	. 230	25 163
Barrow, Lysons v. . .	. 463	25 244			
Beaumont v. Mountain . . .	. 177	25 183	Hammond v. Hooley . . .	. 664	27 335
Beavan, Bushell v. . .	. 622	27 320	Hardeastle, Haworth v. . .	448, 720	25 241
Belcher v. Prittie . . .	. 295	25 184	Harding, Dunne v. . .	. 450	25 242
Betham v. Gregg . . .	. 230	25 163	Harris, Price v. . .	. 474	25 155
Bettleley, Cowell v. . .	. 265	25 186	Harvey, Humphrys v. . .	. 500	27 312
Blandy, Cooper v. . .	. 562	27 304	Hastam v. Sherwood . . .	. 434	25 235
Broughton, Orme v. . .	. 417	25 231	Haworth v. Hardeastle . . .	448, 720	25 241
Brown, Roberts v. . .	. 407	25 635	Hellyer, Cockman v. . .	. 487	27 287
Bruce, Surman v. . .	. 184	25 187	Heneage, Stults v. . .	. 472	25 244
Bush v. Parker . . .	. 588	27 312	Hoadley v. MacLaine . . .	. 340	25 208
Bushall v. Beavan . . .	. 622	27 370	Hogg, Dean v. . .	. 188	25 160
Busnach, Stretton v. . .	. 678	27 335			279
Butler v. Mapp . . .	. 258	25 178	Hooley, Hammond v. . .	. 684	27 335
			Hooper, Clarke v. . .	. 353	25 207
Campbell, Mummery v. . .	. 379	25 221	Hopkins, Alchin v. . .	. 615	27 320
Carlisle, Garland v. . .	. 24	25 192	Horwood, Decharms v. . .	. 400	25 228
Clarke v. Hooper . . .	. 353	25 207	Humphrey, Dabbs v. . .	. 286	25 190
Clegg, Irving v. . .	. 572	27 308	Humphreys v. Harvey . . .	. 500	27 312
Cockman v. Hellyer . . .	. 487	27 287			
Cocks v. Nash . . .	. 162	23 439	Ireland v. Johnson . . .	. 706	27 162
		25 329	Irving v. Clegg . . .	. 572	27 308
Cooper v. Blandy . . .	. 562	27 304			
Coppin v. Potter . . .	. 272	25 190	James v. Saunders . . .	. 316	25 184
Cowell v. Bettleley . . .	. 265	25 186	Jaquest, Sims v. . .	. 380	25 221
Curtis v. Curtis . . .	. 337	25 206	Johnston, Ireland v. . .	. 706	27 162
— v. Spitty . . .	. 554	27 291			
		563	Kendall v. Allen . . .	. 319	25 189
Cutting, Wilson v. . .	. 268	25 187	King v. Shrives . . .	. 149	25 113
Dabbs v. Humphrey . . .	. 265	25 190	Lawford, Doe d. v. Roe . . .	. 681	27 341
		27 438	Levy, Acebal v. . .	. 217	25 170
Daniel, Morris v. . .	. 383	25 220	Lysons v. Barrow . . .	. 463	25 244
Davis, Pickford v. . .	. 683	27 386			
Dean v. Hogg . . .	. 188	25 160	M'Andrews v. Adams . . .	. 517	27 297
		279			385
Decharms v. Horwood . . .	. 400	25 228	M'Kenzie v. M'Leod . . .	. 249	25 175
Doy d. Lawford v. Roe . . .	. 681	27 341	MacLaine, Hoadley v. . .	. 340	25 208
Dunne v. Harding . . .	. 450	25 242	M'Leod, M'Kenzie v. . .	. 249	25 175
Dutton, Slowman v. . .	. 174	25 182	Mammatt v. Matthew . . .	. 356	25 219
			Mapp, Butler v. . .	. 258	25 178
Elliott v. Pybus . . .	. 389	25 222	Maskell, Watson v. . .	. 461	27 419
					559
Farren, Simons v. . .	. 672	27 233	Matthew, Mammatt v. . .	. 356	25 219
Fleming v. Gooding . . .	. 455	25 239			

	4 M. & S.	E. C. L.		4 M. & S.	E. C. L.
Meekin v. Whalley	494	27 310	Sims v. Jaquest	380	25 221
Morrison, Tremeere v. . .	603. 609	27 315	Slowman v. Dutton . . .	174	25 182
Mountain, Beaumont v. . .	177	25 183	Spitty, Curtis v. . . .	554	27 291
Mummery v. Campbell . . .	379	25 221	Stannard v. Ullithorne . .	359	25 212
Nash, Cocks v.	162	23 439	Stevenson, Tildasley v. . .	442	25 237
Niblet v. Pottow	595	27 315	Stretton v. Busnach . . .	676	27 337
Norris v. Daniell	383	25 220	Stringer, Furnival v. . .	578, 582	27 312
Orme v. Broughton	417	25 231	Stults v. Heneage	472	25 244
Parker, Bush v.	588	27 312	Surman v. Bruce	184	25 187
Pennell, Osborne v. . . .	431	25 230	Tildasley v. Stephenson . .	442	25 237
Pickford v. Davis	683	27 336	Towns, Gilbert v. . . .	735	27 346
Potter, Coppin v.	272	25 190	Treemere v. Morrison . .	603, 609	27 315
Pottow, Niblet v.	595	27 315	Trimbey v. Vignier	695	25 263
Price v. Harris	474	25 155	Tutin, Whitford v. . . .	166	25 179
Prittle, Belcher v. . . .	295	25 184	Ullithorne, Stannard v. . .	359	25 212
Pybus, Elliott v.	389	25 222	Usborne v. Pennell	431	25 230
Roberts v. Brown	407	25 224			27 403
—— v. Wedderburne . . .	488	27 287	Vignier, Trimbey v. . . .	695	25 263
Roe, Doe d. Lawford v. . .	681	27 341			27 336
Saunders, James v. . . .	316	25 184	Wedderburne, Roberts v. . .	488	27 287
Sherwood, Haslam v. . . .	434	25 235	Whalley, Meekin v. . . .	494	27 310
Shrives, King v.	149	25 113	Whitford v. Tutin	166	25 179
Simons v. Farren	672	27 332			370
		386	Wilson v. Cutting	268	25 187
			Wood, Allen v.	510	27 288

	4 N. & M.	E. C. L.		4 N. & M.	E. C. L.
Albert v. Spence v. . . .	385	29 212	Bird doe d. Wetherill v. . .	285	29 57
Anderson, Doyle v. . . .	873	28 169	Bird v. Higginson	505	29 66
Antrobus, Esq. Rex v. . . .	565	29 213			177
Atkins v. Owen	123	29 22	Bowler v. Brown	17	29 47
Atkinson v. Hawdon . . .	409	29 169	Bowman v. Rostraw	552	29 98
Axbridge, Inhabitants of, Rex					(n.)
v.	477	29 160	—— v. Taylor	264	29 90
Ayer v. Craven	220	29 11	Boyd v. Emmerson	99	29 68
Baker, King v.	228	29 110	Brett, Donlan v.	854	29 115
Barnard Castle, Inh. of Rex			Bridge & Wright, in the mat-		
v.	128	29 46	ter of arbitration between,	5	29 26
Barnby Dun, Inhabitants of,			Brindley, Heath v. . . .	235	29 119
Rex v.	436	29 162	Bristol, Inhab. of, Till-Adam		
Banett, Searle v.	200	29 41	v.	144	29 125
Bennett, Sandall v. . . .	89	29 78	Brooks, Rigby v.	3	29 18
Betts v. Gibbons	64	29 29	Brown, Bowler v.	17	29 47
Birch v. Dawson	222	29 23	Brown v. Shevill	277	29 51
			Burrows, Lowe v.	366	29 152
			Burton v. Plummer	315	29 113

TABLE OF CASES.

483

	4 N. & M.	E. O. L.		4 N. & M.	E. O. L.
Cambridge, Justices of the town of, Rex v.	238	29 121	Frankum v. Earl of Falmouth	330	29 140
Campbell, M'Arthur v.	208	29 27	Frazer, Purdhomme v.	512	29 171
Capper v. Dando	335	29 142	Garside, Rex v.	33	29 84
Cartmel, Inhabitants of, Rex v.	357	29 162	Gibbons, Betts v.	64	29 29
Chesterman v. Lamb	195	29 48	Gillet, Smith q. t. v.	225	29 118
Clancy v. Piggott	496	29 147	Greenwich & London Railway, In re	458	29 176
Connop v. Yeates	302	29 107	Gregory, doe d. Parker v.	308	29 14
Coombs, Pitt v.	535	29 143	Guyer, Rex v.	158	29 78
Cooper Samuel v.	520	29 203	Gyde, Davis v.	462	29 166
Cottingham, Inhab. of Rex v.	215	29 79	Hadley, Holl v.	515	29 206
Craven, Ayre v.	220	29 11	Hall, Rex v.	546	29 164
Cregina, Inhabitants of, Rex v.	455	29 161	Harborne, Inhab. of, Rex v.	341	29 161
Cresswell, Robins v.	307	29 18	Hargraves v. Hutchinson	11	29 13
Cross, Lord v.	30	29 40	Harris v. Duncan	63	29 55
Dando, Capper v.	335	29 142	—— Edmunds v.	182	29 126
Davis v. Gyde	462	29 166	Hawdon, Atkinson v.	409	29 169
Dawson, Birch v.	22	29 23	Hayter, Nicholas v.	882	29 116
Doe dem. Bullen v. Mills	25	29 16	Heath v. Brindley	235	29 119
—— Marshall v. Roe	553	29 163	Hicks, Moreau v.	563	29 212
—— Parker v. Gregory	308	29 14	Higginson, Bird v.	505	29 56
—— Smith v. Webber	381	28 54	Holder v. Raith	466	29 139
—— Strode v. Seaton	81	29 62	Holl v. Hadley	515	29 206
—— Wetherell v. Bird	285	29 57	Hooper, Lewis v.	318	29 51
—— Wheeler v. Wheeler	10	29 19	Humphrey, Peer v.	430	29 158
—— Williams v. Williams	259	29 122	Hutchinson, Hargreaves v.	11	29 13
Donlan v. Brett	854	29 115	Iken, Inhab. of, Rex v.	117	29 54
Doorman v. Jenkins	170	29 80	In the matter between Bridge and Wright	5	29 26
Doyle v. Anderson	873	29 169	In the matter of Clarke	709	
—— v. Stewart	873	29 169	—— of Fentiman	136	29 47
Duncan, Harrison v.	63	29 55	—— of Oliver	471	29 165
Dunsford, Rex v.	349	29 162	In re, London and Greenwich Railway Company	458	29 176
Edmunds v. Harris	182	29 126	In re Palmer	529	29 177
Emmerson, Boyd v.	99	29 68	—— Walmsley	543	29 162
Ex parte Fentiman	126	29 47	Jenkins, Doorman v.	170	29 80
—— Jones	340	29 136	Jones, Ex parte	340	29 136
—— Law	7	29 26	——, Phillpot v.	14	29 24
Fakenham, Inhab. of, Rex v.	553	29 161	Jordon v. Farr	347	29 137
Falmouth, Earl of, Frankum v.	330	29 140	Keeling, Fox qui t. v.	523	29 173
Farr, Jordan v.	347	29 137	King v. Baker	228	29 110
Fentiman, In the matter of	126	29 47	Lamb, Chesterman v.	195	29 48
Foleshill, Inhabitants of, Rex v.	360	29 164	Law, Ex parte	7	29 26
Ford, Rex v.	451	29 163	Lewis v. Hooper	318	29 51
Fox qui tam. v. Keeling	523	29 173	London & Greenwich Railway Company, In re	458	29 176
Francis, Rex v.	251	29 27			

	4 N. & M.	E. C. L.		4 N. & M.	E. C. L.
Longstaff v. Meagoe	211	29 60	Rex v. Rawden, Inhab. of	97	29 54
Lowe v. Burrows	366	29 152	— v. Shepherd	185	29 100
Lord v. Cross	30	29 40	— v. St. Gregory, Canter- bury, Inhab. of	137	29 42
McArthur v. Campbell	208	29 27	— v. St. James, Westmin- ster, Rector &c. of, ...	252	29 79
Mason v. Morgan	46	29 19	— v. St. John, Hackney	336	29 161
Meagoe, Longstaff v.	211	29 60	— v. St. Martins, Exeter, Inhab. of	388	29 172
Mills, doe dem. Bullen v.	25	29 16	— v. St. Martins, Leicester, Inhab. of	202	29 78
Moreau v. Hicks	563	29 212	— v. St. Nicholas, Colches- ter, Inhab. of	422	29 164
Morgan, Mason v.	46	29 19	— v. Warwickshire, Jus- tices of	370	29 211
Morrice, Pearce v.	48	29 42	— v. Wickham, Inhab. of	406	29 160
Nicholas v. Hayter	882	29 116	— v. Winesham, Inhab. of	447	29 172
Noy v. Reynolds	483	29 144	— v. Wrangle, Inhab. of	375	29 160
Oliver, In the matter of	471	29 469	Reynolds, Noy v.	483	29 144
Owen, Atkins v.	123	29 22	Rigby v. Brooks	3	29 18
Palmer, In re	529	29 177	Robins v. Cresswell	307	29 18
Pearce v. Morris	48	29 42	Roe, doe d. Marshall v.	553	29 163
Peer v. Humphrey	430	29 158	— Blair v. Street	42	29 108
Philpott v. Jones	14	29 24	Rastrow, Bowman v.	551	29 98
Piggott, Claney v.	496	29 147			(a.)
Pkt v. Coombs	535	29 143	Samuel v. Cooper	520	29 203
— v. Williams	412	29 128	Sandall v. Bennett	89	29 78
Plummer, Burton v.	315	29 113	Seaton, doe d. Strode v.	81	29 62
Poynter, Shaw v.	290	29 100	Searle v. Barrett	200	29 41
Prudhomme v. Frazer	512	29 171	Shaw, Bart. v. Poynter	290	29 100
Raith, Holder v.	466	29 139	Shepherd, Rex v.	185	29 100
Rawden, Inhab. of, Rex v.	97	29 54	Shevil, Brown v.	277	29 51
Relph, Bird v.	878	29 211	Smith, qui t. v. Gillett	225	29 118
Rex v. Antrobus	555	29 213	Spence v. Albert	385	29 212
— v. Axbridge, Inhab. of	477	29 160	St. Gregory, Canterbury, In- hab. of, Rex v.	137	29 42
— v. Barnby Dun, Inhab. of	436	29 162	St. James, Westminster, Rec- tor, &c. of, Rex v.	252	29 79
— v. Barnard Castle, In- hab. of	128	29 46	St. John, Hackney, Rex v.	336	29 161
— v. Cambridge, Justices of town of	238	29 121	St. Martin's Exeter, Inhab. of, Rex v.	388	29 172
— v. Cartmel, Inhab. of	357	29 162	St. Martin's Leicester, Inhab. of, Rex v.	202	29 78
— v. Cottingham, Inhab. of	215	29 79	St. Nicholas, Colchester, In- hab. of, Rex v.	422	29 164
— v. Cregrina, Inhab. of	455	29 161	Stewart, Doyle v.	873	29 169
— v. Dunsford	349	29 162	Street, Doe d. Blair	42	29 108
— v. Fakenham, Inhab. of	353	29 161	Sutton Wakeman v.	114	29 39
— v. Foleshill, Inhab. of	360	29 164	Taylor, Bowman v.	264	29 90
— v. Ford	451	29 163	Till-Adam v. Bristol, Inh. of	144	29 125
— v. Francis	251	29 27	Tummon v. Ward	876	28 167
— v. Garside	33	29 84	Wakeman v. Sutton	114	29 39
— v. Gwyer	158	29 78			
— v. Hall	546	29 164			
— v. Harborne, Inhab. of	341	29 161			
— v. Iken, Inhab. of	117	29 54			

TABLE OF CASES.

485

	4 N. & M.	E. O. L.		4 N. & M.	E. O. L.
Walmesley, In re . . .	543	29 163	Williams, Pitt v. . .	412	29 128
Waltham, Watson v. . .	537	29 153	———, doe dem. Williams		
Ward v. Tummon . . .	876	28 167	v.	259	29 122
Warwickshire, Justices of,			Witnesham, Inhab. of, Rex		
Rex v.	370	29 211	v.	447	29 172
Watson v. Waltham . . .	537	29 153	Wrangle, Inhab. of, Rex v. . .	375	29 160
Webber, doe d. Smith . . .	381	28 54	Wright & Bridge, In the mat-		
		29 139	ter between	5	29 26
Wheeler, doe d. Wheeler v. .	10	29 19	Yeates, Connop v.	302	29 107
Wickman, Inhab. of, Rex v. .	406	29 160			

	2 Scott.	E. O. L.		2 Scott.	E. O. L.
Adams, Jackson v.	599	29 371	Darthez, Mitchell v.	771	29 419
Anderson, In re	626	29 387	Doe d. Barrett v. Kemp . . .	9	29 271
Andrews v. Drever	1	29 227	——— Robbins v. Warwick		
Angla, Osborne v.	500	29 349	Canal Company	717	29 402
Astley, Schalts v.	815	29 414	——— Watt v. Morris	276	29 304
			Drever, Andrews v.	1	29 227
Barber, In re	436	29 331	Drummond v. Pigou	228	29 278
Barnes, Edwards v.	411	29 324			
Barnett, Wadilove v.	763	29 410	Edgington v. Nixon	507. 509	29 348
Barrett, doe d. v. Kemp . . .	9	29 271	Edwards v. Barnes	411	29 324
Barrington, Lambert v. . . .	263	29 288	Elliotson v. Feetham	174	29 283
Barrow, Lysons v.	721	29 402	Engler v. Twysden	427	29 328
Beck v. Mordaunt	178	29 285			
Beeseley, Green v.	164	29 275	Falcon v. Newland	105. 113	29 254
Begbie v. Crook	128	29 259	Feetham, Elliotson v.	174	29 283
——— v. Hayne	193	29 278	Finch v. Brook	511. 517	29 349
Bischam, Ireland v.	207	29 267	Flight v. Lord Lake	126	29 259
Blaby, Tarpley v.	642	29 387	——— v. Glossop	220. 223	29 279
Bonsor, Linley v.	399	29 319	Foot, dem. Sheriff, def.	806. 813	29 408
Bowdidge v. Slaney	197	29 285	Foster v. Ley	438	29 331
Bower v. Hill	535. 540	29 355	Fothergill, Pierce v.	334	29 296
Boyce v. Chapman	365	29 314	Fruhling v. Schroder	135. 143	29 260
Boyce v. Hewetson	831. 837	29 428			
Bradshaw v. Skilbeck	294	29 300	Gatcombe, Chapman v.	738	29 408
Briggs, Brook v.	808	29 426	Glassbroke, Green v.	261	29 286
Brogden v. Marriott	703. 712	29 397	Gleadow, Robinson v.	250	29 290
Brook v. Briggs	803	29 426	Glossop, Flight v.	220. 223	29 279
———, Finch v.	511. 517	29 349	Goldney v. Laporte	670	29 395
Brooke v. Turner	611	29 380	Goodfellow, Symes v.	769	29 408
Burnell, Gwynne v.	16	29 228	Goodricke, Hall v.	363	29 319
			Grace v. Morgan	790	29 409
Cannell v. Curtis	379	29 316	Green v. Beesley	164	29 275
Canot v. Hughes	663	29 391	——— v. Glasbrooke	261	29 286
Chapman, Boyce v.	365	29 314	Griffin v. Yeates	845	29 430
——— v. Gatcombe	738	29 408	Groom v. Mealey	171	29 285
Clark Munk v.	475	29 345	Gwynne v. Burnell	16	29 228
Crook, Begbie v.	128	29 259			
Cumpston v. Haigh	684	29 391	Haigh, Cumpson v.	684	29 391
Cursham v. Newland	105. 113	29 254	Hall v. Goodricke	363	29 319
		257	Hayne, Begbie v.	193	29 278
Curtis, Cannell v.	379	29 316	Heath v. Milward	160	29 269
			Hewetson, Boyes v.	831. 837	29 428

	2 Scott.	E. C. L.		2 Scott.	E. L. C.
Hill, Bower v.	535. 540	29 355	Pierce v. Fothergill	334	29 296
Hoffman v. Marshall	559	29 367	Pigon, Drummond v.	228	29 278
Hooper v. Truscott	672	29 395	Plimley v. Westley	423	29 322
Hughes, Canot v.	663	29 391	Raphael, Moon v.	489	29 345
Hungerford Mark. Co. Wilkes v.	446	29 336	Reeves v. Ward	390	29 316
Ireland v. Bircham	207	29 266	Robins, Doe d. v. Warwick Canal Company	717	29 402
Jackson v. Adams	599	29 371	Robinson v. Gleadow	250	29 290
Jacobs, Shirley v.	157	29 266	Rooke Macdonald v.	359	29 312
James v. Salter	750	29 403	Rose v. Savory	199	29 286
Johnston, Sharp v.	405. 407	29 322	Rotherham, West v.	802	29 408
Kemp, Doe d. Barrett v.	9	29 271	Sadler, ten. Mason, dem.	510	29 349
Knight, Yates v.	470	29 335	Salter, James v.	750	29 403
Lake, Flight v.	126	29 259	Savory, Rose v.	199	29 286
Lambirth v. Barrington	263	29 288	Schroder, Fruhling v.	135. 142	29 260
Laporte, Goldney v.	670	29 395	Shultz v. Astley	815	29 414
Le Feuvre, Nicholls v.	146	29 262	Sharp v. Johnson	405. 407	29 322
Leigh, dem. Leigh, ten. 666. 668	29 397		Shirley v. Jacobs	157	29 266
Leonard v. Simpson	335	29 297	Sheriff, def. Foot dem. 806. 813	29 408	
Ley, Foster v.	438	29 331	Short, Marson v.	243	29 278
Linley v. Bonsor	399	29 319	Simpson, Leonard v.	335	29 297
Lowndes, ten. Twynning, dem. 260	29 283		Skilbeck, Bradshaw v.	294	29 300
Lysons v. Barrow	721	29 402	Slany, Bowdidge v.	197	29 285
Macdonald v. Rooke	359	29 312	Smith v. Thomas	546	29 362
Mantell v. Southall	132	29 259	Southall, Mantell v.	132	29 259
Marriott, Brogden v.	703. 712	29 397	Symes v. Goodfellow	769	29 408
Marshall, Hoffman v.	559	29 367	Tansley v. Turner	238	29 288
Marson v. Short	243	29 278	Tarpley v. Blaby	642	29 387
—— Whittaker, v.	567	29 357	Thomas, Smith v.	546	29 362
Martin v. Martin	389	29 319	Truscott, Hooper v.	672	29 395
Mason, dem. Sadler, ten.	510	29 348	Turner, Brooke v.	611	29 380
Mealey, Groom v.	171	29 285	——, Tansley v.	238	29 288
Milward, Heath v.	160	29 269	Twynning, dem. Lowndes, ten. 260	29 283	
Miller, d. Miller, ten. 116, 117. 122	29 258		Twysden, Engler v.	427	29 328
	260		Vincent, Pearce v.	347	29 350
Mitchell v. Darthes	771	29 419	——, Wilcox v.	347	29 350
Moon v. Raphael	489	29 345	Waddilove v. Barnett	763	29 410
Mordaunt, Beck v.	178	29 285	Ward, Reeves v.	390	29 316
Morgan, Grace v.	790	29 409	Warwick Canal Company Doe d. Robinson v.	717	29 402
Morris, Doe d. Watt v.	276	29 304	Watt, Doe d. v. Morris	276	29 304
Munk v. Clark	475	29 345	West v. Rotherham	802	29 408
Newland, Cursham v.	105. 113	29 254	Westley, Plimley v.	423	29 322
	257		Whittaker v. Marson	567	29 357
—— Falcon v.	105. 113	29 254	Whitton v. Peacock	630	29 375
	257		Wilcox v. Vincent	347	29 350
Nicholls v. Le Feuvre	146	29 262	Wilkes v. Hungerford Market Company	446	29 336
Nixon, Edgington v.	507. 509	29 348	Yates, Griffin v.	845	29 430
Osborne v. Angle	500	29 349	—— v. Knight	470	29 336
Peacock, Whitton v.	630	29 375			
Pearce v. Vincent	347	29 350			

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas,

AND

EXCHEQUER CHAMBER,

DURING

May, Easter, Trinity & Michaelmas Terms,

IN THE

THIRD AND FOURTH YEARS OF THE REIGN OF WILLIAM IV. 1833.

BY JOHN BAYLY MOORE,

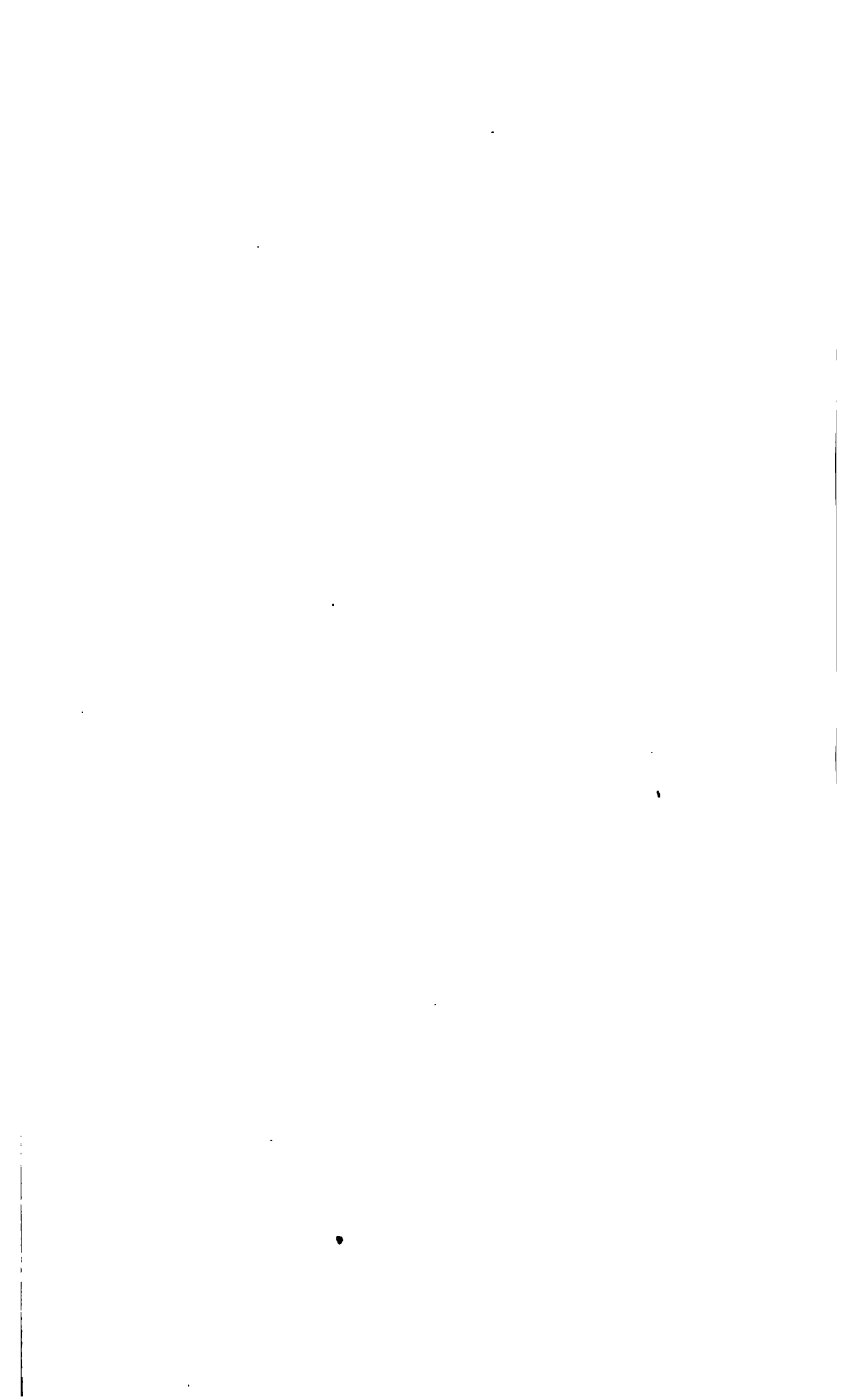
OF THE INNER TEMPLE, ESQ.,

AND

JOHN SCOTT,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

VOL. III.



CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS.

IN

Easter Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.—1833.

MILLARD, Gent., One &c., v. MILLMAN.—p. 63.

Since the statute 2 Will. 4, c. 39, s. 8, it is not necessary to remove by habeas corpus a prisoner in the custody of the Marshal of the King's Bench, to the custody of the Warden of the Fleet, in order to declare against him in this court, where the action is commenced by writ of *summons* or *capias* under the authority of that act.

ALLAN and Another v. KENNING.—p. 80.

On motion for a nonsuit on the ground of a variance between the declaration and the contract of guarantie therein set forth, or for a new trial on the ground that the guarantie was not continuing, the court, being of opinion that the defendant was liable upon the contract, but that it was improperly declared on, made a rule that the verdict which had been found for the plaintiffs for the sum secured, should stand, but that the defendant should be allowed to deduct therefrom his costs of the trial and of the motion. On taxation, the officer allowed to the plaintiff his costs up to the notice of trial, and to the defendant all the subsequent costs. Held, that he had done right.

JAY v. BYLES,—p. 86.

A cause was referred to an arbitrator, with liberty to him to state upon his award any point of law raised by either party in reference to the matters thereby referred. Certain points of law were accordingly submitted to the arbitrator, which he set out upon his award, (but without reference to any particular state of facts,) and certified that he had over-ruled them. The arbitrator's decision upon these points, as abstract propositions, being correct, the court refused either to refer it back to him to amend his award by setting forth the facts upon which the questions of law arose, or to set aside the award.

ALL matters in difference in this cause were by an order of *Nisi Prius* referred to the arbitration of a barrister. The order of reference contained the following provision—"That the arbitrator shall state on his award any point or points of law raised by either party, in reference to the matters hereby referred." The arbitrator, in his award, after adjusting the amount of damages, proceeded

thus: "And I do certify and declare that the following objections and points of law have been raised before me, on behalf of the defendant, in reference to the matters so as aforesaid to me referred, that is to say—first, 'that no action at law will lie by one partner against another, for money paid or work or labour performed by one partner on behalf of the partnership'—second, 'that no action will lie for contribution for damages paid by one partner for the partnership, in respect of a tort'—third, 'that no verdict can be maintained by one partner against his copartner for contribution for damages awarded against that one in an action on the case for negligence, where the cause of action accrued during the partnership,—and fourth, 'that no action will lie by one partner for contribution for damages awarded generally for causes of action accruing during and subsequent to the dissolution of partnership.' But it appearing to me, after hearing the arguments of counsel upon the said objections, and upon consideration of the evidence adduced before me in the said reference, that none of the said objections ought to prevent the plaintiff from maintaining the said action against the defendant, I have over-ruled the same."

Mr. Serjeant *Merewether*, in the last term, moved that the award might be referred back to the arbitrator to be amended by setting forth the facts upon which the above questions of law arose. He submitted that the parties could not otherwise take the opinion of the Court upon the correctness of the arbitrator's conclusions, which it was intended they should have an opportunity to do.

But the Court said they thought the arbitrator had acted very judiciously, and that there was no pretence for the application; and that he seemed, (very properly,) to have had no doubt in his mind upon any of the points of law that had been submitted to him, and which he had stated upon his award. The rule was therefore refused.

The learned serjeant now moved that the award might be set aside, on the ground of error in point of law in the arbitrator's decision.

Lord Chief Justice TINDAL. The broad propositions submitted to the arbitrator, and stated upon the award, clearly are not tenable. He has done right; and therefore there being nothing erroneous on the face of the award, we cannot set it aside.

The rest of the Court concurring—

Rule refused.

UPTON v. FERGUSSON.—p. 88

The plaintiff took of the defendant a house, at a *yearly* rent, under an agreement, by the terms of which the latter undertook, that, up to the date of the agreement, he had paid or would pay or discharge "all arrears of *rent*, rates, taxes, or assessments;" and the former agreed, that "from and after that day, *the same* should be kept paid by him for the period he might occupy the premises." At the expiration of the *first quarter*, the superior landlord distrained for rent. Held, that there was no implied duty in the defendant to indemnify the plaintiff against this claim, although the agreement between them stipulated for a *yearly* rent; the defendant having, by the subsequent clause, expressly undertaken to keep the reserved rent paid.

THIS was an action on the case brought by the plaintiff to recover from the defendant damages alleged to have resulted to the plaintiff from a supposed breach of an implied duty in the defendant to indemnify the plaintiff, to whom he had agreed to let certain premises, from the consequence of his, the defendant's, failure to pay the rent reserved to the superior landlord.

The declaration contained three counts. The first count stated, that, before and at the committing of the grievances by the defendant as thereafter next mentioned, the defendant held and enjoyed certain premises as tenant thereof to one Sarah Brownell, to wit, in the county of Surrey; that, whilst the defend-

ant was such tenant to the said Sarah Brownell, and before and at the time of the committing of the grievances thereafter next mentioned, to wit on the 29th of September, 1832, to wit, in the county aforesaid, the plaintiff, at the special instance and request of the defendant, had become and was tenant to the defendant of the said premises with the appurtenances, at and under a certain yearly rent, to wit, the yearly rent of 270*l.*; and thereupon it then and there became and was the duty of the defendant, so long as the defendant continued such tenant to the said Sarah Brownell, and so long as the plaintiff continued such tenant to the defendant, and paid the said rent of 270*l.* to the defendant, for him to pay the said first-mentioned rent to the said Sarah Brownell, and to indemnify and save harmless the plaintiff from and against the payment of any of the said rent so payable to the said Sarah Brownell, over and above the amount of the said rent so payable to the defendant as aforesaid, which might be due and in arrear from the plaintiff to the defendant, and from and against any distress, or costs, charges, damages, or expenses which should or might or might be made, arise or happen to the plaintiff for or by reason of the non-payment thereof; and although the said tenancy of the defendant to the said Sarah Brownell and the said tenancy of the plaintiff to the defendant were and continued for a long time to wit, until and after the committing of the grievances thereafter next mentioned and hitherto; and although no part of the said rent of 270*l.* had yet become due and payable from the plaintiff to the defendant; yet the defendant, not regarding his duty aforesaid, but contriving and fraudulently intending to injure and defraud the plaintiff, did not nor would, during the continuance of the said tenancies, pay the said first mentioned rent to the said Sarah Brownell, or save harmless or indemnify the plaintiff, according to his said duty, but wholly neglected so to do; and by reason thereof, during the continuance of the said tenancies, to wit, on the 9th of February, 1833, to wit, in, &c., a certain distress was made, by and on behalf of the said Sarah Brownell, on divers goods and chattels of the plaintiff, to wit, &c. &c., of great value, to wit, of the value of 200*l.*, then in and upon the said premises, for a certain sum of money amounting to the sum of 67*l.* 10*s.* then due and in arrear from the defendant to the said Sarah Brownell for and in respect of the said rent so payable to her as aforesaid; and the said Sarah Brownell kept and detained the said goods and chattels of the plaintiff under the said distress for a long space of time, to wit, until the 11th day of February, 1833, until the plaintiff, on, &c., in order to regain possession of the said goods and chattels, was forced and obliged to, and did, replevy the same, and was therein and thereby, put to a great expense, amounting, to wit, to 20*l.*; and by means of the premises the plaintiff would be forced and obliged to pay to the said Sarah Brownell the said arrears of rent so due and owing to her from the defendant, and the costs and charges of the said distress and incident thereto; and the plaintiff had been and was much prejudiced, injured, and damaged by means of the premises, to wit, in, &c.

The second count was in substance the same as the first; the third was in trover for the goods and chattels mentioned in the first count. The defendant pleaded the general issue.

At the trial before Lord Chief Justice Tindal, at the last Assizes at Kingston, the facts that appeared in evidence were as follows:—In the month of September last, the defendant who held the premises in question of Mrs. Sarah Brownell, under a lease of assignment, of which one year and a quarter were then unexpired, entered into the following agreement with the plaintiff:—

“The said John Ferguson agrees to let to the said John Upton all the house and premises No. 54, Strand, late in the occupation of P. P. H. Roberts at the yearly rent of 270*l.*, from the 29th instant, up to which day the said John Ferguson has or will bear, pay, discharge, or allow to the said John Upton any and all arrears of rent, rents, rates, taxes, or assessments, (if any are left unpaid,) to the 29th instant; and that, from and after that day, the same are to

be kept paid by the said John Upton for the period he may occupy the said house and premises, and which is agreed to be for the whole of the unexpired term now to come in a lease of one year and a quarter of another year from Michaelmas day instant, wanting the number of days provided for surrendering as in the said lease contained, &c. &c."

The plaintiff was let into possession of the premises under the above agreement, and, shortly after the expiration of the first quarter, the defendant's landlady, Mrs. Brownell, distrained upon the plaintiff's goods for 67*l.* 10*s.*, for a quarter's rent due to her from the defendant.

His lordship nonsuited the plaintiff, giving him leave to move to enter a verdict for 10*l.*, the costs he had incurred in replevying, should the Court be of opinion that the agreement above set out imposed upon the defendant the duty of indemnity contended for by the plaintiff.

Mr. Serjeant *Taddy* now moved accordingly. Under the agreement in question, no rent would be due from the plaintiff to the defendant until the expiration of a year from the taking: the agreement stipulating for a *yearly* rent. The defendant himself had no right of distress; he by the agreement had parted with the whole of his interest in the premises, and therefore it operated in law as an assignment. The defendant's landlady, Mrs. Brownell, undoubtedly had a right to distress; but the question whether it is not a necessary inference from the defendant's contract with the plaintiff, that he was bound to indemnify him from the claim of Mrs. Brownell. In *Burnett v. Lynch*, 8 Dow. & Ry. 368; S. C. 5 Barn. & Cress. 589, it was held that case lies by the assignor against the assignee of a lease assigned by deed-poll, upon his implied duty to perform the covenants in the original lease, although the assignor had by the assignment parted with all his interest: and in *Hancock v. Coffin*, 7 M. & Scott, 521, where the defendant held premises under a lease from one J. H., at a certain rent, and entered into an agreement with one N. for the sale of all the household furniture, &c. on the premises, for a certain sum, to be paid by instalments—covenanting on payment of the whole of the purchase-money, to demise the premises to N. for twenty-five years; the lease to contain the like covenants on the part of N. as were contained in the lease under which the defendant held. The agreement also contained a covenant that N. should in the mean time, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted; with a power of distress for non-payment of the rent. N. was let into immediate possession under this agreement, and paid rent. The defendant neglecting to satisfy the rent due to the superior landlord, the latter distrained and sold the goods of N. The Court held that there was an implied duty in the defendant to indemnify N. from the consequences of non-performance of his covenants with the superior landlord.

Lord Chief Justice TINDAL. I thought at the trial, and still think, that the understanding of the parties must have been, that, from the time the plaintiff took the premises, he was to be looked to by the landlady, Mrs. Brownell, for the rent thereafter to become due; and that the defendant was thenceforth to be discharged from all responsibility, he having parted with the whole of his interest in the premises. By the terms of the agreement, the defendant undertakes that, up to the 29th September, the date of the instrument, he "has or will bear, pay, discharge, or allow to the said John Upton any and all arrears of rent, rents, rates, taxes, or assessments;" and the plaintiff agrees, that "from and after that day, the same are to be kept paid by the said John Upton for the period he may occupy the said house and premises." The agreement gave the plaintiff notice of the lease under which the defendant held the premises; he ought to have inquired into the terms of that lease; had he done so, he would have ascertained that the rent was reserved to be paid quarterly to Mrs. Brownell. As, therefore the plaintiff has in terms undertaken to keep down the rent, I think the nonsuit was right.

Mr. Justice PARK. I am by no means prepared to say that this was so strictly a *yearly* rent as to prevent the defendant from demanding it in the usual manner. At all events, the plaintiff had notice of the lease under which the defendant held, and he took subject to it. I therefore concur in thinking that the nonsuit should not be set aside.

The rest of the Court concurring—

Rule refused.

MARSHALL v. THOMAS.—p. 98.

It is no ground of special demurrer that the plaintiff omits to describe the nature of the action at the commencement of the declaration, pursuant to the rule of Michaelmas Term, 1654.

By the terms of a charter-party it was stipulated that the freight should be paid "one third in cash on arrival, and the remainder on delivery, by good and approved bills on or payable in London, at four months' date." In the declaration thereon, the breach was stated generally, that the defendant had not paid the freight "according to the terms of the charter-party."—Held sufficient, on special demurrer.

THIS was an action of assumpsit upon a charter-party. The declaration commenced as follows:—

"Lancashire (to wit). John William Marshall (the plaintiff in this suit) complains of John Wood Thomas (the defendant in this suit), who has been summoned to answer the said plaintiff—For that whereas, &c."

By the terms of the charter-party, the freight was to be paid "one third in cash on arrival, and the remainder on delivery, by good and approved bills on or payable in London, at four months' date." The first count of the declaration, after setting out the charter-party, the shipment under it, and the amount of freight, proceeded as follows: "Of all which premises the defendant then and there had notice, and was then and there requested by the plaintiff to pay the said sum of 940*l.* 0*s.* 7*d.* in the manner in the said charter-party mentioned, to wit, in, &c.; Yet the defendant had not yet paid to the plaintiff the said last-mentioned sum of money, or any part thereof, but to pay the same or any part thereof to the plaintiff, according to the terms of the said charter-party, or in any other manner, the defendant had hitherto wholly refused, and still did refuse, &c." The second count was similar.

The defendant demurred specially—as to the commencement of the declaration—"For that every declaration, in the commencement thereof, should state and shew, for the information of the Court and the defendant, in a concise way, the form of the action, whether it be in an action on promises or otherwise; nevertheless the said declaration does not in the commencement thereof in any way show the form of the action, nor does it, as it ought to do, show in what plea the defendant was summoned to answer the plaintiff as therein stated:" and, as to the first count—"That, in and by the charter-party in the said first count mentioned, the freight was to be paid, one third in cash on arrival, and the remainder on delivery, by good and approved bills on or payable in London, at four months' date: nevertheless, in stating a breach of the non-payment by the defendant of that freight, the plaintiff hath not positively and with sufficient certainty averred that the defendant ever refused or neglected to pay the same by such bills, but hath merely alleged that the defendant hath not paid the said freight according to the terms of the said charter-party, or in any other manner; and which mode of stating the breach is too general, indefinite, and uncertain: And also for that it is not in or by the said first count stated or alleged that the plaintiff ever tendered to the defendant any bill of exchange for the payment of the said freight, or that the plaintiff ever requested the defendant to pay the same by bills." There was a similar demurrer to the second count. The plaintiff joined in demurrer.

The case now came on for argument.

Mr. Serjeant *Wilde*, in support of the demurrer. In the commencement of his declaration the plaintiff has departed from the known course of pleading. By a rule of Court of Michaelmas Term, 1654, "For avoiding of long and unnecessary repetitions of the original writ in actions upon the case, and personal actions upon penal statutes," it is ordered, "That declarations in actions of trespass upon the case, or personal actions upon any general statute, &c., and such like, other than debt, repeat not the original writ, but only the nature of the action, viz. A. B. was attached to answer C. D. in a plea of trespass upon the case," &c. That rule has been acted upon ever since. In the present case the declaration has departed from the course there pointed out, and is therefore bad on special demurrer. Where, by the terms of a contract, several things are required to be done, it is the duty of the party alleging a breach of that contract, to negative the performance of each in terms. Here, by the charter-party, the freight was to be paid in two different modes, viz. one third on the ship's arrival, and the remainder on delivery of the cargo, by good and approved bills at four months' date. The plaintiff ought to have negatived the payment in either of the modes pointed out.

Mr. Serjeant *Stephen*, contra, was stopped by the Court.

Lord Chief Justice TINDAL. The rule of 1654, which required the writ to be shortly set out at the commencement of the declaration, was a mere rule of Court, the disobedience to which is not to be visited like the breach of a positive law. The form of the commencement used in this case is not bad according to the law of the land. With regard to the general breach assigned in the first and second counts, viz., that the defendant had not paid the freight "according to the terms of the charter-party," I think that statement sufficient.

The rest of the Court concurring—

Judgment for the plaintiff.

BANBURY, Plaintiff, HARPER and Wife, Deforciant.—p. 101.

Where in levying two fines between the same parties, the one sur concessit, the other sur cognizance de droit, the parcels had by mistake been transposed, the court allowed the fines to be amended, so as to make them conformable with the deed to lead the uses.

POND v. DIMES.—p. 161.

The court permitted the examination of a witness before the prothonotary, under the statute 1 Will. 4, c. 22, (on payment of costs), upon the affidavit of his medical attendant, who swore that he was in a *precarious* state, and could not attend at the trial without great danger.

Mr. Serjeant *Storks*, on the part of the defendant, on a former day, obtained a rule calling on the plaintiff to show cause why the evidence of one Outhwaite should not be taken viva voce before the Prothonotary, and why such examination, to be certified under the hand of the Prothonotary, should not be read and given in evidence on the trial of the cause, saving all just exceptions thereto, pursuant to the statute 1 Will. 4, c. 22. The motion was founded upon the affidavit of a surgeon, who deposed that he had attended the witness professionally for eight or nine months last past; that he had been for some time past seriously ill, and his life was then in a *very precarious state*; and that his confinement in a crowded room or Court of law, for even a short period, might, in the judgment of the deponent, be attended with the most fatal consequences to the witness.

Mr. Serjeant *Wilde*, contra, submitted that the affidavits did not disclose a case for the interference of the Court; and that, to dispense with the personal attendance of a witness before the Court and jury, the affidavit should be such as to satisfy the Court that a positive danger would be likely to be incurred by the witness if compelled to appear.

Lord Chief Justice TINDAL. Applications of this nature certainly are not to be lightly entertained: but, as the affidavit of the medical attendant of the witness states his life to be in a very *precarious* state, I think we may allow the examination, although perhaps the case is barely brought within the statute, on payment of costs.

Mr. Justice ALDERSON. The examination will not prejudice the opposite party: it will be only *de bene esse*; for, by the 10th section of the statute, it is enacted, "that no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable, from *permanent* sickness, or other *permanent* infirmity, to attend the trial."

The rest of the Court concurring—

Rule absolute, on payment of costs.(a)

WRIGHT v. WARREN.—p. 163.

A motion to set aside the service of a writ of summons on the ground of an irregularity in the indorsements thereon, and that it is directed to a different county from that into which the distringas is issued, must be made within a reasonable time after the service thereof.

Semble, that eighteen days is an unreasonable delay in this respect, provided the defendant might have come earlier.

Mr. Serjeant *Talfourd*, on the 17th instant, obtained a rule nisi that the service of the writ of distringas in this case might be set aside for irregularity, on the grounds, among others, that the name of the attorney by whom the writ of summons had been sued out was not properly indorsed thereon, and that the writ of summons had been issued into the county of Middlesex, and the distringas into London.

Mr. Serjeant *Wilde* now showed cause, on an affidavit which stated that the writ of summons was served upon the 30th of March. He therefore submitted that the application was made too late; referring to rule 33, Hilary Term, 2 Will. 4, which provides that "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity."

Mr. Serjeant *Talfourd*, in support of this rule, submitted that the writ was a nullity, the requisitions of the statute as to the indorsements not having been complied with.(b)

Lord Chief Justice TINDAL. By rule X. of Michaelmas Term, 3 Will. 4, it is ordered, "that, if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act (b) to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular, upon appli-

(a) See *Abraham v. Norton*, 1 M. & Scott, 384, where the court refused to grant an order for the examination before the prothonotary (pursuant to the statute) of a female witness, upon an affidavit that the cause was set down for trial at the sittings after Hilary Term, and that the witness was expected to be confined in the month of February or March, and therefore would be unable to attend.

(b) See the statute, 2 Will. 4, c. 39, s. 12.

cation to be made to the Court out of which the same shall issue, or to any judge." The writ in this case therefore is not void. That which is complained of is a mere irregularity; and then the question comes round to the 33d rule of Hilary Term, 2 Will. 4, which provides that no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time. Can we say that an application is made within a reasonable time, when the writ of summons is served on the 30th March, and the rule to set aside the service is not moved for until the 17th of April? I am clearly of opinion that the motion was too late, and therefore that the rule must be discharged with costs.

Mr. Justice PARK concurred.

Mr. Justice GASELEE. Rule X. of Michaelmas Term, 3 Will. 4, is not imperative.

Mr. Justice ALDERSON. According to the statute, the distringas must go to the *place of abode* of the defendant. The writ of summons, however, may issue into any county where the party may reside or *be*.

Rule discharged, with costs.

DUEAR v. MACKINTOSH.—p. 174.

The costs of the applicant under the interpleader act, where he has acted *bonâ fide*, will in the first instance be directed to be paid out of the fund or the produce of the thing in dispute, to be repaid by the party ultimately unsuccessful.

THIS was a motion under the interpleader act, 1 & 2 Will. 4, c. 58. The debt for which the action was brought was claimed by two parties. The defendant prayed for costs.

Lord Chief Justice TINDAL. It seems to me that the better course for us to pursue with respect to costs would be to follow, as nearly as possible, the practice of the Courts of equity. There, where it appears that all parties have acted properly, the fund is charged with the costs. I therefore think that in this case the fund should, in the first instance, be charged with the defendant's expenses of the motion. We cannot throw the costs upon either of the contending parties, inasmuch as it is not yet ascertained which is in the wrong.

Mr. Justice PARK. I see no objection to the fund being charged in the first instance: the party who may ultimately turn out to be wrong paying the costs eventfully.

The rest of the Court expressing no dissent—

Rule accordingly.(a)

SMITH v. WIGLEY and TUNNICLIFFE.—p. 174.

W. & T., partners, were indebted to the plaintiff, and, after the dissolution of the partnership, T. also became indebted on his separate account to the plaintiff:—Held, that, in the absence of any specific appropriation by either party, payments made by T. after the dissolution must go in reduction of the entire account, and consequently must discharge the earlier items.

THIS was an action of assumpsit brought by the plaintiff, a news vender, against the defendants, news agents at Coventry, for the price of newspapers supplied to them. The particular of demand delivered by the plaintiff was as follows:—

(a) And see *Cotter v. The Bank of England*, post, 286.

	£	s.	d.
Bill delivered to 14th January, 1831	84	10	0
Then followed various small items, up to the 14th July, 1831, amount- ing in the whole to	115	10	0
Or.	200	0	0
By cash remitted 19th January, 1831	20	0	0
Do. " " 1st March	20	0	0
Do. " " 17th May	35	0	0
	75	0	0

The defendant Tunncliffe pleaded his discharge under the insolvent debtor's act. Wigley pleaded the general issue. The cause was tried before Lord Chief Justice Tindal, at the Sittings after the last term. The defence on the part of Wigley was, that, on the 14th January, 1831, the partnership between Tunncliffe and himself had been dissolved, of which notice had been duly given to the plaintiff; and that the papers had since that date been supplied upon the credit of Tunncliffe only: and he claimed to set off the remittances (made by Tunncliffe) on the 19th January, 1st March, and 17th May, amounting to 75*l.*, against the 84*l.* 10*s.*, the amount of the bill delivered on the joint account of Wigley and Tunncliffe, to the 14th January, 1831. The difference between these two sums had been paid into Court. It was contended, on the part of the defendant, that, as the account was entire, the payment must, upon the authority of Clayton's case, 1 Meriv. 604, and the other cases of that class, be set against the earlier items, in the absence of any specific appropriation either by the payer or the payee.

His lordship thought that it was impossible for the plaintiff, after the particular delivered by him, to contend that the two accounts were not blended together and made one. The plaintiff was thereupon nonsuited.

Mr. Serjeant *Stephen*, on a former day in this term, obtained a rule nisi that the nonsuit might be set aside and a new trial had. He submitted that the construction put upon it at the trial was dealing much too strictly with the bill of particulars, which was never understood as intending to put the plaintiff's demand into any legal shape. [Mr. Justice ALDERSON. The safer course would be, not to give any credit in the particulars; but merely to state what the plaintiff claims in the whole, and then state what he goes for.]

Mr. Serjeant *Merewether* now showed cause. The nonsuit was correct. Where sums are paid without any specific appropriation, the law applies them in reduction of the earlier items of the account. That doctrine was first laid down in Clayton's case, afterwards adopted in *Bodenham v. Purchas*, 2 Barn. & Ald. 89; and further recognised in *Simons v. Ingham*, 2 Barn. & Cress. 65; S. C. 2 Dow. & Ryl. 249. In *Bodenham v. Purchas*, Mr. Justice Bayley says, 2 Barn. & Ald. 45: "The principle established by the decisions is this, that, where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases; but, where the accounts are treated as one entire account by all parties, that rule does not apply." And in *Simson v. Ingham*, the same learned judge says, 2 Barn. & Cress. 72: "The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. (a) If he does not

(a) A person who is indebted to another on two several accounts may, on paying him money, ascribe it to which account he pleases; and his election may either be expressed or may be inferred from the circumstances of the transaction; but, if the payer does not pay specifically on one account, the receiver may afterwards appropriate the payment to the discharge of either of the accounts that he pleases; and, if he sue on one account, semble, that he thereby declares his election, and the defendant cannot, by a subsequent notice of set-off, elect to which account he will ascribe the payment. *Peters v. Anderson*, 5 Taunt. 596; S. C. 1 Marsh. 239.

make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz. that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt." The principles thus clearly defined in these cases must govern the present; for, here, there was no specific appropriation by either party, and the two accounts were dealt with by the plaintiff himself as one entire account.

Mr. Serjeant *Stephen*, in support of his rule. The law upon the subject of appropriation of payments certainly is pretty much as has been stated. Where there are two accounts, and a general payment has been made, and there has been no specific appropriation of it by the debtor in discharge of either, it is in the power of the creditor to apply it to which account he pleases. In the present case, the payments made by Tunncliffe would *prima facie* go in discharge of the debt due from him. [Lord Chief Justice TINDAL. The state of the account upon the 19th January, the day on which the first 20*l.* were paid, shows *quo animo* the payment was made. Tunncliffe was liable for the whole account: and, on that day, there was not so much as 20*l.* due upon the new account.] In *Thompson v. Brown*, 1 Moody & Malkin, 40, it was held, that, though money paid generally ought to be applied to the first items in the account, yet, where there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money is money of the partners, the creditors may not apply it to the private debt of the individual. Lord Chief Justice Abbott there says: "The general rule certainly is, that, when money is paid generally, without any appropriation, it ought to be applied to the first items in the account; but the rule is subject to this qualification, that, when there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual: that would be allowing the creditor to pay the debt of one person with the money of others." So, here, the payments cannot be applied exclusively in discharge of the old account, inasmuch as the effect of such application would be to charge a fund not properly chargeable with that debt.

Lord Chief Justice TINDAL. It appears to me that this rule ought to be discharged. This is a case in which two distinct accounts are involved; one a joint account due from Wigley and Tunncliffe to the plaintiff, up to the 14th January, 1831; the other a separate account for goods supplied by the plaintiff to Tunncliffe alone from the 14th January to the 14th July. Tunncliffe therefore was liable to the plaintiff to the full extent of both the accounts. This being the state of circumstances, Tunncliffe, on the 19th of January, makes a payment to the plaintiff of 20*l.*, and on the 1st March and 14th May, to other similar payments of 20*l.* and 35*l.*; all which payments were made without any specific appropriation on the part of Tunncliffe to either of the two accounts. The question is, whether, upon the evidence, it appeared that Tunncliffe, who by law had the first right of appropriation, has appropriated the payments to any particular part of the account. I am of opinion that enough appears to show that he has expressed his intention to apply them generally in reduction of the whole account; for, at the time the first payment of 20*l.* was made, there was a very small sum only due from Tunncliffe to the plaintiff on the separate account; and there is no distinction as to his intention with regard to the subsequent payments. Upon the evidence, therefore, I say that Tunncliffe has in point of fact applied the sums remitted by him generally in reduction of the plaintiff's demand upon both the accounts. Then, supposing the conduct of Tunncliffe not to amount to an indication of intention so to appropriate the pay-

ments, has the plaintiff, who in the next place has the right, (a) signified his intention to set the sums received by him against the latter part of the account exclusively? In the absence of appropriation by the debtor, the creditor must make the appropriation at the time the money comes to his hands. Here, there was no evidence that the plaintiff had ever applied the payments in question in discharge of the separate debt of Tunncliffe. Indeed, he could not do so as to the first payment of 20*l.*; for, at that time, nothing like that sum was due upon Tunncliffe's separate account. One cannot help seeing, on looking at the bill of particulars, that the plaintiff, at the time he received the money, assented to its application in reduction of the account generally; though I desire to be understood as not deciding this case upon the construction of the bill of particulars, but upon the general rule of appropriation, which the law directs in the absence of any specific appropriation by the parties themselves, according to the rule laid down in Clayton's case, in *Bodenham v. Purchas*, and in *Simson v. Ingham*. The case of *Thompson v. Brown* cannot apply, because Tunncliffe was liable to the plaintiff for the entire debt due upon both accounts.

Mr. Justice PARK. I am of the same opinion. I cannot distinguish this case from *Bodenham v. Purchas*, and *Simson v. Ingham*.

The rest of the court concurring—

Rule discharged.

COTTER v. The BANK of ENGLAND.—p. 180.

A lien attaching upon the goods in dispute does not prevent the party who holds them from applying to the court for relief under the interpleader act.

A party fairly applying for relief under the interpleader act is entitled to his costs out of the fund, or out of the proceeds of the goods in dispute.

CERTAIN bullion had been deposited in the Bank of England by the plaintiff. Two persons, of the names of Harris and Guest, assignees of Matthie and another, bankrupts, claimed it as belonging to the estate of Matthie & Co. The Bank are in the habit of allowing bullion to be deposited with them for security by the importers, the Bank paying the freight and charges upon it, and having a lien upon it for their payment of the money thus advanced: but they make no additional charge to the owners. In the present case, the Bank having received notice of the claim of Harris and Guest, and refusing to deliver the bullion in question to the plaintiff, the present action was commenced against them to recover it. Under these circumstances—

Mr. Serjeant *Wilde*, on the part of the Bank, on a former day in this term, obtained a rule nisi for relief under the interpleader act, 1 & 2 Will. 4, c. 58. The Bank disclaimed all interest in the subject-matter of the suit, and offered to bring the proceeds of the bullion into Court, deducting the amount of their claim upon it for freight and charges, or otherwise to deal with it as the Court should think fit.

Mr. Serjeant *Coleridge*, for the plaintiff, opposed the motion, on the ground that certain proceedings had already been taken both before the Lord Chancellor and the Vice Chancellor with respect to the bullion; and therefore he submitted that this Court could not interfere. It appeared, however, that those proceedings were not in the nature of an interpleader. The learned serjeant further contended, upon the authority of *Braddick v. Smith*, 2 M. & Scott, 181;

(a) See *Campbell v. Hodgson*, Gow, 74; *Hall v. Wood*, 14 East, 243, n.; *Kirby v. The Duke of Marlborough*, 2 Mau. & Selw. 18.

A creditor receiving money without any specific appropriation may be permitted in a court of law to ascribe his receipt to the discharge of a prior and purely equitable debt, and to sue at law for a subsequent legal demand. *Bosanquet v. Wray*, 6 Taunt. 597; S. C. 2 Marsh. 319.

S. C. 9 Bing. 84, that the Courts of law could not grant relief under the statute in cases where the intermediate party claimed a lien upon the goods which were the subject of the motion.

Mr. Serjeant *Bompas*, appeared for Harris and Guest, the claimants, and consented to abide the order of the Court.

Mr. Serjeant *Wilde*, in support of his rule. The proceedings in Chancery are not such as would afford the relief intended to be given by the 1 & 2 Will. 4, c. 58. This case is distinguishable from *Braddick v. Smith*, there, the Court refused to interfere, because the claim of lien attached only to one of the parties by whom the goods were claimed; whereas, here, the freight must be paid by whichever party ultimately turns out to be entitled to the bullion. With respect to the costs—in *Aldridge v. Mesner*, 6 Vesey, 418; and *Farebrother v. Pratter*, 1 Daniell, 64, it is laid down as a general rule, by the Lord Chancellor, that, in all cases, a party coming to interplead fairly is entitled to his costs. As therefore, the Bank would clearly have been entitled to their costs on filing a bill of interpleader, they are equally entitled to them when availing themselves of the substituted and less expensive proceeding. The fund should be charged.

Lord Chief Justice TINDAL. It appears to me that this case is within both the principle and the words of the act. It recites that "whereas it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay;" for remedy thereof, it goes on to enact "that, upon application made by or on the behalf of any defendant sued in any of his majesty's courts of law at Westminster, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party, who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court, or to pay or dispose of the subject-matter of the action in such manner as the Court, (or any judge thereof,) may order or direct, it shall be lawful for the Court, or any judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and, upon such rule or order, to hear the allegations, as well of such third party as of the plaintiff, and in the mean time to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable." Looking at the facts of the present case, I can see no mode in which the defendants could obtain relief against the conflicting claims of the parties, except by a bill of interpleader. I was at first inclined to think that the matter might have been settled by the proceedings that have taken place in equity; but that appears not to be so; the rights of the Bank, as stake-holders between the parties, do not appear to have been brought before the Court of Chancery; a bill of interpleader would have been necessary for that purpose. The case therefore stands clear of that objection. Now, in order to bring themselves within the 1 & 2 Will. 4, c. 58, the intermediate parties must show that they have no interest in the subject-matter of the suit. Here, the Bank disclaim all interest in the bullion; they merely claim a lien upon it in respect of the freight and charges

they have paid on account of it. They do not, however, seek to charge one party or the other; they charge the bullion. The case therefore seems to me to be distinguishable from *Braddick v. Smith*. With respect to costs, I think we must decide as we did the other day, in the case of *Duear v. Mackintosh*, ante, page 496, viz. that the bank shall be paid their costs in the first instance out of the funds, or out of the proceeds of the bullion.

Mr. Justice PARK. Unless we were to hold a case like the present to be within the act, we should avert all the benefit it was intended to produce.

Mr. Justice GASELLEE concurred.

Mr. Justice ALDERSON. The real question is, what is the subject-matter in dispute between the parties. It is not simply the bullion, but the bullion subject to the lien of the Bank for the freight and charges which they have paid on account of it. In *Braddick v. Smith* the lien attached upon one party only.

Rule absolute, the form to be settled by a Judge at chambers.

ASHTON v. NAULL.—p. 184.

Where there have been mutual dealings between a plaintiff and defendant, and each has a demand against the other, and the former arrests the latter for the whole amount of one side of the account, with full knowledge of at least a part of the defendant's demand against him, although the defendant has neglected or refused to deliver his account, the plaintiff is liable to costs under the 43 Geo. 3, c. 46, s. 3.

THE plaintiff and defendant had had dealings with each other, in the course of which the latter was indebted to the former in the sum of 105*l.* 17*s.* 6*d.*: the sum due to the defendant from the plaintiff was unascertained, the defendant not having furnished his account; but a part of it consisted of a sum of 39*l.* 9*s.* 11*d.*, the price of certain bricks and tiles supplied by the defendant to the plaintiff. The plaintiff arrested the defendant for the whole amount of the debit side of the account, without giving him credit for the goods that had so been furnished to him by the defendant. The cause was referred; and the plaintiff ultimately recovered, by the certificate of an arbitrator, 17*l.* 1*s.* 11*d.* only.

Mr. Serjeant *Wilde*, upon an affidavit of these facts, on a former day in this term, obtained a rule nisi that the defendant's costs might be taxed and allowed to him under the statute 43 Geo. 3, c. 46, s. 3.

Mr. Serjeant *Coleridge* now showed cause, upon an affidavit admitting that the plaintiff had arrested the defendant for one side of the account, but stating, that, when the defendant was applied to for the particulars of his claim upon the plaintiff, he refused to give it; whereupon he was told by the plaintiff that he would arrest him for the whole amount of his account; to which he answered—"Very well; do so." In *Germain v. Burrows*, 5 Taunt. 259, the plaintiff had employed the defendant, a carpenter, to do work for him under an agreement to pay him in goods. The work done by the defendant amounted to 25*l.*, and the plaintiff had supplied goods to the defendant to the value of 30*l.* and upwards. The defendant having been pressed to state his demand, and having neglected to do so, the plaintiff arrested him for the 30*l.*, and at the trial obtained a verdict for the balance only. On a motion for costs under the statute, the Court adverted to the defendant's neglect to deliver an account of his demand, and held that the work done by the defendant might be used as set off; therefore the original debt might truly be sworn to as 30*l.*: and said there was no pretence for the motion. [Mr. Justice ALDERSON.—Although the defendant in this case had neglected to deliver his account, the defendant at all events knew of the claim of 39*l.* 9*s.* 11*d.* for the bricks and tiles.] In all the older cases upon this subject, the liability of the plaintiff to an action for a ma-

decision in *Donlan v. Brett*. The want of reasonable or probable cause is a circumstance whence malice may be inferred. In the present case, there was a sum of 39*l.* 9*s.* 11*d.* at the least, out of the 105*l.* 17*s.* 6*d.*, for which the plaintiff had no right whatever to hold the defendant to bail, inasmuch as he knew that that sum had been paid off.

Mr. Justice GASELLE. It is inconsistent to suppose that the plaintiff could have had reasonable or probable cause for holding the defendant to bail to the full amount of the account between them, without deducting the items on the credit side.

Mr. Justice ALDERSON. Where there is an uncertain demand to set off against an ascertained one, I think it will be found that a party cannot arrest for more than he can conscientiously swear is due to him for the balance. When the question arises, I shall be prepared to pronounce an opinion upon it.

Rule absolute.

SIGGERS v. SANSOM.—p. 194.

Where a writ of summons which had originally been issued into one county was afterwards (without being re-sealed) altered by the substitution of another—The court set aside the proceedings, on payment of the debt *without costs*, although the defendant had, before taking the objection, obtained a judge's order for staying the proceeding on his undertaking to pay the debt *and costs*, which order had afterwards been made a rule of court.

A WRIT of summons was issued against the defendant, on the 10th March, directed to the defendant in the county of Middlesex. It being afterwards discovered that the defendant resided in Surrey, the plaintiff's attorney altered the writ by inserting Surrey in lieu of Middlesex. The writ was not re-sealed after this alteration. The defendant was served on the 15th March. On the 11th April following, he took out a summons to stay proceedings on payment of debt and costs. An order was made thereon, which was afterwards made a rule of Court.

Mr. Serjeant *Bompas*, on a former day, obtained a rule nisi to set aside the writ and subsequent proceedings, on the ground that the writ was avoided by the unauthorized substitution of one county for the other.

Mr. Serjeant *Wilde* now showed cause. He contended that the application was too late, the defendant having waived the irregularity in the process by his application to stay the proceedings, and, on the order for that purpose being made, undertaking to pay the costs.

Mr. Serjeant *Bompas*. The writ was not merely irregular, but void, and therefore no subsequent act of the defendant could set it up. In an anonymous case, 2 Chit. Rep. 287, the Court set aside proceedings for irregularity, where no latitat was issued, notwithstanding three terms' delay in moving the Court. [Lord Chief Justice TINDAL. In that case there was no *act* done by the defendant: it was a mere delay to take advantage of the irregularity.] In *Taylor v. Phillips*, 3 East, 155, it was held that the service of process on a Sunday, being absolutely void by the statute 29 Car. 2, c. 7, s. 6, cannot be made good by any subsequent waiver of the defendant, by his not objecting till after a rule to plead given. And Lord Ellenborough said "that it was a matter of public policy that no proceedings in the nature described in the statute should be had on a Sunday; and therefore the regularity or irregularity of them could not depend on the assent of the party afterwards to waive an objection to such proceedings which were in themselves actually avoided by the statute.

PER CURIAM. The ground upon which we incline to think the proceedings in this case should be set aside, is, that the attorney for the plaintiff has been guilty of gross misconduct in altering the process of the court without causing

it to be re-sealed. We think the rule should be made absolute for setting aside the proceedings on payment of the debt without costs. No hardship or injustice will be inflicted upon the plaintiff by this course; for, under the circumstances, he will not be liable to his attorney for these costs.

Rule absolute.

PATTERSON v. POWELL.—p. 196.

A cause had been tried and a verdict found for the plaintiff, which was afterwards set aside by the court on the ground that the contract upon which the plaintiff sued was illegal and void. After the rule for a new trial was made absolute, it appearing that the defence had been conducted by an attorney of the Court of King's Bench, acting in the name of one who had for some years ceased to be an attorney of this court—the court permitted the plaintiff to discontinue without payment of costs, except as to so much money as might be found to have been paid by the defendant to his attorney on account of the suit.

ANONYMOUS.—p. 210.

The court allowed judgment to be entered upon an old warrant of attorney, on an affidavit that a letter had been received from the party, the twopenny post date on which was within the term.

Mr. Serjeant *Talfourd* moved for leave to enter up judgment on an old warrant of attorney, upon an affidavit stating that a letter had been received from the party within the term, through the two-penny post, the post-mark on which bore date the 30th April, 1833.

Granted.(a)

POUND v. LEWIS.—p. 210.

By the 54th rule of Hilary Term, 2 Will. 4, service of a rule to reply or plead any subsequent pleading is necessary.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule nisi to set aside for irregularity (with costs) a judgment of nonpros. which had been signed in this cause on the ground that there had been no service of a rule to reply.

Mr. Serjeant *Adams* now showed cause. He stated that all that was ever done in this Court was, to leave the rule to reply at the Secondary's office. The Secondary also certified this to have been the constant practice.

Mr. Serjeant *Wilde*, in support of the rule. The practice in the Courts of King's Bench and Exchequer formerly was, to serve the rule to reply, which service was deemed a demand of a replication, and no distinct demand was requisite; but, in this Court, no rule to reply was served, a demand of a replication being necessary. The 54th rule of Hilary Term, 2 Will. 4, provides that "Service of a rule to reply or plead any subsequent pleading shall be deemed a sufficient demand of a replication or such other subsequent pleading." Although that rule dispenses with the necessity (in all the Courts) of a demand

(a) In *Constable and another v. Wren*, in Michaelmas Term, 4 Will. 4, Mr. Serjeant Andrews obtained a rule to enter up judgment on a warrant of attorney (more than ten years old) upon the usual affidavit. The attesting witness to the execution of the warrant of attorney was dead; and, to prove the execution, an affidavit was made by one of the plaintiffs verifying the handwriting of the witness.

of the payment to petition the insolvent debtor's court. The whole transaction was bottomed in fraud.

Mr. Justice PARKE. There certainly was evidence, and I think very considerable evidence of fraud.

Mr. Justice GASELEE concurred.

Mr. Justice ALDERSON. The first question, viz. whether or not the payment amounted to a voluntary transfer, charge, or delivery of the insolvent's property, was clearly a question for the jury. If there was no evidence whence a reasonable jury could draw any conclusion upon the subject, the nonsuit was right; but it seems to me that there was evidence which the plaintiff had a right to have submitted to the jury. Although the transaction did not take place within three months from the date of the petition, still the question arises whether the payment might not have been made or assented to by Whitehouse with a view to petitioning for his discharge under the insolvent debtor's act.

Rule absolute.

CLOTHIER v. ESS.—p. 216.

Appearing to oppose a rule, does not waive an objection to the form of the affidavit upon which the rule was obtained—such as, the omission of the Christian name of one of the parties in the title of the cause.

No taxation of costs is necessary upon a cognovit.

Mr. Serjeant *Bompas*, on a former day, obtained a rule nisi that the defendant might be discharged out of custody, on the ground of an alleged irregularity in the proceedings against him. The defendant had been taken in execution by virtue of a judgment signed upon a cognovit, without having received any notice of the taxation of costs, as the learned serjeant contended was required by rule 12, Trinity Term, 1 Will. 4, by which it is ordered, that, "before taxation of costs, one day's notice shall be given to the opposite party."

Mr. Serjeant *Andrews*, contra, objected that the affidavit upon which the motion was founded omitted to state the Christian name of the defendant in the title of the cause. He submitted that no taxation of costs was necessary in the case of a cognovit, wherein the costs are ascertained and fixed.

Mr. Serjeant *Bompas*, in support of his rule, contended that the objection as to the want of a Christian name was waived by the plaintiff's appearing and using affidavits in opposition to the rule.

Lord Chief Justice TINDAL. Whatever may be the proper construction of the rule in question, this motion is at all events against the merits and against the intention of that rule. In the case of a cognovit, the taxation of costs would be mere matter of form. Without, however, deciding the point, it is enough to say that I think the rule must be discharged upon the preliminary objection—the absence of the Christian name of the defendant in the title of the cause upon the affidavit. There is no complete name; perjury could not be assigned upon such an affidavit.

Mr. Justice PARK concurred.

Mr. Justice GASELEE. There is no foundation for the argument urged on the part of the defendant, that the plaintiff should have stood upon the preliminary objection, and not have filed affidavits in answer. I think the plaintiff has acted wisely: for, the Courts have said that they would not allow costs where a rule is discharged upon an ungracious objection: the plaintiff, therefore, very properly appears to show that he has something like an answer upon the merits. With respect to the construction of the 12th rule of Trinity Term, 1 Will. 4, it is not necessary upon this occasion to determine whether or not

it applies to costs on a cognovit; but I incline to think it does not, for, the costs form part of the cognovit, and are insusceptible of taxation.(a)

Mr. Justice ALDERSON concurred on the first point, but gave no opinion upon the construction of the rule.

Rule discharged, with costs.

WILLIAMS v. BROWN.—p. 218.

When a writ of scire facias has not lain in the office the proper number of days, the motion should be to set aside the proceedings thereon, and not the writ itself.

THE writ of *capias* in this cause was returnable on the 16th April, and a *scire facias* was lodged in the office on the 30th, returnable on the 4th of May.

Mr. Serjeant *Storks*, on a former day, obtained a rule nisi that the writ of *scire facias*, and the proceedings thereon, might be set aside for irregularity, on the ground that the writ had not lain the requisite number of days in the office.

Mr. Serjeant *Wilde*, contra, submitted that the rule was improperly framed, and did not meet the complaint, inasmuch as it sought to set aside the writ (which was unexceptionable) for a supposed irregularity in putting it in force.

PER CURIAM. The rule ought to have prayed that the proceedings only should be set aside.

Rule discharged.

(a) This point has since been decided by Mr. Justice Patteson in the King's Bench Practice Court, in conformity with the inclination here expressed by Mr. Justice Gaselee. A cognovit had been given for debt and costs in an action on a bill of exchange. Judgment having been signed for the amount of debt and costs mentioned in the cognovit and the costs of signing judgment, without any notice of taxation having been given pursuant to the above-mentioned rule, a motion was made for setting aside the judgment and execution for irregularity. On discharging the rule Mr. Justice Patteson said it was not necessary to tax the costs of signing judgment on the cognovit, because the amount of such costs is an ascertained sum, which cannot be reduced; that, the amount of the other costs being ascertained in the cognovit, it was not necessary to tax them; and that, no taxation being necessary, no notice of taxation could be so; but that the rule referred to could only apply to those cases in which a notice of taxation is necessary; and the rule was discharged *with costs*. *Griffiths v. Liversedge*, MS. 1 May, 1833, K. B.

the contingent uses and estates thereafter limited from being defeated or destroyed, and for that purpose to bring actions or make entries as occasion should be or require; but nevertheless to permit and suffer the said Christopher Hawkins and his assigns during his life to receive and take the rents and profits thereof and of every part thereof for his and their own use and benefit: and, from and after the decease of the said Christopher Hawkins, in case Mary Hawkins his then wife should survive him, to the use and behoof of her the said Mary Hawkins and her assigns for and during the term of her natural life; and, from and after the determination of that estate, to the use of the said Sir John St. Aubyn and Henry Sperling, and their heirs, during the life of the said Mary Hawkins; upon trust to support and preserve the contingent uses and estates thereafter limited from being defeated or destroyed, and for that purpose to bring actions or make entries from time to time as occasion should require, but nevertheless to permit and suffer the said Mary Hawkins and her assigns during her life to receive and take the rents and profits thereof to and for her and their own use and benefit; and, from and immediately after the decease of the said Mary Hawkins, in case the said Thomas Hawkins should survive her, to the use of the said Thomas Hawkins and his assigns for and during the term of his natural life, without impeachment of waste; and, from and immediately after the determination of that estate, to the use of the said Sir John St. Aubyn and Henry Sperling, and their heirs, during the natural life of the said Thomas Hawkins, upon trust to preserve and support the contingent uses and estates thereafter limited from being defeated or destroyed, and for that purpose to bring actions or make entries from time to time as occasion should require, but nevertheless to permit and suffer the said Thomas Hawkins and his assigns to receive and take the rents and profits thereof to and for his and their own use and benefit; and, from and immediately after the decease of the said Thomas Hawkins, in case the said Ann Heywood should happen to survive the said Thomas Hawkins, her intended husband, to the use, intent, and purpose that the said Ann Heywood should and might yearly and every year for and during the term of her natural life, have, receive, and take from and out of the said messuages, lands, tenements, and hereditaments, and from and out of the moneys to be raised by fines by making and granting leases pursuant to the proviso or liberty thereafter contained, and from and out of the yearly and other rents, issues, and casual and other profits thereof, one annuity or clear yearly rent-charge of 200*l.* of lawful money of Great Britain in lieu and bar of dower, with power of distress and entry for recovering the same when in arrear: And as to, for, and concerning all and singular the same messuages, lands, tenements, hereditaments, and premises so charged or chargeable with the said annual sum or rent-charge of 200*l.*, and such remedies for the same as therein mentioned, and, from and immediately after the decease of the said Thomas Hawkins, to the use and behoof of the said Sir R. Vyvyan and James Sperling, and their executors, administrators, and assigns, for and during and unto the full end of five hundred years from thence next ensuing and fully to be complete and ended, without impeachment of or for any manner of waste; but, nevertheless, upon the several trusts and for the several intents and purposes, and under and subject to the several provisos, limitations, declarations, and agreements therein-after mentioned, expressed, and declared of and concerning the same term, that is to say, In trust in the first place for the better securing to the said Ann Heywood and her assigns during her life the due payment of the said annual sum or yearly rent-charge of 200*l.*, and also the arrears thereof, in such manner as therein is mentioned; and upon further trust to permit such persons as would be entitled to the reversion or remainder expectant on the said term of five hundred years to receive the residue of the rents over and above what should be sufficient to satisfy the said annuity of 200*l.*, with a proviso for ceaser of the said term after the decease of the said Ann Heywood and payment of all the arrears of the said annual sum or yearly rent-charge and all costs attending the same: And

as to, for, and concerning all and every the messuages, lands, tenements, and hereditaments thereinbefore mentioned and described called Allwarne *alias* Alwerton *alias* Alwarnton *alias* Alwarton, and the grist mill thereto belonging, one-third of the manor and barton of Trewinnard and the mills called Trewinnard mills, and also all that messuage or tenement called Colrogger, being of the yearly value of 200*l.* per annum and upwards, from and after the end or determination of the said term and estate of five hundred years, and subject thereto in the meantime, *To the use and behoof of such person as, at the time of the decease of the said Thomas Hawkins, should be the second son then living of the body of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten*, and of the heirs of the body of such second son lawfully issuing; and, for default of such issue, to the use and behoof of the third, fourth, fifth, sixth, and all and every other son and sons (other than and except the eldest son for the time being) of the body of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten, *who should*, by the death of such second, third, fourth, or other son, without issue of his or their respective body or bodies, *become a second son*, severally and successively and in remainder, one after another, as they and every of them should be in priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; and, for default of such issue as aforesaid, and in case there should be two or more daughters of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten, then to the use of all and every such daughters of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten, and the heirs of their several and respective bodies lawfully issuing, to take as tenants in common, and not as joint tenants: but in case there should be only one such daughter of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten, then, To the use of the eldest or only son of the said Thomas Hawkins on the body of the said Ann Heywood, his intended wife, to be begotten, and the heirs of the body of such eldest or only son lawfully issuing; and, in default of all such issue, to the use of the said Thomas Hawkins, his heirs and assigns, forever: And as to, for, and concerning the rest, residue, and remainder of all and every the several messuages, lands, tenements, and hereditaments thereinbefore granted and conveyed, subject to the several uses thereinbefore mentioned and declared thereof, and from and after the expiration or other sooner determination of the said term of five hundred years, to the use and behoof of the said Thomas Hawkins his heirs and assigns forever.

The said Thomas Hawkins died intestate in the year 1766, in the lifetime of his said father Christopher Hawkins. The said Christopher Hawkins departed this life in the year 1769, leaving his wife, the said Mary Hawkins, him surviving. The said Mary Hawkins departed this life in the year 1779. The said Ann Heywood, afterwards Ann Hawkins, had long since departed this life, and the said annuity of 200*l.* had long since been fully paid and satisfied. The marriage between Thomas Hawkins and Ann Heywood was duly had and solemnized shortly after the date of the said indentures of lease and release and settlement, and there was issue of the said marriage, four sons, that is to say—Philip Hawkins, the eldest son, who survived his father, and died an infant and without issue in the year 1770—Christopher Hawkins, afterwards Sir Christopher Hawkins, who was at the time of the decease of the said Thomas Hawkins, his father, the second son of the said marriage, and died a bachelor on the 6th day of April, 1829—Thomas Hawkins, who was the third son, and was born in the year 1759, and died a bachelor on or about the 3rd of August, 1788—and John Hawkins, who was the fourth son of the said marriage, and is now living; and also one daughter only, Mary, who is the wife of Mr. Trelawney.

By indentures of lease and release bearing date respectively the 23rd and 24th days of May, 1780, the release being made and executed between the said

Sir Christopher Hawkins, then Christopher Hawkins, Esq., and therein described to be the eldest surviving son and heir of the body of the said Thomas Hawkins deceased, of the first part, John Radcliffe, therein described, of the second part, and Robert Venables Hinde, therein described, of the third part—it was by the said indenture of release witnessed, that, for barring docking, defeating and extinguishing all estates tail, and all the reversions and remainders expectant thereon of and in the manors, messuages, tenements, farms, lands, and hereditaments, and parts of manors, messuages, tenements, &c., thereafter mentioned to be thereby granted and released, and to the intent that the same several manors, messuages, lands, hereditaments, and premises might be settled, limited, and assured to the use of the said Christopher Hawkins and his heirs, and for the nominal consideration therein mentioned, he the said Christopher Hawkins did grant, bargain sell, alien, release, and confirm unto the said John Radcliffe and to his heirs (amongst divers other manors and hereditaments) all that the manor or reputed manor of Treveneague and Pemberthy, with the appurtenances, and the capital messuage, barton, farm, and demense lands called Treveneague, Trevenague Vean, and Frighton, and the messuages, lands, and tenements called Pemberthy Kestell, and the messuages, mills, stamping mills, lands, and tenements called Relobes, Relobes Vean, and Relobes mills, Trewalla, Carbus *alias* Carbewa, and Carbas *alias* Carbons mills; and also all those houses, gardens, lands, and premises in Market Jew *alias* Marhassion; and also all those messuages, cottages, lands, wastes, and commons called Nanguska, Penhale, Manyn, and Knee Bone, and the messuage or tenement called Chenoeweth *alias* Chaweth; and all those lands, wastes, and commons called St. Hillar *alias* St. Hillar Downes and Relobes Moor; and all those messuages, lands, and tenements called Trewidden Veor and Trewidden Vean, in the parish of Maddern; all which of the said manors, and all and singular other the manors, messuages, tenements, lands, and hereditaments whatsoever which were theretofore belonging to Philip Hawkins, deceased, and were by him given and devised to the use of the said Thomas Hawkins, the father of the said Christopher Hawkins, for his life, and, after his decease, to the use of the first and other sons in tail male; and all and singular other the manors, messuages, lands, tenements, and hereditaments, and parts of manors, &c., of him the said Christopher Hawkins lying and being in the several parishes, places, and precincts aforesaid, or either of them in the said county of Cornwall—To hold unto and to the use of the said John Radcliffe and his heirs, to the intent that he might become tenant of the freehold of the said manors, hereditaments, and premises in order that one or more common recovery or recoveries might be thereof suffered as therein mentioned, which should enure to the only proper use and behoof of the said Christopher Hawkins, his heirs and assigns forever, and to and for no other use, intent or purpose whatsoever.

In Trinity Term, 20 Geo. 3, a recovery was accordingly suffered, wherein the said Robert Venables Hinde was demandant and the said John Radcliffe was tenant, and the said Sir Christopher Hawkins (then Christopher Hawkins) was vouchee, of the said manor of Treveneague and divers other manors, messuages, tofts, mills, gardens, lands and premises in St. Hilary, Wadderne, Market Jew, St. Erth, and divers other parishes and places in the said county of Cornwall.

The said Sir Christopher Hawkins, on or about the 28th January, 1823, duly signed and published his last will and testament in writing, which was executed and attested in such manner as is by law required for passing freehold estates by devise; and by such will the said Sir Christopher Hawkins gave and devised all his manors and lordships, reputed manors and lordships, and all other the freehold messuages, lands, tenements, and hereditaments, and real estate (except certain estates in the borough and parish of St. Imes, and in the parish of St. Breock, his share in the company of Trevenen Carne and Wood, and the next presentations to the churches of St. Just, in Roseland, and St. Mewan,) to his nephew, Christopher Henry Thomas Hawkins for his life, with remainders over.

The questions for the opinion of the Court were—

First—whether John Hawkins, the fourth son of Thomas Hawkins, the father of the said Sir Christopher Hawkins, did, under or by virtue of the said indentures of lease and release and settlement of the 16th and 17th of June, 1756, either in the lifetime or on the death of the said Sir Christopher Hawkins, and in the events which have happened, take any and what estate or interest, estates or interests, in the several messuages, lands and hereditaments comprised in the said indentures of lease and release and settlement of the 16th and 17th days of June, 1756, or any and which of them.

Secondly—whether, having regard to the term of the indentures of 23d and 24th days of May, 1780, being the deeds to make the tenant to the præcipe for, and to lead or declare the uses of the said recovery which was suffered by the said Sir Christopher Hawkins in Trinity Term, 20 Geo. 8, such recovery comprised any and which of the several messuages, lands, and hereditaments conveyed by the said indentures of lease and release and settlement of the 16th and 17th days of June, 1756, and thereby limited to the use and behoof of such persons as at the time of the decease of the said Thomas Hawkins should be the second son then living of the said Thomas Hawkins on the body of the said Ann Heywood to be begotten, and of the heirs of the body of such second son lawfully issuing.

Mr. Serjeant *Taddy*, for the plaintiff. Upon the death of the settlor, Thomas Hawkins, in the year 1766, the state of the family was this:—There were then living four sons, Philip, Christopher, Thomas, and John (the present defendant) and one daughter. The primary object of the settlement being to make provision for the second son, Christopher took possession; and upon his death the question arises. Before the death of Christopher, the first and third sons, Philip and Thomas, also died. At the death, therefore, of Christopher, John became not a second, but an only son. Upon the authorities the construction of this limitation is free from difficulty. The intent of the settlement was, first, to provide for the second son of the marriage, then for the daughters, and afterwards for the eldest or only son. The defendant cannot take as eldest or only son; for, at the decease of the settlor, Philip was the eldest son; and that estate, being once vested, could not afterwards divest. In *Shelly's case*, 1 Rep. 95, it is said: "If a lease be made to one for life, the remainder to the right heirs of J. S., if J. S. dies having a daughter, his wife with child with a son, the daughter claims it by purchase, and therefore the son born after shall never divest it:" and the Year Book, 9 Hen. 7, 25 a, is cited, where it is laid down, "that, if a condition descends to the daughter, and she enters for the condition broken, the son born afterwards shall never enter upon her; and yet there she is in by descent, and the title of her entry, that is to say, the condition that she hath as heir: and yet, because she was the first in whom it vested, the son born after shall not divest it." In *Trafford v. Ashton*, 2 Vern. 660; and see *Lomax v. Holmden*, 1 Vez. 290, it was held that a second son took an estate by that description, being second, in order of birth, the eldest son being dead before the birth of the second. In *Driver v. Frank*, Mr. Justice Dampier says: (a) "It has always been an object with the Courts of law and of equity to

(a) 3 Man. & Selw. 32. Devise of all testatrix's real estate to the use of B. F., the husband of her niece, for life, and from and immediately after his decease, then to and to the use of the second, third, fourth, and all and every other the son and sons of the body of B. F. by his said wife (except the first or eldest son) severally and successively and in remainder one after another, and of the several heirs male of the body of every such son and sons (except the said first or eldest son); and, for default of such issue, to the use of F. S., youngest son of another niece of the testatrix, for life, &c.:—Held, that the remainder to the sons of B. F. (who had no children at the date of the will,) was not a contingent remainder, to such son as should be the second son of B. F. at the death of B. F., nor a vested remainder in the second or other son of B. F., liable to be divested by his becoming the first or eldest, by the death of his elder brother in the life-time of B. F.: but a vested indefeasible remainder in the second or other son of B. F. who should be

vest interest as soon as the words of an instrument will admit of it. Such a construction is convenient, as it facilitates provisions for families, by ascertaining the rights and property belonging to each member of it, and tends in general to an equal and fair arrangement and distribution." And after mentioning the several authorities on the subject, he proceeds—"Nothing arises from the expression 'from and immediately after the death,' &c. considered alone; much more effective words have been holden, in some of the cases above cited, not to prevent the vesting of estates. Here they point out the time when the party shall come into possession, and whether the devise be immediate or in remainder makes no real distinction. The case of *Lomax v. Holmden* shows only that the *first* son, at the time of the *testator's* death, might take under the description of *first* son in the will; though a son had been born, and died, after the making of the will, and in the testator's lifetime. It also shows that the same person may answer the description of *primogenitus et secundus*.' It proves only that a *second born son* may take under the description of *first*. As it shows that he may also take under the description of *second*, it rather turns the other way, and it appears to overturn the distinction between *first* and *eldest*." And Mr. Justice Bayley, in delivering his judgment in that case, says (a) "Inasmuch as I cannot see with certainty that this exception of the first or eldest son was to prevent an union of the family estates, as this is only the most probable of several possible motives, as (if this were the motive) it is reasonable to expect there would have been express words to divest it even after B. F.'s death, as the construction contended for would prevent any family settlement of this estate during B. F.'s life, and would in many possible cases leave the issue of the second, third, fourth, or other succeeding sons of B. F. unprovided for, and carry on the estate of persons who were more distant objects of the testatrix's consideration, and as the holding that this remainder vested in B. F.'s son *as soon as he had two sons together in esse* will satisfy every word in the will, and, as far as I can be certain, every motive of the testatrix, and as it falls in with the axiom that no remainder is to be deemed contingent which can be deemed vested, I am of opinion that this remainder vested in Edward Frank (the second son) upon his birth, and that it did not become divested upon his becoming his father's only son." All the arguments there used against contingent remainders will apply with equal force in this case. If Thomas Hawkins, the first son, had left issue, and John were held to take as second son, the issue of Thomas would have been disinherited. (b)

Mr. Serjeant *Merevether*, for the defendants. The settlement of the 16th and 17th June, 1756, begins with a recital, that, under the will of Philip Hawkins, ample provision had been made for the eldest son of the settlor; the first limitation, therefore, is made in favour of the second son; the second limitation provides for the contingency of the second son becoming by the death of the first an eldest son. The clear intent upon the whole is apparent, that no person who should become the eldest son should take the estate. It may be admitted, that, on the death of the settlor, the estate vested in Christopher Hawkins; but conditionally only—the condition being, that he should never become an eldest son. When Christopher became the eldest son, the defendant John was the second, and the estate vested in Christopher would, on his death without issue, pass to John. Upon the second limitation there can be no doubt. In default of there being a second or other son, and in case there should be only one daughter, the estate was limited to the eldest or only son; under this limitation John is clearly entitled to the estate called Allwarne, and to one-third of the manor and barten of Trewinnard, and the mills called

born living an elder: and therefore, B. F. having had four sons, of whom the second and third, and second and fourth, were in existence at the same time, but all, except the fourth, died in the life-time of B. F. without issue:—Held that the surviving son was entitled to the devise.

(a) 3 Mau. & Selw. 42.

(b) The second point was withdrawn.

Trewinnard mills, and Colrogger. In *Driver v. Frank*, the doubt was, not as to whether or not the estate of the party could by law divest, but whether such was the intention of the testatrix.

Mr. Serjeant *Taddy*, in reply. The case of *Driver v. Frank* went upon the ground of the disinclination of the Courts to construe those estates to be contingent which may be construed to be vested. "I can find no words," says Mr. Justice Le Blanc, "to warrant a divesting of the estate, once vested, in the event of a second or younger son becoming an eldest son, such as were the words of the will in *Fen d. Lowndes v. Lowndes*, 4 Burr. 2247, and such words I conceive we cannot supply. It therefore appears to me that the intent is not sufficiently plain to limit the description of second and other sons to such person as shall answer such description at the death of the father, so as to make it contingent; nor to divest the remainder, once vested, in the event of the person in whom it vested becoming a first or eldest son."

The following certificate was afterwards sent:—

We have heard this case argued before us by counsel, and have considered it, and we are of opinion that John Hawkins, the fourth son of Thomas Hawkins, father of the said Sir Christopher Hawkins, did, under and by virtue of the said indenture of lease and release and settlement of the 16th and 17th June, 1756, on the death of the said Sir Christopher Hawkins, and in the events which have happened, take an estate in tail general in the messuages, lands, tenements, and hereditaments called Allwarne alias Alwerton alias Alwarnton alias Alwarton, and the grist mill thereto belonging, one-third of the manor and barton of Trewinnard, and the mills called Trewinnard mills, and also all that messuage or tenement called Colrogger, being part of the premises comprised in the said indentures of lease and release and settlement of the 16th and 17th June, 1756.

N. C. TINDAL.

J. A. PARK.

S. GASKELL.

E. H. ALDERSON.

DALE v. GORDON, Esq.—p. 339.

In an action against the sheriff for taking insufficient pledges in a replevin bond, the court allowed the declaration, which was in the common form, to be amended (upon payment of costs) by alleging, instead of a recovery in the original action, a reference by the consent of the sureties and the defendant, and the result of that reference; and also by adding a new count.

THIS was an action against the defendant, the late sheriff of Herefordshire, for having taken insufficient sureties in a replevin bond. The declaration was in the common form. The replevin suit was instituted by a person of the name of Cawley against the present plaintiff and one Price; and, after issue joined, and notice of trial given, they respectively consented that the cause and all matters in difference should be referred to an arbitrator, which was accordingly done by an order of the Lord Chief Justice. The arbitrator made his award, and declared that Cawley had no cause of action against the plaintiff and Price, and that the sum of 23*l.* 10*s.* was due from Cawley to the plaintiff for rent; and he directed a verdict to be entered for the defendants in the replevin suit, namely, the now plaintiff and Price, and that the costs of the cause should be paid by Cawley.

A rule was obtained by Mr. Serjeant *Talfourd*, in the last term, calling upon the defendant to show cause why the plaintiff should not be at liberty to amend his declaration, by alleging, instead of a recovery in the original action, a reference by the consent of the sureties and the defendant, and the result of that

reference; and also by adding a count alleging that the plaintiff in the replevin cause did not prosecute his suit with effect or without delay, and that the arrears of rent due to the plaintiff had not been paid or satisfied.

Mr. Serjeant *Coleridge* now showed cause. He submitted that, as the plaintiff had shown no ground for the amendment, the Court would not interpose. Besides, the arbitrator had no authority to direct a verdict to be entered for the defendants in the replevin suit, for, in *Jackson v. Clarke*, 1 M'Clel. & Younge, 200, where an arbitrator, to whom a cause before at issue was referred by rule of court on motion, directed that a verdict in the cause should be finally entered for the plaintiffs, with 284*l.* 12*s.* damages—it was held that he had exceeded his authority in directing the entry of a verdict; and the Court inclined to think that it could not be done in any case of a submission to arbitration, except on a reference from *Nisi Prius*, and by the intervention of a jury.

But the Court was of opinion that the amendment ought to be allowed, as it was merely intended to raise the question whether or not the defendant, as sheriff, was liable, by the introduction of certain facts upon the face of the record; and they directed that the plaintiff should be at liberty to amend the declaration, in the terms prayed, upon payment of the costs of the application.

Rule absolute accordingly.

DOE, on the Demise of FRY, v. ROE.—p. 370.

The xvth rule of Michaelmas Term, 3 Will. 4, does not apply to declarations in ejectment.

DANSEY, Demandant; LEE, Tenant; CROWTHER, Vouches.—p. 371.

The court allowed a recovery to be amended by inserting "Holy Trinity" before "Kingston-upon-Hull," on an affidavit that the property intended to pass was situate in the parish of The Holy Trinity, at Kingston-upon-Hull.

ROYSTON and Wife, Administratrix, &c., v. SARAH HANKEY.—p. 381.

Declarations by an intestate, that he meant that a person with whom he resided should have his furniture and effects for what he owed her:—Held, sufficient to entitle such person to take, and retain possession of the property.

THIS was an action of trover, brought by the plaintiff, and his wife, as administratrix of one Charles Baker, against the defendant, to recover certain property belonging to the intestate at the time of his death.

At the trial, before Mr. Baron Bayley, at the last Assizes at Chester, it appeared that the plaintiff's wife was Baker's only child, and that he went to reside with the defendant about five years since, and had continued to live in her house to the day of his death, which took place on the 31st December last; and that his property consisted of a cow, two calves, an ass, and several articles of household furniture. The defendant proved that Baker had lived in her house for the period above stated, and that, when he first came, he agreed to pay her 2*s.* per week. The defendant's daughter stated, that the cow and ass were paid for by her mother; that Baker had frequently said that she was to have them, as well as his furniture, for what he owed her; and that he said so on Christmas day last; that Baker had not paid the defendant any rent for a long time past; and that he had three shillings per week from a benefit club, for some time previous to his death, he being a cripple and unable to work.

The learned judge told the jury, that, if there were an agreement entered into between Baker and the defendant that she should have his property for what he owed her, she would be entitled to it; but that, if there were no such agreement, the plaintiff would be entitled to a verdict; and that the question rested chiefly on the testimony of the defendant's daughter; and it was for the jury to say whether they believed her statement to be true. The jury found a verdict for the defendant.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi that this verdict might be set aside, and a verdict entered for the plaintiffs, or that a new trial might be had, on the ground that there was not sufficient evidence to establish a gift of the intestate's property to the defendant; and that the judge should have so decided, and not left the question to the jury, there being no proof offered of a delivery to make it a gift or donatio mortis causa, or any testamentary instrument as required by the statute of frauds.

Mr. Serjeant *Jones* now showed cause. The intestate resided constantly at the defendant's house for five years previous to his death, and was indebted to her for rent. No point of law was raised at the trial, and the question was properly left to the jury. The intestate meant that the defendant should take his stock and furniture in satisfaction of the debt due to her for rent.

Mr. Serjeant *Wilde*, in support of his rule. There was no evidence of a sale or gift by Baker, the intestate, to the defendant, and she could not acquire any right of possession over his property merely because he lived in her house and was indebted to her for rent. He never parted with the dominion over his property; and the defendant's daughter merely stated that he had frequently said that her mother should have it for what he owed her. The case, therefore, clearly falls within the mischief intended to be guarded against by the statute of frauds; and there was no proof of a delivery of any part of the property to the defendant, but, on the contrary, proof that the intestate exercised acts of ownership over it down to the time of his death. The cases of *Bunn v. Markham*, 2 Marsh. 532; 7 Taunt. 224, and *Irons v. Smallpiece*, 2 Barn. & Ald. 551, are decisive to show that a verbal gift of a chattel, without actual delivery of possession, will not pass the property to the donee.

Lord Chief Justice *TINDAL*. Although this case is not altogether free from doubt and difficulty, yet I think the verdict may be sustained by the evidence adduced for the defendant at the trial. The defendant's daughter stated that the intestate had frequently said that her mother should have his property for what he owed her, and that he said so on Christmas-day, which was six days before his death. If, indeed, there had been this single declaration only, the question would be very different. It appeared that Baker had lived in the defendant's house for five years previous to his death, and that he had become a cripple, and was unable to work. There was no complete or absolute delivery required, as both the intestate and the defendant lived under the same roof, and it was proved that he was indebted to her for rent, and all his property was on the premises at the time of his death.

Mr. Justice *PARK* concurred.

Mr. Justice *GASLEE*. The defendant's house was occupied by herself and the intestate. His furniture was probably used for the accommodation of both, and the defendant proved that the cow and ass were paid for by herself.

Mr. Justice *BOSANQUET*. I am also of opinion that there is no ground for disturbing this verdict. The learned judge who tried the cause has expressed no dissatisfaction, and I think there was sufficient evidence to warrant the jury in coming to the conclusion that the goods of the deceased were to be taken by the defendant in satisfaction of the rent previously due to her; and as both parties resided in the same house, it appears to me that there was a sufficient delivery to the defendant, and that the verdict for her must stand.

Rule discharged.

HAYWARD v. PRIEST.—p. 388.

The twenty days' notice required to be given before bringing up a prisoner under the compulsory clauses of the Lords' act, must expire before the first day of the term in which he is brought up.

TAYLOR v. LEIGHTON.—p. 423.

An affidavit by the plaintiff that the defendant was indebted to him on an old warrant of attorney, and that he had not paid the sum secured by it, that he saw the defendant execute it, and that the attesting witness was also present, but was now residing in France, and that the defendant was alive:—Held, sufficient to entitle the plaintiff to enter up judgment.

Mr. Serjeant *Wilde* moved for leave to enter up judgment on an old warrant of attorney, upon an affidavit of the plaintiff, that the defendant had not paid to him, the plaintiff, or to any person on his behalf, the sum secured by the warrant of attorney, or any part thereof, but that the same was still due and owing from the defendant to the plaintiff; that the plaintiff was present and saw the defendant execute the warrant of attorney; that the subscribing witness attested the execution in the plaintiff's presence; and that he was at that time his clerk; but that he had left his service about two years ago, and was now, as the plaintiff had been informed, and believed, residing in France; and that the plaintiff saw and conversed with the defendant on the 25th of May last.

THE COURT concurred in thinking that the affidavit was sufficient.

Rule absolute.(a)

BURT v. JACKSON.—p. 552.

It is not necessary for the filacer to sign his name to a writ of summons; if he impress upon it the stamp of Court, it is sufficient, although the rule of Mich. 3 Will. 4, r. 2, allows fees to be taken for *signing* as well as for *sealing* such writ.

MANSER v. PIERCY.—p. 558.

A person who has lain in prison twelve months under an execution sued out on a judgment for a less sum than 20*l.* is entitled to his discharge under the statute 48 Geo. 3, c. 123, although he had sufficient property at the time of the application to satisfy the judgment, and although several other detainers were lodged against him by other creditors.

REGULAE GENERALES.

IT IS DECLARED AND ORDERED, that, in all cases in which a defendant shall have been or shall be detained in prison on any writ of *capias* or detainer under the statute 2 Will. 4, c. 39, or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been or shall be rendered

(a) See *Constable and Another v. Wren*, ante, 293, n.

to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the statute 2 Will. 4, c. 39, Schedule, No. 2; unless further time to declare shall have been given to such plaintiff by rule of Court or order of a Judge.

Tenterden.
N. C. Tindal.
Lyndhurst.
J. Bayley.
J. A. Park.

J. Littledale.
S. Gaselee.
J. Vaughan.
J. Parke.
W. Bolland.

J. B. Bosanquet.
W. E. Taunton.
E. H. Alderson.
J. Patteson.
J. Gurney.

IT IS ORDERED, that, from the present day, in all actions against prisoners in the custody of the Marshal of the Marshalsea, or of the Warden of the Fleet, or of the sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody.

(Signed by all the Judges.)

IT IS ORDERED, that, from and after the 10th day of July next, where the plaintiff proceeds by action of debt on the recognizance of bail in any of the Courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that, upon such render being duly made, and notice thereof given, the proceedings shall be stayed, upon payment of the costs of the writ and service thereof only.

(Signed by all the Judges.)

The Judges who sat in Banc during this term were—The Lord Chief Justice, Mr. Justice Park, Mr. Justice Gaselee, and Mr. Justice Bosanquet.

IN THE EXCHEQUER CHAMBER.

WOLVERIDGE v. STEWARD.—p. 561.

[In Error.]

A., by indenture executed by himself and B., assigned to B. certain premises, "subject to the payment of the rent and to the performance of the covenants and agreements reserved and contained in the original lease." B. entered under this assignment, and afterwards assigned over to a third person:—Held, that B. was not liable in covenant to A., for rent which the latter had been called upon to pay in consequence of the default of B.'s assignee—the words "subject to the payment of the rent, &c." being words of qualification, and not of contract.

THIS was an action of covenant by an assignor (a lessee) against his immediate assignee, for non-performance of the covenants in the original lease, on the part of the lessee and his assigns to be performed, and which it was contended on the part of the plaintiff that the defendant, according to the legal effect of the assignment from the plaintiff to him, covenanted to perform. The assignment was by indenture, executed by both parties, and was made subject to the payment of rent and performance of the covenants and agreements reserved and contained in the original lease. The defendant below took possession and occupied the premises under this assignment, and before the expiration of the term, assigned to a third person. After the assignment by the defendant below, the lessee was called upon by the lessor to pay rent which the assignee had suffered to be in arrear. The cause came on before the Court of Common Pleas on demurrer to one of the defendant's pleas. See 9 Bing. p. 60. That court, after argument, held that covenant was maintainable by the plaintiff below (the lessee)

lease; and that the plaintiff in error accepted the said assignment, and entered. The declaration then assigns as a breach the non-payment of rent due after the assignment, by reason whereof the defendant in error was obliged to pay the amount. The plaintiff in error (the defendant below) pleaded several pleas, on which issue was joined, and found against him; and one plea, viz. that, before the rent became due, he assigned over; to which plea there was a demurrer and joinder, on which judgment was given by the Court of Common Pleas for the defendant in error.

The question in this case is, whether the plaintiff in error is liable to the defendant in error for non-payment of rent due after he had assigned one; and that depends upon the further question, whether the words "subject nevertheless to the payment of the yearly rent, &c.," amount to a covenant to pay the rent during the whole residue of the unexpired term. If they do, the judgment of the Court below ought to be affirmed; if they do not, it ought to be reversed. We are of opinion that they do not.

It is fully established that no precise form of words is necessary to constitute a covenant—"Any words in a deed which *show an agreement* to do a thing, make a covenant," Com. Dig. "Covenant," (A. 2): but it must be clear that they are meant to operate *as an agreement*, and not merely as words of condition or qualification, (Com. Dig. "Covenant," (A. 8.); 1 Roll. Abr. 518). Are then the words in question meant to be used as words of agreement between the assignor and assignee, or words of qualification to modify and restrain the generality of the words which precede, and to express clearly the intention of the assignor, not to assign an absolute term, but a term subject to all the obligations towards the lessor to which it was originally liable? To determine this we must look at the indenture as stated on the record, and observe in what part the words occur. They come after the habendum and constitute part of it. Though the indenture contains the language of both parties, in the granting part the words are those of the grantor, which are to be taken most strongly against himself; and therefore it was material for him to qualify the grant, that he might not be considered as conveying any greater estate than he really intended: this is properly done in the habendum. The office of the habendum is, to limit the certainty of the estate. (Co. Litt. 6, a.) "It doth qualify the general intentment of the premises; and the reason of this is, for that it is a maxim of law that every man's grant shall be taken by construction of law most forcible against himself," (Co. Litt. 133, a; see also Hale, 171; Com. Dig. "Fait," (E. 9.)) As these expressions, therefore, occur in that part of the deed in which they ought to be if their object was merely to qualify and abridge the generality of the granting part, it is highly probable that they were intended to have that effect only; and some instances were adduced by the counsel for the plaintiff in error, where similar words occurring in the same part of the deed could not possibly have any other signification. For example, the assignment of a lease by way of mortgage, and the conveyance of an estate, subject to a mortgage or incumbrance, to a second mortgagee, or to a purchaser, where it is impossible that these words could constitute a covenant by the mortgagee to pay the rent in the one case, or by the second mortgagee or purchaser to pay off the mortgage or incumbrance in the other. It may be said, however, that, in these instances, the context and subject-matter of the instrument lead to the inference that no covenant was intended by these words; but that, in the present case, no such inference arises; and that the same words in different instruments may have different meanings. This may be true; but it lies upon the defendant in error to show affirmatively that the words amount to an agreement with him to pay the rent and perform the covenants; and, is there any thing in this indenture which tends to prove that they were meant to be used in any other sense than that which would naturally be attributed to them in the place in which they occur? On the contrary, if the assignor really intended that the assignee should covenant with him to pay the rent and perform every covenant

during the term, and thus become liable, not only for his own defaults, but for those of all subsequent assignees, and the assignee really intended also to bind himself to that extent, is it not to be expected that they would have expressed themselves in distinct unambiguous language? especially as it is the usual practice in cases of this kind, where such a liability is intended, for the assignee to enter into a bond or express covenant of indemnity with the assignor against the covenants in the original lease. It is a very just remark made by the counsel for the plaintiff in error, that it is the duty of a party who intends to bind another by a covenant in a former formal instrument, to insert it in that instrument, in distinct and intelligible terms, by which the party to be bound cannot be deceived, and not to call upon the court to infer such a covenant from the words which are at least equivocal, and which one party may never have meant to use in the sense ascribed to them by the other.

For these reasons, we think that the proper construction of this indenture is, that these are words of qualification, and not of contract; and, if the question were entirely new, we should adopt that construction. We have, however, the authority of the Court of King's Bench in a case which is not reported, the particulars of which have been furnished to us by my brother James Parke, who was counsel in it—*Mills v. Harris*, Michaelmas Term, 1820. It was an action of assumpsit by the assignor against the assignee of a lease, who had accepted but not executed the assignment, for not repaying to the assignor the rent which he had been obliged to pay after the assignee had assigned over. The deed contained similar words to those in this instrument. Lord Tenterden nonsuited the plaintiff on the trial, at the Sittings before Michaelmas Term, 1820. On a motion for a new trial, the court confirmed his lordship's decision by refusing a rule, on the ground that these were not words of agreement, but were merely descriptive of the obligations to which the assignee would be liable as between him and the lessor. It remains only to make some observations on the cases relied on by the defendant in error. That of *Burnett v. Lynch* proceeds upon the ground that, *during the continuance of the interest of the assignee*, there is a duty on his part to pay the rent and to perform the covenants. Mr. Justice Bayley, in giving judgment, states that the duty is commensurate with the time during which the assignee has an interest in the premises. This duty we think would arise from the mere relation between the parties; for, the effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal, bound whilst he is assignee to pay the rent and perform the covenants running with the estate; and the surety, after paying the debt or discharging the obligation to which he is liable, has his remedy over against the principal. And he would also, in all probability, have the same remedy over against each subsequent assignee, in respect of breaches committed during the continuance of the interest of each; for, the lessee is, in effect, a surety for each of them to the lessor. The case of *Chancellor v. Poole* was also mentioned, in which Lord Mansfield said, "that there was a covenant by the defendant for paying the rent in the deed-poll, but it was with *the lessee*." There, however, the words of the instrument were very different; they were these—"the assignee paying the rent and performing the covenants, and indemnifying the lessee against the same;" which last words were incapable of being construed as qualifying the generality of the granting part, and could have no other effect than an agreement on the part of the assignee with the assignor.

For these reasons, we think that the judgment of the Court of Common Pleas ought to be reversed.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.—1833.

ANONYMOUS.—p. 751.

In ejectment on a vacant possession, the affidavit that six months' rent are in arrear may be made by a receiver.

Mr. Serjeant *Jones* moved for judgment against the casual ejector, in an ejectment upon a vacant possession. An objection had been taken by the Secondary to the affidavit of six months' rent being due which was sworn, not by the lessor of the plaintiff, but by a receiver who had for many years taken the rent. The lessor of the plaintiff resided in Yorkshire. The premises were situate in London.

Lord Chief Justice TINDAL. I think the affidavit of the receiver is sufficient.
Granted.

PACK v. ALEXANDER.—p. 789.

Semble, that the delivery of a letter to the bell-man is a delivery to the post-office.

THE defendant, at the request of the plaintiff, inclosed a £50 bank-note in a letter to be sent by the post. The letter never reached its destination. The plaintiff now sought to recover the value of the note. At the trial it was proved that the letter containing the note was delivered by a clerk of the defendant to the bellman, by whom it was put into his bag. The latter also proved that the letter bags are delivered to the postmen, locked, at the post-office, and that a letter once put into the bag, could not, by reason of the construction of the aperture, be abstracted without the aid of the key. The jury found that there was no evidence of the letter having ever reached the post-office, and accordingly returned a verdict for the plaintiff.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi for a new trial, on the ground that the verdict was against the evidence. He cited *Warwick v. Noakes*, Peake's N. P. C. 67; and *Hawkins v. Rutt*, Peake's N. P. C. 186.

Mr. Serjeant *Coleridge* now shewed cause. When an agent is desired to send money to his principal by the post, it must be understood that the latter intended it to be remitted in the most proper and secure manner, viz. by a post-office order. In the present case due diligence and caution had not been observed in the conveyance of the letter to the post office. [Lord Chief Justice TINDAL. What degree of diligence would you expect from a bailee of this sort : he is not a bailee for hire. Is it not enough that he used the same degree of caution that he would have employed in his own case ?] The question was one purely for the consideration of the jury. It was for them to say whether or not the letter containing the note had ever reached the post-office.

PER CURIAM. The Court are clearly of opinion that the verdict was against evidence, and therefore the rule must be made absolute.

Rule absolute on payment of costs.

HUNT v. COLSON.—p. 790.

The plaintiff was employed by the Highgate archway company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent. The company having ceased to collect toll at the particular spot, the plaintiff was dismissed from their employ, and received a notice to leave the house, which he promised to do :—Held, that these circumstances did not constitute the plaintiff a *tenant* of the company ; and therefore that he could not maintain trespass against their agent for pulling down the toll-house.

THIS was an action of trespass for breaking and entering the plaintiff's cottage and destroying his furniture. The defendant was agent to the Highgate Archway Company ; the plaintiff was a labourer who had been employed to collect toll upon a by-road under the management of the company, for which purpose he had been put into the cottage in question, and one shilling per week deducted from his wages by way of rent. Subsequently, the company, having ceased to collect toll at the spot in question, had discharged the plaintiff from their service, and contracted to sell the land upon which the cottage stood to another person. The plaintiff accordingly received notice to quit, to which he assented ; but he afterwards refused to deliver up possession, whereupon the defendant, as agent of the company, proceeded to demolish the cottage ; which was the trespass complained of. The cause was tried before Lord Chief Justice Tindal, at the Sittings at Westminster after the last term. For the defendant it was submitted—first, that, as the plaintiff had merely occupied the cottage as the servant of the company, he was bound to quit when he left their employ—secondly, that, even if he could under the circumstances be deemed a tenant to the company, he was in no condition to maintain the present action, being himself a trespasser by reason of the notices to quit and of his promises to give up the premises. His lordship was of opinion that the deduction of one shilling per week for rent out of the wages of the plaintiff constituted him a tenant to the company. The jury returned a verdict for the plaintiff—damages 15*l*.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule nisi that this verdict might be set aside and a new trial had, on the ground of misdirection. He cited *Bertie v. Beaumont*, 16 East, 33 ; *Taunton v. Costar*, 7 Term Rep. 431 ; *Turner v. Meymott*, 7 J. B. Moore, 574 ; S. C. 1 Bing. 158 ; and *Butcher v. Butcher*, 7 Barn. & Cress. 399 ; 1 Man. & Ryl. 220. [Mr. Justice ALDERSON referred to *The King v. Cheshunt*, 1 Barn. & Ald. 473. There, a pauper employed as a labourer by the Board of Ordnance, having previously occupied a house at an annual rent of 7*l*., which was then purchased by the Board, still continued to reside in part of the premises, at a weekly rent of two shillings, which was deducted out of his wages ; and during such last occupation he also occupied a shop (the shop and house together being of the annual

PER CURIAM. Under all the circumstances, let the 50*l*. be paid over to the plaintiff, and, if he proceed further in the suit, it will be at the hazard of costs.
Rule accordingly.

✓ STAPLES v. PURSER and Wife.—p. 800.

Judgment cannot be entered up against husband and wife on a warrant of attorney given by the wife *dum sola*, without leave of the Court.

MR. Serjeant *Wilde* moved for leave to enter up judgment against husband and wife upon an old warrant of attorney(a) given by the wife *dum sola*.

Upon the authority of the case of *Hartford v. Mattingly*, 2 Chit. Rep. 117, (and see *Anonymous*, Lofft, 329), the Court granted the rule.

REYNOLDS v. FLOWER and MARSDEN.—p. 801.

The plaintiff arrested the defendant for 400*l*., having previously obtained acceptances for 320*l*., for part of the debt, from the defendant's agents, to meet which remittances were made to the latter by the defendant. Held, that the arrest for 400*l*. was made without reasonable or probable cause, and therefore that the defendant was entitled to costs under the 43 Geo. 3, c. 46, s. 3.

THE plaintiff had been in the habit of consigning goods to Messrs. Flower & Marsden, the defendants, merchants, residing at Sidney, in New South Wales. Flower & Marsden corresponded with the house of Flower & Moss, in London; the Flowers were father and son. The plaintiff having consigned a quantity of goods to Flower & Marsden, and the remittances not coming so speedily as his necessities required, he applied to Messrs. Flower & Moss, and obtained from them on account of Flower & Marsden, their acceptances for 320*l*., which were duly honoured, and to meet which the defendants had made remittances to Flower & Moss. The plaintiff eventually became insolvent, and assigned his effects to trustees, (Flower the father being one of them,) for the benefit of his creditors. The trustees sued the defendants for the 400*l*., arresting Flower, and outlawing Marsden. The cause was referred. The arbitrator, after considerable hesitation upon the facts presented to him, allowed the defendants credit for the 320*l*. obtained by the plaintiff from Flower & Moss; and also deducted a sum of 15*l*., as to which the plaintiff failed to establish his case, and a further sum for a debt due from one of the defendants before the partnership, which was included in the plaintiff's demand; and the arbitrator awarded 35*l*. to the plaintiff, for which sum the verdict was entered.

Under these circumstances, Mr. Serjeant *Wilde*, on a former day, obtained a rule calling upon the plaintiff to show cause why he should not pay the defendant Flower his costs, under the 43 Geo. 3, c. 46, s. 3, on the ground that he had been arrested and held to bail without reasonable or probable cause to the extent of 400*l*.

Mr. Serjeant *Stephen* now showed cause. By the terms of the reference the costs were to abide the event of the award; this application, therefore, is in direct violation of the agreement between the parties. [Lord Chief Justice TINDAL. This is a collateral legal event. The only question is as to whether or not the plaintiff had reasonable or probable cause for causing the defendant

(a) Judgment cannot be entered up on a warrant of attorney given to the wife *dum sola*, after her marriage, without leave of the court, though the warrant of attorney be less than a year old. *Metcalfe v. Boote*, 6 Dowl. & Ry. 46.

to be arrested and held to special bail.] In *Keene v. Deeble*, 5 Dow. & Ryl. 383, (S. C. 3 Barn. & Cress. 491,) the defendant having been held to bail for 38*l.*, paid 2*l.* into court, which the plaintiff did not take out; but, before the cause was called on for trial, it was agreed to refer the cause and all matters in difference to an arbitrator, with power to him to examine the parties on oath, and call for books, &c.; the costs of the cause to abide the event; and the arbitrator having awarded only 1*l.* 19*s.* in addition to the 2*l.* paid into court—it was held that the defendant was not entitled to his costs under the statute. Mr. Justice Bayley said, (3 Barn. & Cress. 493,) “I think that the money awarded in this case cannot be considered as money recovered in the action. It was awarded upon a reference of the action and all matters in difference. The parties might have made a special provision for the costs, but by the rule they agreed that they should abide the event of the award.” And Mr. Justice Littledale said: “At the trial the defendant’s evidence could not have been received; before the arbitrator it was admissible, and might positively operate to reduce the plaintiff’s damages. When, therefore, parties by their agreement take a case out of the ordinary course of investigation, I think that they take it out of the statute.” [Lord Chief Justice TINDAL. In that case there was no verdict; here there was: that makes a material difference.] In *Thompson v. Atkinson*, 6 Barn. & Cress. 193, the defendant was arrested for 179*l.* At the trial a verdict was found for the plaintiff, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred; and the costs of the cause were to abide the event of the award. The arbitrator found that at the commencement of the suit there was due from the defendant to the plaintiff the sum of 45*l.* 10*s.*, and that the plaintiff had no reasonable or probable cause for arresting the defendant for 179*l.* and that the defendant, by reason thereof, was to have compensation or damages to the amount of 20*l.* The arbitrator then ordered the verdict to be finally entered for the plaintiff for 25*l.* 10*s.*, the balance due to him after deducting the damages awarded to the defendant. The court refused to allow the defendant costs under the statute, inasmuch as by the terms of the reference the costs were to abide the event of the award, and that was in favour of the plaintiff. And in *Silversides v. Bowley*, 1 J. B. Moore, 92,(a) the plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to a reference for ascertaining the amount of the damages, and the arbitrator awarded a less sum than 15*l.* Upon an application to the court to allow the defendant his costs under the statute, it was held, that, in order to entitle the defendant to such costs, he must show that the arrest was vexatious and malicious. [Mr. Justice BOSANQUET. The more recent cases have determined that malice is not necessary.(b)] It appears here from the hesitation of the arbitrator, that it was a matter of doubt whether the deduction of the 320*l.* should be allowed. It cannot therefore be said that the arrest was altogether vexatious. [Lord Chief Justice TINDAL. The case of a set-off comes within the act. *Ashton v. Naull*, Ante, p. 501.(c) The question is, whether the plaintiff has acted so unreasonably and with such culpable negligence as to render himself liable to the penalties imposed by the act.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL. It appears from the affidavits that, a month

(a) And see *Turner v. Prince*, 2 Moore & Payne, 305. *Sherwood v. Taylor*, 3 Moore & Payne, 641. *Spooner v. Danks*, 3 Moore & Payne, 701.

(b) See *Donlan v. Brett*, 10 Barn. & Cress. 117. *Forster v. Weston*, 4 Moore & Payne, 278.

(c) Where there have been mutual dealings between the plaintiff and defendant, and each has a demand against the other, and the former arrests the latter for the whole amount of one side of the account, with full knowledge of at least a part of the defendant’s demand against him, although the defendant has neglected or refused to deliver his account, the plaintiff is liable to costs under the 43 Geo. 3, c. 48, s. 3.

before the time of the arrest, the defendants had to the knowledge of the plaintiff remitted 320*l.* to their agents here, who accepted bills for the plaintiff upon this precise fund. The plaintiff therefore could have no reasonable or probable cause for holding the defendants to bail for that sum. The attention of the plaintiff being specifically called to this sum of 320*l.*, he ought to have been prepared to show us that he derived no benefit from the remittance. As well in a moral as in a legal point of view, I think the defendant Flower has been, in the words of the act, held to special bail for the sum of 400*l.* without reasonable or probable cause, and therefore that he is entitled to his costs.

Mr. Justice GASELKE and Mr. Justice BOSANQUET concurred.

Mr. Justice ALDERSON. The remittance of Flower & Moss must for this purpose be considered as a remittance to the plaintiff himself.

Rule absolute.

MOORE v. THOMAS.—p. 810.

Where the sheriff has neglected to comply with rule iv. of Michaelmas term, 3 Will. 4, by indorsing on the writ of *capias* the day of its execution, the party's remedy is, not by attachment, but by a rule calling upon the sheriff to amend his return.

MR. Serjeant *Wilde* moved for a rule nisi for an attachment against the sheriff of Cornwall for not indorsing on the process the day of the execution thereof, in pursuance of the rule of Michaelmas term, 3 Will. 4, by which it is ordered "that the sheriff or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof; and, in default thereof, shall be liable in a summary way to make such compensation for any damage that may result from his neglect as the Court or judge shall direct." [THE COURT referred to *Ridley v. Weston*, 2 M. & Scott, 724, where it was held, that, where the sheriff has neglected to comply with the rule in question, the plaintiff's remedy is, not by attachment, but by a rule calling upon the sheriff to amend his return.] The learned serjeant submitted that, the case of *Ridley v. Weston* having arisen shortly after the passing of the statute 2 Will. 4, c. 39, and the making of the rule, the Court might not on that occasion have felt inclined to visit the sheriff with harshness; but that no such reason for a lax construction of the rule existed now. [MR. Justice BOSANQUET. The penalty being given by the rule, seems to exclude a motion like the present.] The penalty mentioned in the rule is cumulative; the sheriff is always liable to an attachment for a breach of duty; were it otherwise, there would be nothing to induce the sheriff to adhere to the rule. If a plaintiff's only remedy in such a case as this is by motion to compel the sheriff to amend his return, great delay in all cases, and possible injury and loss to the plaintiff in many, will be the necessary result.

LORD Chief Justice TINDAL. The rule of Michaelmas term, 3 Will. 4, renders the sheriff liable in a summary way, to make such compensation for any damage that may result from his neglect as the Court or a judge shall order. The Court or the judge before whom the proceeding is had will look at the circumstances of the case, and take into consideration the injury the plaintiff may have sustained, and assess the amount of compensation to be paid by the sheriff accordingly.

Rule nisi in the terms of the rule in *Ridley v. Weston*(a)—cause to be shown at Chambers.

(a) Calling on the sheriff to show cause why he should not amend his return to the

COOMBS v. DOD. p. 817.

In the case of a London commission, the Court will not enlarge the time for the render of the principal until after his final examination before the commissioners.

HENNING v. SAMUEL. p. 818.

Semble that the rule laid down by the Courts at Westminster as to new trials where the sum recovered is under 20*l.*, applies to causes tried in the sheriff's court.

CURTIS v. CURTIS. p. 819.

In an action of slander imputing to the plaintiff that he was the writer of a scandalous letter reflecting upon the defendant, the latter in one of his pleas set forth the letter and justified the words spoken. The Court permitted the plaintiff to inspect the letter with witnesses, in order that he might be prepared at the trial to show that it was not in his hand-writing.

THIS was an action on the case for slander. The declaration charged that the defendant imputed to the plaintiff that he was the writer of a certain scandalous letter reflecting upon the character of the defendant. The latter pleaded the general issue, and also a plea of justification setting forth the letter, and asserting that the plaintiff was the author.

Mr. Serjeant *Wilde*, on a former day, obtained a rule nisi that the plaintiff might be at liberty with certain witnesses to inspect the letter in question in the hands of the defendant, in order that he might be prepared with evidence to negative the fact of its being in his hand-writing.

Mr. Serjeant *Stephen* now showed cause. The Court have no jurisdiction in this case: they cannot compel the defendant to furnish evidence against himself. The only case in which a party is compelled to produce for the inspection of his opponent a document in his custody, is, where he can be considered as holding it as trustee. In *Jessel v. Millingen*, 1 M. & Scott, 605, the Court refused to allow the plaintiff to inspect a document in the hands of the defendant, alleged by his (the defendant's) attorney to be signed by the plaintiff, and to afford a perfect defence to the action, upon an affidavit of the plaintiff, that, if such document existed, and purported to be signed by him, the signature was a forgery. Lord Chief Justice Tindal there says: "Inspection of documents in the custody of an adversary, is only permitted where they are to some extent the property of both parties, as in the case of an agreement of which there is but one copy: there, the party who holds it, holds it as trustee for the other. But, by the present motion, the plaintiff seeks to compel the defendant to show the nature of his defence to the action." [Mr. Justice ALDERSON. How can this case differ from the ordinary one of an application for leave to inspect a bill of exchange, which we are in the daily habit of allowing?] In that case the plaintiff declares on the bill, and the inspection is sought in analogy to a perfort; which is very different from the present case. In *Hildyard v. Smith*, 8 J. B. Moore, 586, S. C. 1 Bing. 451, (a) in an action on a bill of exchange, the Court refused to compel the plaintiff to deposit it in

writ by indorsing thereon the true day of the execution thereof, and why he should not make such compensation to the plaintiff as the Court should direct, and why he should not pay the costs of the application.

(a) See *Thelfall v. Webster*, 7 J. B. Moore, 559; S. C. 1 Bing. 161.

the hands of the prothonotary, for the purpose of enabling the defendant to inspect it, in order to ascertain whether the signature had been forged.

Mr. Serjeant *Wilde*, in support of his rule. The Court has abundant jurisdiction in the matter. All that is required is, that the plaintiff may have an opportunity of showing the letter to his witnesses, that they may be prepared to prove that the handwriting is not his. In *Jessel v. Millingen* the agreement was not upon the record: and the main ground of the decision was that the party applying was not prepared to show the existence of the document. And in *Hildyard v. Smith* the motion was made before declaration; and the Court said they could not interfere in that stage of the proceedings.

Lord Chief Justice TINDAL. *Hildyard v. Smith* is quite foreign from the present case. Here, the defendant in his plea sets up a letter which he states to be in the handwriting of the plaintiff; and the latter seeks to inspect it so that he may be prepared with witnesses at the trial to disprove that statement. Good sense and justice require that the inspection prayed should be granted; otherwise the plaintiff may be surprised at the trial, and the cause may consequently have to go down again. In *Jessel v. Millingen* the sole ground of the motion was an idle assertion made by the defendant's attorney, that he had in his possession a document bearing the plaintiff's signature, that, when produced, would put an end to the cause. The existence of the writing itself was not made sufficiently to appear: whereas here the defendant sets out the letter in question upon the record. Besides, the plaintiff does not even want to know the contents of the paper here. The rule must therefore be made absolute for liberty to the plaintiff to inspect the letter in the hands of the defendant's attorney a reasonable time before the trial, upon giving twenty-four hours' notice.

Mr. Justice BOSANQUET. I am of the same opinion. Where forgery is suggested, an inspection of the document is constantly allowed.

Mr. Justice ALDERSON mentioned a case wherein Mr. Justice Bayley, at the Assizes for Westmoreland, granted an inspection under circumstances precisely similar to the present.

Rule absolute.

BRAZIER v. BRYANT.—p. 844.

A cause being referred, the arbitrator in 1825 received from the plaintiff's attorney 87*l.* for his fees and expenses. In 1827, the parties went before the prothonotary, when he allowed only 35*l.* The defendant now, after a lapse of eight years from the time the payment was made (the attorney who paid the money having died in the interim,) applied to the court to order the arbitrator to refund the difference:—Held, that the application was too late.

Mr. Serjeant *Bompas*, on a former day in this term, obtained a rule calling upon an arbitrator to show cause why he should not pay over to the plaintiff a sum of 52*l.*, which it was alleged he had been overpaid. The circumstances out of which the motion arose were these: The cause had been referred in the year 1825, when the arbitrator received from Mr. Carter, the plaintiff's attorney (since deceased), 87*l.* for his fees and expenses. In the year 1827, the parties went before one of the prothonotaries, who allowed only 35*l.* The present application sought to compel the arbitrator to refund the difference.

Mr. Serjeant *Taddy*, contra, submitted that the application came too late, more than six years having elapsed (which would be an answer to an action brought to recover back the money), and Mr. Carter, who might have explained the transaction, having died in the interim.

Mr. Serjeant *Bompas* contended that the objection as to the lapse of time would apply with at least equal force in the case of an attorney's bill, which the Court nevertheless had opened after an interval of ten years.(a)

(a) See *Ex parte Shipden*, 6 Dow. & Ry. 338, where, more than seven years having

Lord Chief Justice TINDAL. I am of opinion that we ought not to entertain this motion. The transaction out of which it arises took place in the year 1825—eight years since; and no application has been made to the Court until the present term, notwithstanding the parties had their attention called to the matter when they went before the prothonotary in 1827. Besides, Mr. Carter, who could probably have thrown some light on the affair (he having paid the money) is now dead. It seems to me, that, in acceding to an application of this sort after so great a lapse of time, we should be holding out premium dormientibus. If the arbitrator has really received too much, I am not aware that he is not liable to an action. The party may, therefore, if he please, take his action, with all its consequences.

Mr. Justice GASELEE. The Court are not to be understood as laying it down that the statute of limitations is the guide in such cases: all they mean to say is, that they exercise their discretion in refusing to rip up stale transactions; by analogy to cases on annuities.

Mr. Justice BOSANQUET concurred.

Mr. Justice ALDERSON. This is an application to the discretion of the Court, and I do not think it would be a sound exercise of our discretion to interfere. How can we infer anything improper in the conduct of the arbitrator, when the parties have slept so long? The motion being delayed until after the death of Carter, induces some suspicion; and I think the Court would not do its duty to its officers if it did not protect them under such circumstances.

Rule discharged, with costs.

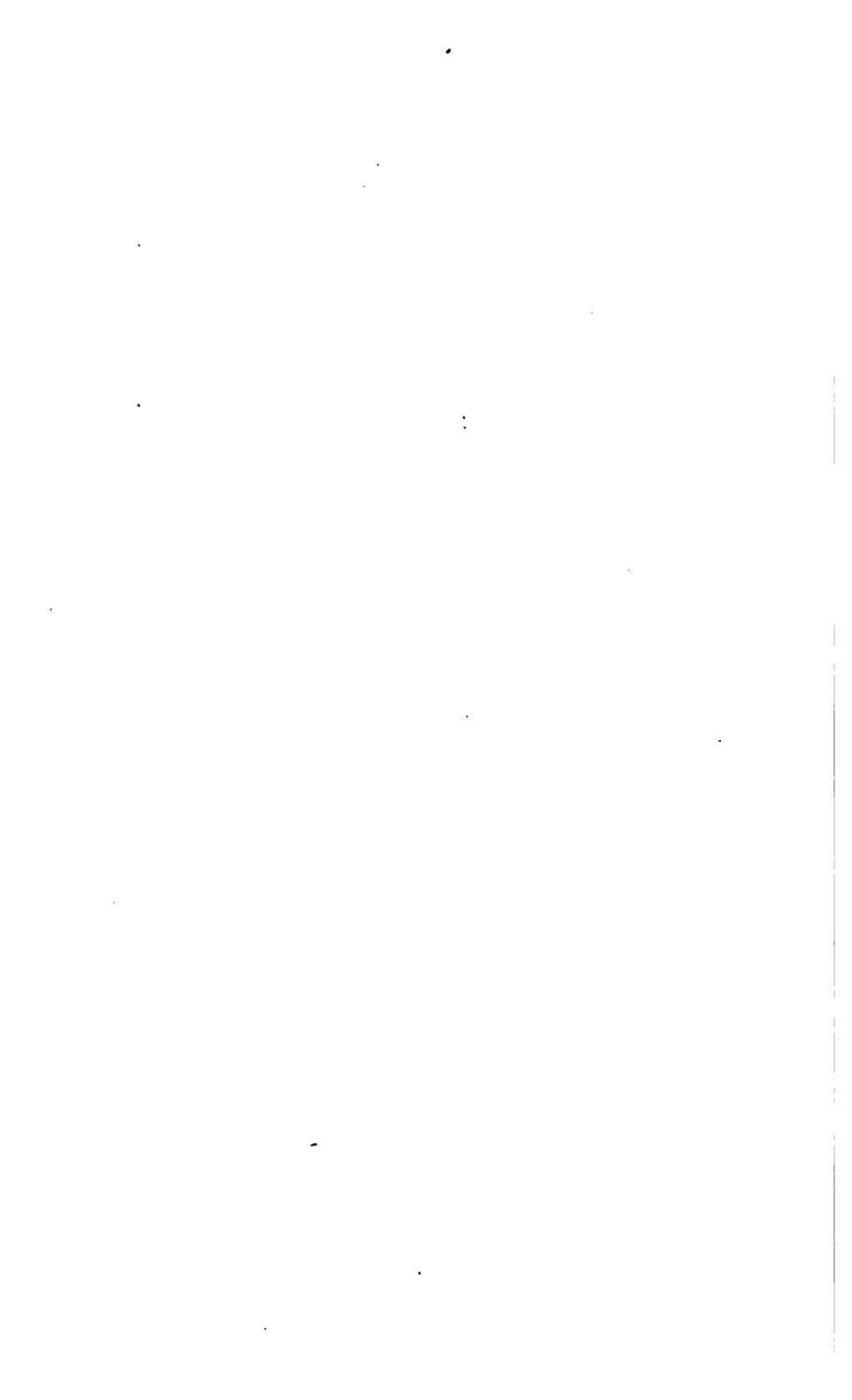
REX v. The Sheriff of ESSEX, in a Cause of LEVY v. PAINE. p. 870.

A defendant arrested upon an alias capias must put in bail in the county wherein he is arrested.

THE Judges who sat in the Court of Common Pleas during the foregoing term were

Lord Chief Justice TINDAL, Mr. Justice GASELEE, Mr. Justice BOSANQUET, Mr. Justice ALDERSON.

elapsed after the settlement of transactions between an attorney and his client, the court refused to interfere to have them re-opened, in the absence of any suggestion of fraud or misconduct.



REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas,

AND

EXCHEQUER CHAMBER,

DURING

Michaelmas, Hilary, Easter & Trinity Terms,

IN THE

FOURTH YEAR OF THE REIGN OF WILLIAM IV.—1833-4.

BY JOHN BAYLY MOORE,

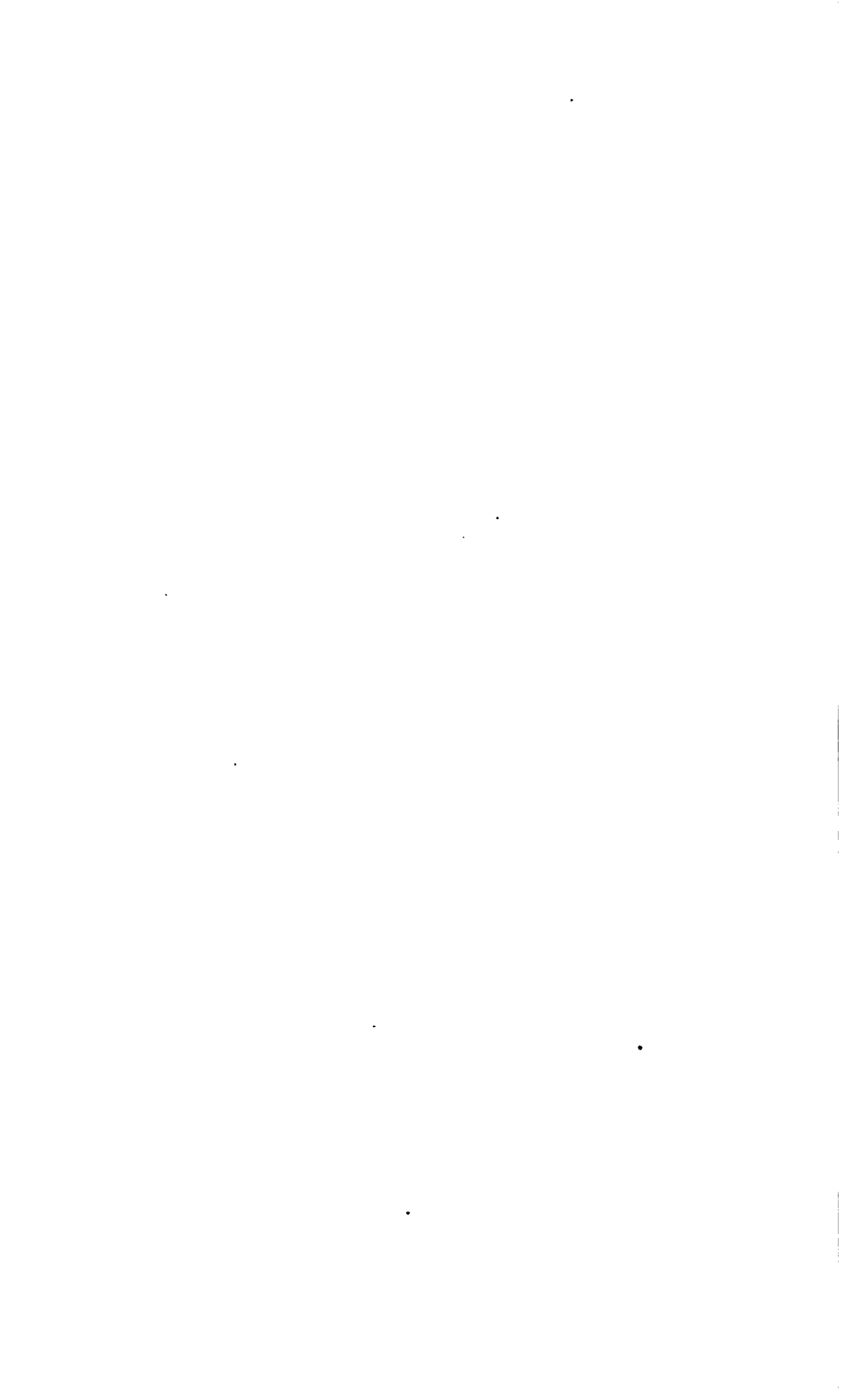
OF THE INNER TEMPLE, ESQ.,

AND

JOHN SCOTT,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

VOL. IV.



C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS.
IN
Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.—1833.

IN THE EXCHEQUER CHAMBER.

MICHAELMAS VACATION.

ARMSTRONG *v.* LEWIS and Others.—p. 1.

[In Error.]

A contract made between two or more persons to enter into a partnership in contravention of the law, is void, and confers no rights upon either party.

A. and B. carried on the business of a pawnbroker in partnership under a deed. The business was conducted solely by A., and his name alone appeared over the shop-door and upon the printed tickets and duplicates used by persons in that trade, and the license contained the name of A. only:—Semble, that, although the parties might by this contract have rendered themselves liable to penalties imposed by the statute 39 & 40 Geo. 3, c. 99, yet, that, there being no actual agreement for an infraction of the law, the contract was not void.

Where exceptions are not properly taken—as, where they appear upon the record before the finding of the jury—the court of error cannot give judgment thereon.

THIS was an issue directed by his Honor, the Master of the Rolls. The issue stated that one Robert Armstrong, now deceased, in his lifetime, and at the time of his death, and before the discourse thereafter mentioned, used, exercised, and carried on the business or concern of a pawnbroker, to wit, &c.; that, before the making of the promise of the defendant thereafter next mentioned, to wit, on &c., in &c., a certain discourse was had and moved by and between the plaintiffs and the defendant, wherein the following questions then and there arose, viz. first, whether, at the death of Robert Armstrong, Samuel Shephard Warner was legally to be considered as a partner of the said Robert Armstrong, and entitled to receive payment at the rate of 10*l.* per cent. upon the capital advanced by him out of the profits or effects of the concern; and secondly, if he was to be considered as such partner and entitled to receive payment as aforesaid, then, whether he was entitled to receive such payment on a sum of 4,300*l.*: and, in that discourse, the plaintiffs then and there asserted, &c. &c., concluding in the usual term.

The issue came on for trial before Lord Chief Baron Lyndhurst at the Sit-

ings at Westminster in Hilary term, 1832. The plaintiffs' counsel, to maintain the issues on their part, proved that Robert Armstrong had carried on the business of a pawnbroker, in Baldwin's Gardens, Leather Lane, Holborn, for several years before the making of the deed hereinafter next mentioned, and continued to carry on such business at the same place, *in his own sole name*, until the time of his death, which happened in the month of August, 1819: and the plaintiffs claimed, that, whilst Armstrong so carried on his said business in his own name, he the said S. S. Warner was a dormant and secret partner; and, to support such claim, they gave in evidence a certain deed, purporting to be a deed of co-partnership, dated the 24th of June, 1810, between the said S. S. Warner, deceased, and the said R. Armstrong, deceased; of which the following is a copy:—

"This indenture made this 24th June, 1810, between Samuel Shephard Warner, of King Street, in the parish of St. George, Bloomsbury, in the county of Middlesex, dyer, of the one part, and Robert Armstrong, of Baldwin's Gardens, in the parish of St. Andrew, Holborn, and county aforesaid, pawnbroker, of the other part: Whereas the said S. S. Warner and R. Armstrong have consented and agreed to become co-partners and joint traders in the trade or business of a pawnbroker, which the said Robert Armstrong now carries on in Baldwin's Garden's aforesaid: Now this indenture witnesseth that the said S. S. Warner and R. Armstrong, for and in consideration of the good opinion they have and entertain for each other, and also in consideration of the sum of 2,000*l.* of lawful money of Great Britain, advanced by the said S. S. Warner to the said R. Armstrong, the receipt whereof he the said R. Armstrong doth hereby acknowledge, have concluded and agreed, and by these presents do mutually covenant, promise, and agree to and with each other, to be and continue co-partners and joint traders in the trade or business of a pawnbroker, and all things appertaining thereto, for and during the term of fourteen years, to commence from the day of the date hereof; determinable, nevertheless, as hereinafter mentioned: and the same joint trade or business is to be managed and carried on in Baldwin's Gardens aforesaid, in the house wherein the said R. Armstrong now carries on the said trade or business of a pawnbroker, or in any other place or places that the said parties hereto may think it prudent or advisable for that purpose. And it is hereby further agreed by and between the said parties hereto, that they shall and will, during the term and continuance of this co-partnership, keep such and so many books of account as shall be proper and necessary for carrying on the said business; wherein from time to time shall be fairly entered exact and true accounts of all their loans, buyings, sellings, receipts, and payments, with the circumstances of the dates, sums, and parties, and of all their other transactions relating to the said trade or business; which said book or books shall remain and be kept by the said R. Armstrong in such safe and convenient place and in such manner that the said S. S. Warner shall at all times have free liberty to inspect and examine the same and take copies or extracts thereof: And it is hereby mutually agreed by and between the said parties hereto that the said trade or business of a pawnbroker shall be conducted and carried on by the said R. Armstrong, who shall be at liberty to employ and engage such journeymen, servants, or apprentices as to him shall seem necessary and expedient for conducting and carrying on the said trade or business of a pawnbroker: And it is further agreed that the said parties hereto shall once in every three months examine their books of accounts, and join in making up the same, and balance, adjust, and settle the same accordingly; the first examination and adjustment to take place on Michaelmas-day next ensuing the date thereof; at which time the said S. S. Warner shall receive and take the sum of 50*l.* out of the said co-partnership concern as and for his share and proportion of the profits arising therefrom; and the like sum of 50*l.* at every subsequent adjustment and settlement, which is hereby mutually agreed shall take place quarterly and every quarter during the continuance

of the copartnership: And it is hereby further mutually agreed, that, in case either of the parties hereto shall be minded and desirous of putting an end to and determinidg this co-partnership at the end of the first three, seven, or ten years of the said term of fourteen years, and shall give twelve calender months' notice or warning in writing to the other of such his mind and intention, that then and in such case this copartnership shall cease and determine as if the whole term of fourteen years had been suffered to run out and expire; any thing herein contained to the contrary in any wise notwithstanding: And further, that, at the dissolution of the said co-partnership as aforesaid, the said S. S. Warner shall be at liberty to draw out of the said co-partnership concern the said sum of 2,000*l.* so advanced by him at the time of the execution of these presents: And it is further agreed by and between the said parties hereto, that, during the continuance of the said co-partnership, it shall not be lawful for the said R. Armstrong to discount any promissory note or bill of exchange without the license and consent of the said S. S. Warner first had and obtained; and, in case the said R. Armstrong shall, without such license and consent, discount any note or bill, he shall forfeit and pay to the said S. S. Warner, 100*l.* for every such note or bill so discounted: and lastly it is agreed by and between the parties hereto, that in case the said S. S. Warner shall at any time during the continuance of this copartnership advance a sum of money equal to that which the said R. Armstrong may at that time have engaged in the said trade or business of a pawnbroker, that then and in such case he the said S. S. Warner shall be entitled unto and receive an equal share and proportion of the profits arising therefrom, after deducting such a sum yearly as an allowance to the said R. Armstrong for his trouble in the management and conducting the said trade or business as any two persons in the trade may think an adequate compensation for such management. In witness, &c."

Upon the back of the deed were indorsed, in the hand-writing of R. Armstrong, various sums of money received by him S. S. Warner, in the whole amounting to 4,800*l.*

The net annual profits of the business was supposed to be at the rate of about 12½ per cent. In the summer of 1812, Robert Armstrong told J. O. Harrison, a witness examined on the part of the plaintiff, that he and S. S. Warner had a deed of partnership, and that Warner was a sleeping or private partner, and that his share of the profits was consolidated at the rate of 10*l.* per cent. according to the advances he had made; that no accounts were ever made out or examined or adjusted as declared by the said deed; and that the said R. Armstrong, after the making of such deed down to the time of his death did not pay the said S. S. Warner, at the rate of 50*l.* every three months, but paid him at the rate of 10*l.* per cent. per annum on the various sums advanced by him to the said R. Armstrong, and which said payments were entered in the books of the said R. Armstrong from time to time, thus:—"Paid Mr. Warner interest, &c." mentioning the amount in each entry.

Robert Armstrong afterwards died intestate; and after his death, viz. in or about the month of February, 1820, administration of the estate and effects was granted to Mrs. Betty Armstrong, his widow, and the said defendant. Mrs. Armstrong afterwards passed her account of the estate and effects of her late husband at the Legacy Office; and such account was made out by Mr. Walls (a witness examined on the part of the plaintiffs, and the attorney for S. S. Warner at the time of the administration granted, and up to the time of his death, and also attorney for the plaintiff,) from documents furnished by the defendant to him for that purpose. He also prepared an affidavit verifying the truth of such account, and which affidavit was duly sworn by the said Betty Armstrong: and the account, affidavit, and deed of partnership, were also produced at the said office for the inspection of the comptroller of the legacy duties. In this affidavit, the effects of the deceased were sworn to be under 200*l.* The inventory annexed stated the amount of assets to be 8,090*l.* 10*s.*; and the

debts owing at the time of Armstrong's death (including the 4,300*l.* advanced by Warner) to be 7,926*l.* 18*s.* 2*d.*

On the part of the defendant, the evidence was to the following effect:—In the year 1810, and every succeeding year down to the death of Armstrong, an annual license for carrying on the said business of a pawnbroker at Baldwin's Gardens aforesaid, was taken and made out in the name of Robert Armstrong only; and he conducted and managed the business. Warner never was licensed to carry on the business of a pawnbroker either separately or jointly with Armstrong; and during all that period the name of Robert Armstrong alone was painted and appeared over the door of the premises at Baldwin's Gardens, where the business was so carried on, and the name of Warner was never inserted or used in any of the duplicate tickets, notes, or memoranda given out by Armstrong and his shopmen and servants upon the receiving of pledges of goods from customers; but, from the date of the deed of the 24th June, 1810, to the time of the death of Armstrong, the name of Armstrong alone was inserted and used in such duplicate tickets, notes, or memoranda, and during all that time Warner never ostensibly acted in the conduct or management of the business, nor was he ever known either by the shopmen or servants assisting in the business, or by any person or persons dealing or coming to the shop on business, to be a partner therein with Armstrong; and no other person was known to them as the master or proprietor of the concern but Armstrong.

It is customary for pawnbrokers every year to take an account of the stock of goods and pledges being upon their premises, and for that purpose to call to their assistance pawnbrokers and others, *such persons not being interested in the particular stock to be taken.* From the time of making the deed of the 24th June 1810, until the death of Armstrong, an account of the stock of goods and pledges on the premises at Baldwin's Gardens where the business was carried on, was taken once in every year, by pawnbrokers and others, in different books, as the stock of Armstrong only. Warner himself occasionally assisted in taking such stock; and in the years 1811 and 1812 respectively, he signed memoranda in the following form:—

"The above sum formed part of the stock of Mr. Armstrong as taken by us this 30th day of June, 1811.

(Signed)

S. S. Warner,
W. G. Perryman."

On or about the 28th April, 1819, Armstrong made and executed a deed, whereby, after reciting a lease to him of the premises at which the business was carried on, and that he was possessed of certain stock in trade and pledges and other property, he assigned the same to T. Wood and S. S. Warner upon certain trusts—among others, "Upon trust to permit and suffer Betty Armstrong, the wife of the said R. Armstrong, to take and have the possession of the said premises, stock in trade, pledges, debts, shares, ready money, and securities for money, and all other property that the said R. Armstrong might be possessed of, interested in, or entitled unto at the time of his decease, to carry on in *her own name* the said trade and business that the said R. Armstrong then carried on or should at the time of his death carry on in his said shop and premises, during the continuance of the said lease, and so long as she should be and continue the widow of the said R. Armstrong, and to receive and take the profits of the said business for the support and maintenance of herself and such of the children of the said R. Armstrong, whether sons or daughters under the age of twenty-one years, as may continue to live with her and be subject to her directions, &c."

About a month after the death of Armstrong, the stock was taken by various persons, when Warner and Wood were present, but declined to act in such stock taking, giving for a reason that they were interested in such stock as trustees; referring to the deed of trust.

Armstrong kept cash at Messrs. Nixon & Co.'s, bankers, during the time he

carried on business at Baldwin's Gardens; and, after his death, Warner as such trustee, on the 1st February, 1820, received 11s. 9d. from the said bankers, being the balance due to the estate of Armstrong. Mrs. Armstrong possessed herself of all the stock of goods and pledges then on the premises at Baldwin's Gardens. Administration with the said deed or will of the 28th April, 1819, annexed, was granted to her in the month of February, 1880; and Warner and his attorney, Mr. Walls, were her sureties on that occasion. The business was carried on in her name alone, and she had her name only over the door of the house of business. Warner never took possession of any part of the stock of goods or pledges on the premises or place of business; nor did he ever act or interfere in the management or conduct of the business, or assume any proprietorship over the same or the stock after administration had been so granted, though he assisted on some future occasions in taking stock in the same manner as he had done in the lifetime of Armstrong, and in signing such stock taking as the property of the defendant only.

Some years after the death of Robert Armstrong, Warner made his will, dated the 30th April, 1827, in which he made the following recital:—

"Whereas Betty Armstrong, widow and relict of Robert Armstrong, of Baldwin's Garden's Gray's Inn Lane, in the county of Middlesex, is and stands justly and truly indebted to me in the sum of 7,000*l.* and upwards, for principal money and interest, the principal whereof has been from time to time advanced by me to her for the purpose of enabling her to carry on the business of a pawnbroker; and inasmuch as I am apprehensive that the immediate calling in of so large a sum of money all together at my decease would be very injurious to her in her aforesaid business; it is therefore my earnest wish, and my will and desire, and I declare, order, and direct that my said trustees and executors for the time being do and shall, within three months next after my decease, adjust and balance my account with the said Betty Armstrong, and thereupon with her take an account of the stock then being on the premises of the said Betty Armstrong, and do from time to time continue to take an account of such stock when and so often as they may deem it necessary, and, if satisfied, on such stock taking, that there is and continues a good and sufficient security for the sum or balance due, do and shall allow the said sum of 7,000*l.*, or such other sum as may be found due at the time of my decease, to remain at interest at five per cent. per annum."

Whereupon the counsel for the defendant insisted,—first, that, upon the several matters so produced and given in evidence as aforesaid, Warner, at the death of Armstrong, could not legally be considered as a partner of Armstrong, or entitled to receive payment at the rate of 10*l.* per cent. on the capital advanced by him, out of the profits or effects of the concern—secondly, that, as such partner, he was not entitled to receive such payment on the said sum of 4,300*l.* because, upon the several matters so produced and given in evidence as aforesaid, no legal contract of partnership had been proved in relation to the trade of a pawnbroker carried on by Armstrong; and that Warner could not by law claim an interest as a partner in such trade carried on in the manner as shown by the evidence in the cause and above set forth.

I was further insisted by the defendant's counsel, that a contract of partnership to be carried on in contravention of the statutes relating to pawnbrokers, particularly the statutes 1 Jac. 1, c. 21,—25 Geo. 3, c. 48,—and 39 & 40 Geo. 3, c. 99,—and the stamp act relating to licenses, could not be a legal partnership; and the plaintiffs claiming upon the ground that a secret partnership existed between Warner and Armstrong in respect of the said trade of a pawnbroker, carried on by and in the name of Armstrong alone under the circumstances stated in the evidence, such partnership was in contravention of the statutes referred to, and wholly unlawful; that Warner could not, under such contract of partnership, be legally a partner; and that a contract between two persons to carry on the trade of a pawnbroker in the name of one of such per-

sons, under a license in the name of one only, and with the name of that one alone being painted over the door, all the transactions in relation to the trade to be carried on in the name of such one person, was an illegal and void contract, and contrary to law. Therefore, it was insisted, that, upon these several grounds, the Lord Chief Baron ought to direct the jury accordingly.

His lordship told the jury that the several acts of parliament cited, did not in point of law furnish any impediment to the plaintiff's recovering a verdict on the several issues; and he further stated that a person might as a partner, and a secret partner, and subject as such to the liabilities of a partner, receive more than five per cent. for money advanced by him to the concern. And after referring the jury to the testimony of Harrison, told them that such evidence, if they believed it, was material in favour of the plaintiffs; for, according to the witness, Mr. Armstrong had stated on two occasions to him that Warner was a sleeping or private partner, and that his share of the profits was fixed at a certain rate according to his advances. His lordship afterwards directed the attention of the jury to a point insisted on by the defendant's counsel, viz. that Warner was never *known* to be a partner; this, he said, appeared to him to be an inconclusive fact; for, according to the stipulations in the deed, the business was to be carried on by Armstrong, and the servants were to be hired by him, and they were to be his servants. Possibly, said his lordship, Mr. Armstrong might not wish it to be known that he had a secret partner who had advanced money in the trade; and a person who embarks money in a concern may also be desirous that the circumstance should not be known; that, however, will not make him the less a partner.

The defendant's counsel thereupon excepted to the direction of the Lord Chief Baron.

His lordship having summed up to the jury, observed, that, as these were issues from a court of equity, it might be convenient that they should give their opinion upon the different points separately; and he left it to them to say—first, whether, at the death of Armstrong, Warner was legally to be considered as a partner of Armstrong—secondly, whether Warner was entitled to receive payment at the rate of 10l. per cent. on the capital advanced by him—thirdly, whether Warner was entitled to receive such payment out of the profits or effects of the concern—fourthly, whether or not Warner was entitled to receive such payment on the sum of 4,300l. The jury answered all these questions in the affirmative, and thereupon returned a verdict for the plaintiffs on both the issues.

The exceptions now came on for argument.

Mr. Serjeant *Wilde*, (Mr. Serjeant *Bompas*, and Mr. *Comyn* were with him,) for the plaintiff in error.—The question to be considered is, whether a legal partnership subsisted between Armstrong and Warner, or whether the deed of partnership recited in the bill of exceptions was a mere design to cover an usurious contract; and, in order to disclose what was the real nature of the contract, recourse must be had to the terms of the deed and to the conduct of the parties. The stipulations contained in the deed are not such as would appear in the case of a bona fide partnership. The conduct of the parties in reference to the division of profits, the deed of assignment set forth in the bill of exceptions, and the will of Warner, are alike inconsistent with a partnership between them.

The business of a pawnbroker has from an early period been thought by the legislature to require special provisions for its regulation. Thus, the 1 Jac. 1, c. 21, recites the great increase of late in the members of that trade, the abuses that had consequently grown up therein, and the facility given by them to the utterance of stolen goods; and then proceeds to make certain enactments for remedy of these and other abuses. Further provision for the same purpose was made by the 3 Geo. 2, c. 24. By the 25 Geo. 3, c. 48, persons exercising the trade of pawnbrokers were required annually to take out a license for that purpose. The 3d section of that act contained a general prohibition against carry-

ing on the trade except under a license; and the 8th section provided that persons in partnership, carrying on the trade of a pawnbroker, should not be required to take out more than one license annually for carrying on trade in one house or shop. Then came the 36 Geo. 3, c. 87, which was followed by the 39 & 40 Geo. 3, c. 99, (the act now in force for the regulation of the trade. By the 6th section of that statute, the pawnbroker is required to give to the party pledging goods with him a note in writing, describing the things pawned, upon which note are to be written or printed *the name and place of abode of the pawnbroker giving the same*. The 11th section prohibits the buying or taking in pledge of unfinished goods, or linen or apparel entrusted to others to wash or mend, and imposes for such offence a penalty of double the sum lent and the forfeiture of the goods; and the 12th section empowers peace officers to search for such goods. The 13th section likewise provides for the search of the premises of pawnbrokers unlawfully taking goods in pledge. The 14th relates to the redemption of goods. By s. 15, the pawnbroker is required, on payment of the sum advanced thereon and interest, to restore the goods pawned to the person producing the note. The 16th section regulates the mode of proceeding where the note has been lost. By ss. 17, 18 and 20, pawned goods are declared to be forfeited at the end of a year, and the mode of sale of unredeemed pledges is pointed out. Section 19 extends the period of redemption on notice to the pawnbroker. Section 21 prohibits pawnbrokers from purchasing goods while in their custody, &c. Section 22 requires every person and persons who shall follow and carry on the trade and business of a pawnbroker to cause to be painted or printed, in large legible characters, the rate of profit allowed by the act, &c., and to place the same in a conspicuous part of the shop where he, she, or they shall carry on such trade or business. Section 23, "for the better manifesting by whom the trade or business of a pawnbroker shall hereafter be carried on," enacts "That, from and after the commencement of the act, all and every person or persons who shall carry on the trade or business of a pawnbroker, shall cause to be printed or written in large legible characters over the door of each shop or other place by him, her, or them, respectively made use of for carrying on that trade or business, the christian and surname or names of the person or persons so carrying on the said trade or business, and the word 'Pawnbroker' or 'Pawnbrokers,' as the case may be, following the same"—under the penalty therein mentioned. The 26th section imposes general penalties against pawnbrokers offending against the act; and by the 31st section the act is extended to the executors and administrators of deceased pawnbrokers. In order to give effect to these regulations, the parties carrying on the trade must be known; all of them are incompatible with the existence of a secret partnership; particularly the provision on the 21st section prohibiting pawnbrokers from purchasing goods while in their custody—a provision that might easily be evaded by the dormant partner becoming the purchaser. The act has in view several great objects; among others, the protection of masters from the unlawful pawning of goods by their workmen and servants, the discovery of stolen property, to secure to persons pawning the due restoration of their goods, and to protect them from excessive charges for interest, and from other acts of extortion commonly practised by pawnbrokers. As all these objects are to be attained solely through the personal responsibility of the party, such responsibility would be totally withdrawn, and the intention of the act frustrated, by allowing pawnbrokers to contract secret partnerships, whereby men of substance are enabled to trade upon the irresponsibility of men of straw. The question here is, not as to what remedies exist in such cases against or in behalf of third persons, which is the question that has arisen in most of the decided cases on the subject; not whether the partnership quoad third persons be legal or not; but the dry question whether, where a general prohibition is imposed by statute against parties carrying on a particular trade except under certain regulations, those who contract engagements to contravene such statutory regulations, can

sue each other upon such illegal contract. In *Sullivan v. Greaves*, 1 Park on Insurance, 8, a case upon the statute 6 Geo. 1, c. 18, s. 12, Lord Kenyon said: "If a single name appears on the policy, as in this case, the insurer shall never be allowed, if a loss happen, to defeat a bona fide insurance, by saying to an innocent person, there was a secret partnership between another and myself, and therefore the policy is void. But here the plaintiff is himself the underwriter, who comes to enforce an illegal contract; it is a partnership *pro hac vice*; and this party cannot apply to a court of justice to enforce a contract founded in a breach of that law." That case was confirmed by *Mitchell v. Cockburne*, 2 H. Blac. 379, where A. and B. engaged in a partnership in insuring ships, &c., which was carried on in the name of A., who paid the whole of the losses—it was held that such partnership being illegal under the 6 Geo. 1, c. 18, A. could not recover from B. a share of the money so paid. The same point was determined in *Aubert v. Maze*, 2 Bos. & Pull. 371. So, where one of two partners underwriters policies of insurance upon ships, &c., in his own name, but upon their joint account, contrary to the 6 Geo. 1, c. 18, s. 12, no action can be maintained to recover from the assured the premiums upon such policies—*Branton v. Taddy*, 1 Taunt. 6; nor, where the brokers have received the premiums, can the partners in whose names the insurances are effected recover them from such broker—*Booth v. Hodgson*, 6 Term Rep. 405. Another class of cases analogous to the present is that of contracts made on a Sunday, in contravention of the statute 29 Car. 2, c. 7, which contracts have been declared by numerous cases to be illegal and void—among others, *Drury v. De Fontaine*, 1 Taunt. 131; *Smith v. Sparrow*, 12 J. B. Moore, 266, S. C. 4 Bing. 84; *Fennel v. Riddler*, 8 Dow. & Ryl. 204, S. C. 5 Barn. & Cress. 406; and *Williams v. Paul*, 4 Moore & Payne, 582, S. C. 6 Bing. 654. In *Little v. Poole*, 9 Barn. & Cress. 192, it was held that a vendor of coals who had delivered to a purchaser a vendor's ticket not signed by the meter, contrary to the provision of the statute 47 Geo. 3, c. 68, could not recover from the purchaser the price of such coals. In *Law v. Hodgson*, 11 East, 300, it was held, that, the 17 Geo. 8, c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller, if bricks be sold and delivered under the statutable size, unknown to the buyer, the seller cannot recover the value of them. So, in *Langton v. Hughes*, 1 Man. & Selw. 598, where the plaintiff, a druggist, after the 42 Geo. 3, c. 38, but before the 51 Geo. 3, c. 87, sold and delivered drugs to a brewer, *knowing that they were to be used in the brewery*, it was held that he could not recover the price of them. Mr. Justice Le Blanc there says: "It is an established principle that the court will not lend its aid in order to enforce a contract entered into with a view of carrying into effect any thing which is prohibited by law." The principle upon which these cases turned was that the regulations infringed were not mere fiscal regulations, but intended for the protection of the public against fraud. In *Gallini v. Laborie*, 5 Term Rep. 242, it was held that no action could be maintained for the breach of an agreement "to dance at the King's Theatre in the Haymarket, or at such other place as the plaintiff should appoint;" it appearing that no license for that theatre was granted by the Lord Chamberlain, as required by the statute 10 Geo. 2, c. 28, and that the plaintiff did not request the defendant to dance at any other place which was licensed. In *De Begnis v. Armistead*, 3 M. & Scott, 511, S. C. 10 Bing. 107, it was expressly determined that any contract made in contravention of the provisions of a statute cannot be made the subject of an action. Lord Chief Justice Tindal there said, 3 M. & Scott, 515: "We can entertain no doubt that the agreement between the plaintiff and defendant was an illegal agreement. It was an agreement to become equal sharers in the profits to be derived from acting operas and ballets at a theatre not licensed according to the provisions of the statutes 10 Geo. 1, c. 28, and 28 Geo. 3, c. 30; and, from the language of part of the agreement we can feel no doubt but that it was known to both parties, at the

time of entering into it, that any exhibition in such an unlicensed theatre was a breach of the law. If, therefore, the bill of exchange had been given for the share of profits claimed by the plaintiff, or for the excess of advances made by the plaintiff on account of such illegal partnership, it is clear, upon the authority of *Mitchell v. Cockburne*, that the plaintiff could recover no part of his demand." The rule there laid down directly applies to the present case: for, here the plaintiff below seeks to recover a share of the profits of a business that has been illegally carried on in contravention of the statute—a share of the profits upon duplicates in respect of which he was under no responsibility; and the question is, whether the parties can under such circumstances call upon a Court of justice to interfere in the adjustment of their accounts. In *Marchant v. Evans*, 2 J. B. Moore, 14, S. C. 8 Taunt. 142, and *Bensley v. Bignold*, 5 Barn. & Ald. 335, it was held that an action for work and labour cannot be maintained by a printer for printing a work, unless his name and place of abode be printed in some part thereof, as required by the statute 39 Geo. 3, c. 79, s. 27. In the latter of these cases, Lord Chief Justice Abbott said: "I am of opinion that a party cannot be permitted to sue either for work and labour done or for materials provided, where the whole combined forms one entire subject-matter made in direct violation of the provisions of an act of parliament." In *Stephens v. Robinson*, 2 Crompt. & Jerv. 209, the Court of Exchequer acted upon the authority of *Marchant v. Evans* and *Bensley v. Bignold*. In *Meux v. Humphries*, 1 Moody & M. 132, S. C., 3 Car. & P. 79, it was held, that where a brewer delivers beer to be used in a particular public house, he cannot make any person except the licensed keeper of the house *primarily* liable, so as to maintain an action for goods sold and delivered. So, here, the plaintiff's testator having held Armstrong out to the world as the individual solely carrying on the trade, and the only person amenable to the provisions of the act, is estopped from coming into a court of justice to enforce a claim to participate in the profits. [Mr. Justice J. PARKE. The doctrine laid down by Lord Tenterden in *Meux v. Humphries*, is still under discussion. His lordship ruled in conformity with that case in *Brooks v. Ward*, on the Home Circuit, and the Court of King's Bench granted a rule upon it, which is now pending.] Throughout all the cases this principle will be found to prevail, viz. that, where the prohibition has for its object the public benefit, any contract made in furtherance of a breach of the law is void; but otherwise where the breach is of a mere fiscal or revenue regulation protected by penalties—as in *Johnson v. Hudson*, 11 East, 180; *Hodgson v. Temple*, 5 Taunt. 181, S. C. 1 Marsh. 5; and *Brown v. Duncan*, 10 Barn. & Cress. 93. Here, the Lord Chief Baron, in his direction to the jury, was incorrect in stating that the statutes regulating the trade of pawnbrokers did not prevent the plaintiffs from recovering in this action.

The *Solicitor General* (Mr. *Hutchinson* was with him), contra. The only question that arises upon the exceptions taking to the ruling of the Lord Chief Baron is, whether or not the statutes referred to operate an absolute bar to the maintenance of this action. The jury have found, that, at the death of Armstrong, Warner was a dormant or secret partner with him, and that such partnership was bona fide. No question of fraud, therefore, can now be agitated; and the point is to be considered as if it had arisen between Warner and Armstrong. It is conceded on the other side, that, quoad third persons, Armstrong and Warner were partners: and the jury have found that they were also partners inter se. There is nothing in secret partnerships contrary either to law or to morality. Contracts of that nature are recognised in all mercantile countries. The defendants in error contend, first, that there has been no infraction of the law in the mode in which the business has been carried on; secondly, that, even if there were, there was no express agreement for such infraction, and therefore, although the parties might have subjected themselves to certain penalties imposed by the statute 39 & 40 Geo. 3, c. 99, still the contract is not rendered void.

1. The statutes apply only to those who really take a part in carrying on the business, and not to a dormant partner. There are many trades in which parties are required by various statutes to take out annual licenses and to have their names painted over their doors. The consequences would be most fearful if the Court were to hold (as they must in effect do if the exceptions taken in this case be supported) that a dormant partner, taking no part in the conduct or management of the business, and perhaps residing at a great distance from the place where it is carried on, is nevertheless liable to all the penalties imposed by the legislature for the breach of these regulations, and is also deprived of his remedy against his partner for enforcing the performance of the agreement between them. All the decisions that have hitherto taken place on the subject apply only to those by whom the trade has actually been carried on. The first case is that of *Raynard v. Chase*, 1 Burr. 2, which was determined upon the statute 5 Eliz. c. 4, s. 31, which enacts that "it shall not be lawful to any person or persons other than such as now do lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, use, or exercise any craft, mystery, or occupation now used or occupied within the realm of England or Wales, except he shall have been brought up therein seven years at the least as an apprentice, &c.," under a penalty of forty shillings per month—it was held that one not qualified to exercise a trade himself, by having served an apprenticeship, entering into partnership with a qualified person, and only sharing the profits and standing the risks of the partnership, without ever interfering in the trade personally, was not within the statute. That case was recognised in *Keene v. Dodderidge*, 15 East, 161, though the Court being divided in opinion, no judgment was given. Lord Ellenborough and Mr. Justice Bayley held, that, as the party had not actually interfered in carrying on the trade, he was not liable for the penalties. In *Candler v. Candler*, 6 Mad. 141, an attorney having died and bequeathed all his property to his widow, his eldest son, for the mixed consideration of the good will of the business, the advancement of money for carrying it on, and family affection, entered into an agreement with his mother to continue the business, and to account to her for a moiety of the profits during the minority of his younger brothers and sisters: it was held that this arrangement was not contrary to the policy of the statute 22 Geo. 2, c. 46, s. 11. The Vice Chancellor (Sir John Leach) said: "It appears by the preamble to this clause that the mischief which the legislature had in view was, that unqualified persons, by the assistance or connivance of regular attorneys, were enabled to act and practice as attorneys, to the prejudice of his majesty's subjects and the scandal of the profession; when therefore it is provided that an attorney shall not permit or suffer his name to be in any way made use of upon the account or for the profit of any unqualified person, the plain purpose is that he shall not by any shift or contrivance enable an unqualified person to act or practice in his name. The deed in question does not enable any unqualified person in any manner to act or practise as an attorney. It is simply a grant of a moiety of the profits made by the sole acting of the attorney himself during a certain period, for the mixed consideration of the good will of the business, the advance of money, and family affection, and is neither within the mischief nor the words of the statute." [Mr. Justice PARK referred to *Williams v. Jones*(a) and *Hopkinson v. Smith*.(b)] In both these cases, the agreements were void—the busi-

(a) 7 Dow. & Ry. 548; S. C. 5 Barn. & Cres. 108. By a memorandum, dated in November, 1822, A., an attorney, agreed with B. for a valuable consideration, to take C. (the son of B.) into partnership as attorneys and solicitors for ten years, and to allow him a moiety of the profits. The memorandum did not state when the partnership was to commence. C. was not admitted an attorney until April, 1823, but he conducted the business in the name of A. from the beginning of January, 1823. In an action by A. against B. for part of the consideration money, it was held that the agreement, though legal on the face of it, upon proof that C. had not been admitted an attorney until after its execution, became illegal within the 22 Geo. 2, c. 46, s. 11, and void.

(b) 7 J. B. Moore, 237; 1 Bing. 13. In an action on an attorney's bill, it appeared that

ness was conducted by the unqualified parties. Here, Warner in no respect violated the statute: dormant partners could not be intended to be included in it. One who does not interfere with its management cannot be said to exercise a business: nor can a dormant partner of a pawnbroker be said to take in a pledge; he has no possession of the goods pledged; and it would therefore be absurd to hold that the legislature intended that he should be compellable to deliver up property of which he never was or could be possessed. The Court will be slow to come to the conclusion that Warner was subject to all the penalties imposed by the statute for the acts of commission or omission over which he had no control.

2. Even supposing Warner to have been guilty of an infraction of the law in having omitted to obtain a license to trade as a pawnbroker or to have his name painted over the shop-door or printed on the tickets issued to the pledgers of goods, still the partnership was legal, and not void by reason of such infraction of the law. Had it been expressly stipulated in the deed that Warner should not take out a license, and should not have his name over the door or on the tickets, then it must be admitted that the agreement would have been illegal and void. In the case of *Raynard v. Chase*, the name of Chase was in the license. Consistently with the deed in this case, the name of Warner might have been inserted in the license: there is no contract that the business should be carried on in the name of Armstrong alone.

Mr. Serjeant *Wilde*, in reply. *Raynard v. Chase* was determined with reference to the very doubtful policy of the provisions of the statute 5 Eliz. c. 4. The ground of the decision there was that the defendant did not interfere with the conduct of the trade: and therefore the Court said he had not done that which it was the object of the act to prohibit. Here, the situation of the party is such, that, while he enjoys a very large proportion of the profits of the business, he escapes the liability that the statute intended to impose upon him. It is an essential part of the policy of the act that there shall not be dormant partners in the trade of pawnbrokers; and the authorities clearly establish that a partnership entered into for illegal purposes is void even as between the parties themselves.

Cur. adv. vult..

Lord Chief Justice DENMAN now said that it occurred to several of the judges that the exceptions not having been properly taken, (a) judgment could not be given upon that record: and further, that it did not appear upon the bill of exceptions that any contract had been entered into between the parties to contravene the law—a fact which ought to have been found by the jury. His lordship also observed that it might nevertheless be proper to state it as the opinion of all the judges who had assisted at the argument, that, if there were any such express agreement between the parties having for its object the contravention of the statute, such agreement would be void, and would confer no rights upon either party.

the plaintiff lived at D., five miles from W.; that the defendant lived at H., fourteen miles from W., and applied to J. B. (who resided at W., and who had been a clerk of the plaintiffs, and practised in his name,) to carry on the suit for which the bill in question was incurred; that J. B. did so; that the business done at the office at W. was for J. B.'s benefit, with the exception of a third which the plaintiff received for attending at W. once a week; that the plaintiff's name was not on the door at W., nor was he employed by J. B. in soliciting business; but that J. B. frequently consulted with the plaintiff, and drafts were sometimes engrossed at D. for the office at W.; and that the draft of the brief in the suit which J. B. had carried on for the defendant was in the hand-writing of the plaintiff, as were also some items in J. B.'s books touching that suit: it was held that a nonsuit directed by the judge who tried the cause was proper.

(a) They were placed in the bill of exceptions after the finding of the jury.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Hilary Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.—1834.

FREEMAN v. PAGANINI.—p. 165.

Where money has been paid into court in lieu of bail, the plaintiff on moving to have it paid out to him is entitled to the costs of the application.

MONEY having been paid into Court by the defendant in this action in lieu of special bail, and the plaintiff having recovered a verdict—

Mr. Serjeant *Wilde*, on a former day, moved that it might be paid out, and that the defendant might be ordered to pay the costs of the application. The Court inclined to think that the plaintiff was not entitled to costs: But Mr. Serjeant *Wilde* having on this day referred to Chapman's Practice, p. 137, where it is stated that the costs of the application are in such cases allowed in the King's Bench—

Lord Chief Justice TINDAL admitted that such course was the more consonant with the justice of the case, and (the rest of the Court concurring) the rule was granted with costs. Rule accordingly.

DOE d. TUCKER v. ROE.—p. 165.

A declaration and notice in ejectment were served upon a servant of the tenant, whose wife subsequently admitted that she had received it and had given it to her husband:—Held, insufficient.

MR. Serjeant *Bompas*, on the part of the lessor of the plaintiff, moved that the service of the declaration and notice in this case might be deemed good service. It had been made the day before the commencement of the term, upon the foreman of the tenant in possession on the premises; and on the next day the person by whom the service was made, saw the wife of the tenant, who admitted that the declaration, &c., had been received by her, and stated that she had communicated them to her husband.

Lord Chief Justice TINDAL. That only amounts to an admission by the wife, which cannot affect her husband.

Mr. Justice ALDERSON. The wife is not the agent of her husband for the purpose of making admissions.

The rest of the court concurring—

Rule refused.(a)

CLARK v. MARNER.—p. 171.

The writ of trial under the 3 & 4 Will. 4, c. 42, s. 17, is to be directed to the judge of the court of record in those places in which there is a court of record, and to the sheriff where there is no such court.

A writ of trial was directed to the Mayor of Colchester, and the cause was tried by his deputy. The court refused to set aside the proceedings on a suggestion that the cause ought to have been tried by the mayor himself; it not appearing that that officer had no authority to appoint a deputy.

WHITBOURNE v. PETTIFER.—p. 182.

The plaintiff, assignee of A. who had become bankrupt, sued B. in respect of certain contracts alleged to have been entered into by A. with the plaintiff on the joint account of A. & B.—The court allowed B. to inspect the books of A. in the hands of the plaintiff as his assignee, in order that he might discover what the alleged contracts were.

THE plaintiff having sued the defendant in respect of certain contracts alleged to have been entered into by the latter jointly with Messrs. Waterhouse, for the supply of coaches by the plaintiff; and the plaintiff being an assignee of Messrs. Waterhouse in the possession of their books—

Mr. Serjeant *Wilde*, on a former day, on the part of the defendant, obtained a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to inspect and take copies of those parts of the books of Messrs. Waterhouse which related to the supposed contracts, in order that he might discover what they were.

Mr. Serjeant *Talfourd*, contra, submitted that such an inspection as that prayed in this case had never been allowed; and that, at all events, no sufficient ground had been shewn for it on the present occasion, it not being suggested to what the inspection would lead.

Mr. Serjeant *Wilde*, in support of this rule, contended, that, inasmuch as the plaintiff charged the defendant as being a partner in certain contracts with Messrs. Waterhouse, it was but reasonable that he should be allowed to inspect the partnership books.

PER CURIAM. This case clearly falls within the rule for allowing a defendant to inspect documents in the custody or power of the plaintiff in which the former has an interest,
Rule absolute.

HORNE v. TOOK.—p. 183.

It is no ground for setting aside a declaration, that it has been delivered in defiance of an injunction of a court of equity restraining the plaintiff from proceeding at law.

THE plaintiff having delivered a declaration in this cause, in defiance of an

(a) See *Doe d. Thomas v. Roe*, 1 M. & Scott, 435. But see *Doe d. James v. Roe*, Id. 597.

injunction of a Court of equity restraining him from proceeding at law in respect of the subject-matter of the suit—

Mr. Serjeant *Andrews*, on the part of the defendant, moved that the declaration and subsequent proceedings might be set aside for irregularity.

PER CURIAM. There is no irregularity here; there is nothing contrary to the practice of this Court. Whatever the Court of equity may think fit to do in vindication of the order which the plaintiff has transgressed by proceeding in this Court we cannot interfere. The learned serjeant took nothing.

SHINFIELD v. LAXTON.—p. 187.

The rule requiring a term's notice prior to proceedings being taken, where the cause has been at issue more than four terms, does not apply to proceedings taken on the part of the defendant.

REX v. The SHERIFF OF ESSEX, in a Cause of LEVY v. PAINE.—p. 247.

The 5th rule of Trinity Term, 1 Will. 4, which prohibits the changing of bail without leave of the court or a judge, applies to the case of bail put in by the sheriff for the purpose of rendering the defendant.

EMERY and MIDDLETON v. THOMAS MUCKLOW.—p. 263.

In replevin, the defendant avowed for rent in arrear from one J. M., and also claimed the goods as being the property of himself and another as assignees of J. M., against whom a commission of bankrupt had issued. A verdict having been taken for the defendant on the whole record—The court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees.

Semble, that, pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant founded on his demand for rent.

THIS was an action of replevin for seizing goods alleged to belong to the plaintiffs as trustees named in a deed whereby all the effects of one James Mucklow were conveyed to the plaintiffs in trust for his creditors. The defendant avowed for 460*l.* rent in arrear, due from James Mucklow; and also claimed the goods as belonging to himself and another, as assignees under a commission of bankrupt issued against James Mucklow on the petition of the defendant.

At the trial before Mr. Justice Park, at the last Assizes for the county of Warwick, it appeared that the debt upon which the commission issued was claimed to be due by virtue of a promissory note given by James Mucklow to the defendant on the 2nd of January, 1826, payable on demand. This note was more than six years old, and there was no evidence to take it out of the statute of limitations. A verdict having been found generally for the defendant—

Mr. Serjeant *Wilde*, in the course of the last term, obtained a rule calling on the defendant to show cause why a verdict should not be entered for the plaintiffs on the issue raised on the title of the assignees on the ground of the insufficiency of the debt to support the commission.

Mr. Serjeant *Adams* now showed cause. The balance due for rent, after

deducting the value of the goods, was of itself a sufficient debt to support the commission. [Lord Chief Justice TINDAL. If the defendant had brought an action for the rent, he clearly could not at the same time make it the foundation of a petitioning creditor's debt.] There is a manifest distinction between the case of a replevin and an action for rent. Suppose, instead of a replevin, the goods had been sold under the distress, and the landlord's claim satisfied to the extent of the proceeds, would not the balance form a good petitioning creditor's debt? By distraining, the party makes no election beyond the value of the goods.

Mr. Serjeant *Wilde*, in support of his rule. Whilst the distress was pending, the defendant issued a commission of bankrupt against James Mucklow, the tenant, founded upon the debt claimed to be due on the note. By defending the replevin, he claims the goods as landlord; and by his avowry he also alleges them to be the property of the assignees under that supposed commission. Suppose there had been no note, and the defendant had distrained for rent, how would he have shaped his affidavit in order to procure the commission—the value of the goods not being ascertained at the time?

Lord Chief Justice TINDAL. The only question here in point of fact is, whether or not the defendants shall pay the costs of the issue raised on the title of the assignees. It appears to me, that, having succeeded on the issue raised on the avowry for rent in arrear, and obtained a return of the goods, the defendant cannot be permitted to set up the title of third persons to the same goods. That would be a manifest contradiction on the face of the record. On that ground, therefore, I think the verdict should be entered for the plaintiffs on the issue taken on the title of the assignees.

The rest of the Court concurring—

Rule absolute.

SKIPPER v. LANE.—p. 283.

The sheriff having seized goods under a *fi. fa.*, notice was given to him on the 18th January that a fiat was about to be sued out against the defendant; and on the 28th a claim was made to the goods by the assignees:—Held, that an application by the sheriff on the 29th for relief under the interpleader act, was sufficiently prompt.

CLARKE v. PEDLEY and Others.—p. 321.

On a distress for arrears of a poor rate under the 50 Geo. 3, c. xiv. s. 3:—Held, that although the warrant made no mention of the costs of the previous summons, the reasonable costs of such summons might be levied under it; and that one shilling is a reasonable sum in that behalf.

BARHAM v. LEE.—p. 327.

Appearing to oppose a rule does not waive an objection to the affidavit on which the rule was obtained.

Mr. Serjeant *Adams*, on a former day, obtained a rule nisi to set aside the proceedings in this action for irregularity. The affidavit upon which the motion was founded being by mistake dated January, 1883, instead of 1884—

Mr. Serjeant *Wilde*, after speaking to merits, took the objection, and submitted that the affidavit could not be used.

Mr. Serjeant *Adams*, contra, contended, that, having gone into the merits, the objection was waived.

PER CURIAM. The point has been recently agitated in this Court, in the case of *Clothier v. Ess*, 3 M. & Scott, 216, where it was held that appearing to oppose a rule does not waive an objection to the form of the affidavit upon which the rule was obtained. The reason was correctly given by one of the Court upon that occasion (Mr. Justice Gaselee) thus:—"The Courts have said that they would not allow costs where the rule is discharged upon an ungracious objection; the plaintiff, therefore, very properly appears to show that he has something like an answer upon the merits." The defendant therefore cannot be permitted to use the affidavit in question: but he may attempt to support his rule upon the affidavits filed on the other side.

It afterwards appearing that the irregularity complained of by the defendant had been waived, by his omission duly to avail himself of it, the rule was—
Discharged.

HUBER v. STEINER.—p. 328.

In an action on a promissory note drawn in a foreign country, and due about twenty years since the defendant pleaded the statute of limitations, and the plaintiff replied that he resided abroad until within six years of the commencement of the action. The court afterwards (upon terms) allowed the defendant to add a plea setting up a provision of the law of the country where the note was made and the parties resided, similar in its effect to the statute of limitations.

THIS was an action brought upon certain promissory notes drawn by the defendant at a place called Mulhausen, in Upper Saxony, in the year 1813, in favour of the plaintiff. The action was commenced in May, 1833, the declaration delivered in October, and issue joined on the 14th of this month. The pleas were, the general issue, and the statute of limitations; to which latter there was a replication that the plaintiff was abroad until within six years of the commencement of the action.

Mr. Serjeant *Bompas*, on a former day, obtained a rule calling on the plaintiff to show cause why the defendant should not have leave to add a plea, to the effect that, in the country in which both plaintiff and defendant were domiciled at the time of the making of the notes, and for more than five years after they became due, there existed a law (the place being then under the dominion of the French, and governed by the French laws) similar in its provisions to our statute of limitations—the limit being five years.

Mr. Serjeant *Taddy* now showed cause. If the debt accrued, and the statute expired whilst both parties were subject to the foreign law, the alleged limitation would operate as a bar to the action all over the world. The plaintiff is willing to consent to the matter proposed to be pleaded being given in evidence under the general issue: for, as the record at present stands, the burden of proof of the foreign law will lie on the defendant; whereas, if it be put upon the record, the plaintiff will probably be compelled to reply something which will throw upon him the proof to be drawn from a foreign country. This is an inconvenience that the plaintiff ought not to be visited with to favour the defendant, who ought to have shaped his defence properly in the first instance.

[It appeared that the application had previously been made to Mr. Justice Gaselee, at Chambers; and that that learned judge had refused to grant leave unless upon the terms of the defendant bringing the money into Court.]

Lord Chief Justice TINDAL. It is so manifestly reasonable that parties should not be encouraged to come here and avail themselves of a law different from that which prevails in their own country, and thereby seek to obtain a different measure of justice after having for so many years slept upon their rights, that I think we ought to give the defendant the means of setting up the

proposed defence. At the same time, justice requires that certain terms should be imposed on him. I think the rule should be granted, on payment of all the costs incident to the motion; the defendant admitting his handwriting to the notes, and consenting that there shall be judgment of the term in the event of a verdict passing for the plaintiff.

The rest of the Court concurring, and the parties consenting—

Rule absolute accordingly.

MEMORANDUM.

The Judges who sat in the Court of Common Pleas during the foregoing term (with the exception of two days, when Mr. Justice GASELEE sat in lieu of Mr. Justice BOSANQUET) were—

Lord Chief Justice TINDAL, Mr. Justice PARK, Mr. Justice BOSANQUET, and Mr. Justice ALDERSON.

CASES
 ARGUED AND DETERMINED
 IN THE
 COURT OF COMMON PLEAS,
 IN
 Easter Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.—1834.

Ex parte G. THOMAS, Wife of EVAN THOMAS, a Lunatic.—p. 331.

Motion under the 3 & 4 Will. 4, c. 74, s. 91, to dispense with the concurrence of the husband to a disposition by the wife of lands, &c., to which the latter is entitled in her own right.

BROWN v. LORD GRANVILLE.—p. 333.

The plaintiff and defendant, by their respective attorneys, agreed that a question at issue between them, should be raised on demurrer, in order to a more speedy adjustment of it; and it was further agreed, that, whatever the decision of the court on the argument of the demurrer might be, "each party should pay his own costs and charges in and about the cause, and that such decision should bind the parties." Judgment having been given for the plaintiff on the demurrer:—Held, that it was not competent to the defendant to sue out a writ of error thereon.

THIS was an action against the defendant to recover the amount of certain rates assessed upon him under the Hanley and Shelton watching and lighting acts, 6 Geo. 4, c. lxxiii., and 9 Geo. 4, c. xxviii. The question intended to be raised was whether or not the defendant was liable under the acts, as the owner or occupier of certain engine houses or sheds in the township or vill of Shelton, erected for the protection of engines used for the working of a coal-mine belonging to the defendant, to be rated in respect of such engine houses. It had originally been intended that the facts should be stated in a special case for the opinion of the Court of King's Bench: but, subsequently, in order to avoid the delay that must have attended the adoption of that course, it was agreed between the attorneys for the respective parties that the question should be raised by a demurrer to be argued before this Court. The argument was as follows:—

"A. B. and C. D., attorneys for the plaintiff and defendant in this cause, hereby agree, that, whatever be the decision of the Court on the argument of the demurrer, each party shall pay his own costs and charges in and about the cause, and that such decision shall bind the parties, not only with regard to the sum of money claimed to be due by and sought to be recovered in this cause,

but also with regard to all other moneys due and owing from the defendant to the Hanley and Shelton police commissioners under the Hanley and Shelton watching and lighting acts."

The demurrer came on for argument in Trinity Term last, when the Court held that the defendant was liable to be rated in respect of the buildings in question, 10 Bing. p. 69. The defendant thereupon sued out a writ of error; and in the last term, on the motion of Mr. Serjeant *Coleridge*, obtained a rule nisi for liberty to enter the judgment on record. In the same term, Mr. Serjeant *Ludlow*, on the part of the plaintiff, obtained a rule nisi that execution might issue upon the judgment on the demurrer, notwithstanding the writ of error, on the ground that the defendant had precluded himself by the above-mentioned agreement from suing out a writ of error.

Mr. Serjeant *Wilde* now appeared to show cause against the first-mentioned rule, and in support of the last. He submitted that the intention of the parties, as expressed on the face of the agreement, was, that there should be but one discussion of the matter, and that no ulterior proceedings should be taken by either party to call in question the decision of the court upon the demurrer; and therefore that the plaintiff was entitled to execution for the amount of the rates due.

Mr. Serjeant *Coleridge*, contra. The defendant's common law right to take the benefit of the judgment of a court of error; in the event of his being dissatisfied with that of the court below, is not taken away by any thing contained in the agreement. This is not like a special case, where the judgment of the court is made final and conclusive by the consent of the parties.

Lord Chief Justice TINDAL. The only question in this case arises on the construction that is to be put upon the agreement entered into between the respective attorneys for the plaintiff and defendant. They may honestly and conscientiously differ as to what was their intention at the time of making it; and each party has undoubtedly a right to endeavour to support his own construction of it. It appears that it was originally intended that the facts should be stated in a special case, and set down for argument in the Court of King's Bench. If that course had been pursued, the judgment of that court upon the question would have been conclusive, and neither party could have taken any further proceeding in the cause. The attorneys afterwards thinking that the more speedy course would be to raise the question by demurrer in this court, the declaration was framed with that view, and the attorneys agreed, that, whatever the decision of this court should be on the argument of the demurrer, each party should pay his own costs and charges in and about the cause. Now, if the agreement had stopped there, I should have thought that it amounted to an assent on the part of the respective attorneys that the decision of this court should be final; for, if the judgment could be suspended by a writ of error, no costs could have been incurred on the demurrer. It therefore appears to me, that, the parties having agreed to be bound by the judgment of this court, in the supposition that they should thereby avoid the inconvenience of delay, it is now too late for either of them to say *non hæc in fœdera veni*. By entering into the agreement they virtually precluded themselves from the right of carrying the cause to a higher tribunal.

Mr. Justice PARK. The parties came before me at Chambers; and I then put the same construction upon the agreement that my Lord Chief Justice has now done. Though this application may not be made, strictly speaking, in breach of good faith, still it seems to me to be an attempt to avoid an agreement. By the common law, every suitor has an undoubted right to sue out a writ of error; but, in holding that the defendant is not entitled so to do in this particular case, we do not deprive him of any right the law has given him; he has, by the terms of his agreement, bound himself to consider the judgment of this court final.

Mr. Justice GASELKE. I am of the same opinion. The parties have by

their attorneys consented that the decision of this Court on the demurrer should be conclusive. In order to expedite the cause, they agreed to raise the question on demurrer in this Court, instead of stating a special case for the opinion of the Court of King's Bench—virtually consenting that the demurrer should stand upon the same footing as the special case would have done. They are therefore barred by their agreement from calling in question the judgment pronounced by this Court.

Mr. Justice ALDERSON. It appears that the object of the parties in stating the facts on the declaration, and raising the point by a demurrer, was, to avoid the expense of a trial, and the delay that it was supposed must have arisen if they had pursued the course they at first intended, of setting down a special case for argument in the Court of King's Bench. To attain this object, it was agreed between the respective attorneys that the decision of this Court on the demurrer should be conclusive. The case therefore is not like the ordinary one of a judgment on demurrer; but is in effect a judgment upon a special case.

The rule obtained for the plaintiff, to sue out execution notwithstanding the allowance of the writ of error, must therefore be made absolute, and the rule obtained by the defendant, to enter up the judgment on record, discharged.

Rules absolute and discharged accordingly.

WILLIAMS, Demandant, HARRIS, Tenant.—p. 358

Practice as to the entry of a nolle prosequi by the demandant in a writ of intrusion.

THIS was a writ of intrusion. (a) The demandant proposing to enter a nolle prosequi, the officer refused to receive it without the direction of the court or a judge. Application was afterwards made to Mr. Justice Alderson, at Chambers. That learned Judge said that the plaintiff must enter it upon his own responsibility.

Mr. Serjeant *Stephen* now prayed that the court would direct the officer to make the entry in the usual way; it being competent to the demandant (as he contended) to enter a nolle prosequi at any stage of the proceedings—even after issue joined.

PER CURIAM. The demandant may go to the office, and the nolle prosequi may be entered *de bene esse*. The tenant may afterwards apply for his costs, or to set aside the nolle prosequi for irregularity; and then the question will be raised.

LYNG and Another v. SUTTON.—p. 417.

Declaration in trespass commencing—"A. B. and C. D. *complains*," &c., and stating that the defendant was summoned to answer the *plaintiff*—not demurable.

In trespass for breaking and entering the plaintiff's close, &c., the declaration commenced thus: "A. B. and C. D., by A. W., *complains*, &c.," and stated that the defendant was summoned to answer the "*plaintiff*." The defendant demurred.

Mr. Serjeant *Peake*, in support of the demurrer, cited *Morgan v. Sargent*, 1 Bos. & Pul. 58, where it was held, that, if a declaration on a bail-bond conclude "whereby an action hath accrued to the plaintiff to demand and have of

(a) By the 3 & 4 Will. 4, c. 27, s. 36, the proceeding by writ of intrusion is abolished after the 31st December, 1834.

the principal," instead of the bail, and state non-payment by the principal, it is bad on special demurrer.

PER CURIAM. Mala grammatica non vitiat chartam. Here, if the whole were omitted, the declaration would be sufficient.

Judgment for the plaintiff.(a)

BRYDGES v. FISHER.—p. 458.

An application under the 1 Will. 4, c. 22, for the examination of the witness resident out of the jurisdiction of the court, must be made as early as possible after issue joined.

THIS was an action brought by the plaintiff, late a partner with one Macdonald, as army agents, to recover from the defendant, who had been their clerk, a sum of between 2,000*l.* and 3,000*l.* of prize-money, which had been placed under the defendant's control, and for which he was empowered to draw cheques, and which it was alleged he had, in fraudulent concert with Macdonald, applied to the use of the latter, and the plaintiff had been compelled to replace it. The action was commenced in May, 1833, and issue was joined in Hilary Term last.

Mr. Serjeant *Adams*, on a former day, obtained a rule nisi for a commission for the examination of Macdonald,(b) he being resident at St. Omer's in France.

Mr. Serjeant *Wilde* now showed cause. Before they allow a plaintiff to be subjected to the delay and inconvenience of a commission for the examination of an adverse witness, the court will require it to be shown, that an application has been made without effect to obtain the personal attendance of the party, particularly where the distance is so short, and the means of intercourse so prompt. Besides, the application comes too late: issue was joined in sufficient time to enable the party to apply last term.

Lord Chief Justice TINDAL. I am not disposed to accede to any further postponement of the cause. The commission may go, subject to the chance of its being returned in time for the trial.

Mr. Justice PARK. It is not in all cases necessary that the affidavit upon which a commission for the examination of foreign witnesses is moved for, should allege that applications have been made to the party in order to obtain his personal attendance.

Mr. Justice VAUGHAN. There is always matter for suspicion where a party seeks rather to examine his witness on interrogatories, than to have him examined in court.

Rule absolute, conditionally.(c)

CHEEK, Plaintiff, BOOTLE and Others, Deforciant.—p. 460.

Where the acknowledgment of a party to a fine was taken before commissioners who were aware of the fact of her being a married woman, and of the non-concurrence of

(a) Though mala grammatica non vitiat instrumenta, yet, in expositione instrumentorum mala grammatica, quoad fieri potest, vitanda est.—Parsch. 3 Jac. 1, C. B., Bellamy's case, 6 Rep. 38, b.

(b) Under the statute 1 Will. 4, c. 22, which has been held not to be confined to cases where the witnesses reside within the king's dominions—*Duckett v. Williams*, 1 Cramp. & Jervis, 510. But it does not apply to indictments—*Rex v. Briscoe*, 1 Dowl. P. C. 520.

(c) In *Spalding v. Mure*, MS. 2 Tidd, 814, 9th edit., the Court of King's Bench (the motion being made on the last day of term) awarded a mandamus for the examination of witnesses in India, under the 13th Geo. 3, c. 63, s. 44, before issue joined.

her husband, but the parties were living separate under a deed by which the husband covenanted not to interfere with his wife's property—The court refused to reverse the fine, at the instance of the husband, but left him to his common law remedy.

MR. Serjeant *Talfourd* moved to reverse a fine as to one of the deforcianta, under the following circumstances:—The acknowledgment was taken before commissioners in the year 1826, Mary Roberts, one of the deforcianta, being at the time a married woman, and her husband not concurring. This fact was known to the commissioners at the time of taking her acknowledgment. The premises in respect of which the fine was levied had belonged to one John Grove, the first husband of Mary Roberts, who died seised in fee on the 13th December, 1806—his widow being entitled to dower. In June, 1807, Mary Grove married Roberts; and in the following year they separated, under a deed. No specific mention was made of this property in the deed; but the husband covenanted not to interfere with any of his wife's property. Mrs. Roberts had also become entitled to a moiety of the property under a devise by a deceased daughter by John Grove. The application was made on the part of the husband of Mrs. Roberts.

LORD CHIEF JUSTICE TINDAL. No doubt the Court may interfere to reverse a fine as to a party upon whom fraud has been practised. Here, however, the application is made on the part of the husband of Mrs. Roberts, who has by the deed of separation covenanted not to interfere with his wife's property. I therefore think we ought not to assist him, but leave him to his common law remedy, a writ of error.

The rest of the Court concurring—

Rule refused.

WATSON v. MASKELL.—p. 461.

The plaintiff obtained a verdict at the Spring Assizes; the defendant died on the 18th April (the fourth day of Easter Term;) the costs were taxed on the 21st, final judgment signed on the 22d, and a fi. fa. issued on the same day, tested on the first day of the term. The court refused to set aside the fi. fa. for the irregularity in issuing it after the death of the defendant without a sci. fa. The writ being warranted by the judgment, where the motion did not impeach.

A VERDICT was found for the plaintiff in this cause for 200*l.*, at the last Spring Assizes for Essex. The defendant died on the 18th of April (the fourth day of the present term.) The costs were taxed on the 21st, final judgment signed on the 22nd, and a writ of fieri facias thereon issued on the same day, tested the 15th, (being the first day of term,) and returnable on the 26th.

MR. Serjeant *Goulburn*, on a former day, obtained a rule nisi to set aside the fi. fa. for irregularity, with costs. The irregularity suggested was, the issuing of the fi. fa. after the death of the defendant, without a previous scire facias. The learned serjeant referred to the 3rd section of the first general rules and regulations of Hilary Term last, which provides that "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day."

MR. Serjeant *Wilde* showed cause. The rule is not addressed to the judgment; and therefore, if the fi. fa. is warranted by the judgment, it is regular, and the application is answered. The statute 2 Will. 4, c. 39, s. 12, merely directs that "every writ issued by authority of that act shall bear date on the day on which the same shall be issued;" and that act applies to writs for the commencement of actions only—*Storr v. Bowles*, 1 Dowl. P. C. 516. In *Sutton v. Lord Cardross*, 1 Dowl. P. C. 511, where a ca. sa. was issued in the course of Michaelmas Term, 1832, tested in the name but issued after the death

of Lord Tenterden, who died in that term, Mr. Justice Patteson, after consulting the other judges, said: "We are of opinion that we ought not to enter into the question as to the exact day on which the writ was issued. If we did, we should destroy the principle of relation which has always obtained in practice, that a writ issued at any time in term has relation to the first day of it." The statute 1 Will. 4, c. 7, s. 3, provides that "every execution issued by virtue of that act shall and may bear teste on the day of issuing thereof." But that provision, as well as that in the 3 & 4 Will. 4, c. 67, s. 2, applies only to writs issued under the authority of those acts, and to judgments signed in vacation. They are not intended to operate in restraint of the suitor, but as affording an indulgence. They effect no alteration in the previous practice as to writs of execution. A *scire facias* is never required to be issued, unless the *fi. fa.* appears on the face of it to be tested subsequently to the death of the party. In *Waghorne v. Langmead*, 1 Bos. & Pull. 571, (a) judgment was signed on the 23rd of May, the defendant died on the 29th, and on the 31st a *fi. fa.* issued, tested before the death of the defendant; on a motion to set aside the *fi. fa.*, the court said, "that, to make a *scire facias* necessary to support the execution, the process must appear to have issued after the death of the party;" and Mr. Justice Buller read a case of *Dakin v. Cartwright*, MS. 12 Geo. 2, K. B., where, according to his note of it, Lord Chief Justice Lee referred to a case of *Gill v. Parsons*, MS. Michaelmas, 13 Will. 3, K. B. There, "judgment was entered between Hilary and Easter Terms, after which the defendant died. Execution was taken out, tested the first day of Hilary Term, and the goods in the hands of the executors were taken. And, on motion, it was holden, that, though a judgment in respect of purchasers binds only from the signing, yet, as to the party and his representatives, it binds as it did before at common law; and that the execution so tested was therefore regular." So long as the judgment stands, the writ is regular.

Mr. Serjeant *Goulburn*, in support of his rule. This rule undoubtedly will not set aside the judgment; but it is still competent to the party to show that the judgment upon which the *fi. fa.* has issued, is irregular; which it clearly is, and consequently the *fi. fa.* must fall. The judgment is in direct contravention of the rule above referred to, of Hilary Term last; and a *fi. fa.* cannot be supported upon a judgment that is a nullity.

Lord Chief Justice TINDAL. The plaintiff is by the rule brought here to defend the *fi. fa.* On the face of the writ there is no irregularity. The complaint should have been addressed to the judgment.

The rest of the Court concurring—

Rule discharged.

DICAS, Gent., one, &c. v. WARNE.—p. 470.

Where a rule for striking an attorney off the roll for misconduct is referred to the Prothonotary, he is not to be confined to the affidavits already before the court, but may receive any evidence tending to the elucidation of the matter.

In Michaelmas Term last, a rule was obtained by Mr. Serjeant *Wilde* on the part of the plaintiff, calling on the defendant's attorney to show cause why he should not be struck off the roll of attorneys, for having hired or caused to be hired sham bail in error. In the following term, Mr. Serjeant *Jones* appeared to show cause against the rule. The court directed the matter to be investigated before one of the Prothonotaries. The parties accordingly attended be-

(a) And see *Heapy v. Parris*, 6 Term Rep. 368. *Bragner v. Langmead*, 7 Term Rep. 20.

fore Mr. Prothonotary Ray, who now reported that the attorney had answered all the charges brought against him.

Mr. Serjeant *Wilde* moved that the matter might be referred back to the Prothonotary, with directions that he should take into his consideration certain additional affidavits that had been tendered to him on the hearing, and rejected by him on the ground that they were not before the court when the matter was referred to him.

Mr. Justice PARK. The Prothonotary must go into the investigation again. In such a case all affidavits tending to explain the matter should be received.

Mr. Justice GASELEE. The object of sending the case to the Prothonotary was, that it might receive a fuller and more minute criticism than it could have in open court. I have always understood the practice to be, that, in a case of this description, the officer may receive any thing that tends to elucidate and further the inquiry; he may even examine the parties personally.

Referred back to Mr. Ray.

On a reference to the prothonotary of a rule for striking an attorney off the roll, on a charge of having hired sham bail in error, the officer reported that the attorney did not actually hire the bail, but was aware that they were hired.—The court discharged the rule on the terms of the attorney paying all the costs of and occasioned by the proceedings.

On Tuesday the 10th of June, in Trinity Term, Mr. Prothonotary Ray made his further report, stating that, having taken into consideration the whole of the evidence on both sides, he was of opinion, that, although it did not appear that the attorney did himself actually hire or cause to be hired the bail in question, yet enough appeared to show that he must have been aware that the bail put in were hired bail.

Lord Chief Justice TINDAL.—The report of our officer affixes on the attorney a certain degree of criminality, though undoubtedly of a much lighter character than that with which he was charged. Upon the whole it seems to the court that the justice of the case will be attained by making the attorney who has so misconducted himself pay all the costs of and occasioned by these proceedings; and on these terms, the rule may be discharged.

Rule discharged accordingly

KIRBY v. SIGGERS.—p. 481.

The plaintiff issued two writs, one out of this court, which was never served, the other out of the exchequer, on which he proceeded to declare. The defendant pleaded to the action in the exchequer, another action pending for the same cause in this court. The plaintiff replied nul tiel record, and served the defendant with a rule to produce. The defendant made up a roll from the præcipe on the file of this court :—The court ordered it to be cancelled, with costs.

MEMORANDA.

On Friday, the 25th of April, in this term, the following warrant was read by the officer of the Court, and ordered to be entered of record :

WILLIAM, R.

WHEREAS it hath been represented to us that it would tend to the general despatch of the business now pending in our several Courts of common law at

Westminster, if the right of counsel to practise, plead, and be heard, extended equally to all the said Courts; but such object cannot be effected so long as the serjeants at law have the exclusive privilege of practising, pleading, and audience, during term time, in our Courts of Common Pleas at Westminster: We do therefore hereby order and direct that the right of practising, pleading, and audience, in our said Court of Common Pleas during term time, shall, upon and from the first day of Trinity term now next ensuing, cease to be exercised exclusively by the serjeants at law; and that, upon and from that day, our counsel learned in the law, and all other barristers at law, shall and may according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading, and audience in the said Court of Common Pleas at Westminster, with the serjeants at law: And we do hereby will and require you to signify to Sir Nicolas Conyngham Tindal, knight, our Chief Justice, and companions, Justices of our said Court of Common Pleas, this our royal will and pleasure, requiring them to make proper rules and orders of the said Court, and to do whatever may be necessary to carry this our purpose into effect. And whereas we are graciously pleased, as a mark of our royal favour, to confer upon the serjeants at law hereinafter named, being serjeants at this present time in actual practice in our said Court of Common Pleas, some permanent rank and place in all our Courts of law and equity, we do hereby further order and direct that Vitruvius Lawes, Thomas D'Oyley, Thomas Peake, William St. Julian Arabin, John Adams, Thomas Andrews, Henry Storks, Ebeneser Ludlow, John Scriven, Henry John Stephen, Charles Carpenter Bompas, Edward Goulburn, George Heath, John Taylor Coleridge, and Thomas Noon Talfourd, serjeants at law, shall from henceforth, according to their respective seniority amongst themselves, have rank, place and audience, in all our Courts of law and equity, next after John Balguy, Esq., one of our counsel learned in the law; and we do hereby will and require you not only to cause this our direction to be observed in our Courts of Chancery, but also to signify to the Judges of our several other Courts at Westminster that it is our express pleasure that the same course be observed in all our said Courts. Given at our Court of St. James's this 24th day of April, in the fourth year of our reign.

"To the Rt. Hon. HENRY, Lord BROUGHAM and VAUX,
Lord High Chancellor of Great Britain."

MOTIONS FROM THE SHERIFF'S COURT.

ON Tuesday, the 15th April, Lord Chief Justice TINDAL announced that the judges had come to a resolution, that, upon all motions respecting causes tried before sheriffs or judges of inferior Courts of record pursuant to the statute 3 & 4 Will. 4, c. 42, ss. 17, 18, the party making the application to the Court above must produce an examined copy of the notes of the sheriff or his deputy, or of the judge who tried the cause, together with an affidavit verifying such to be a true copy; and also, in cases where no counsel has been retained to conduct the cause or defence in the Court below, an affidavit setting forth the cause or nature of the application: and that all motions to set aside verdicts obtained in such Courts shall come on for hearing as motions in the ordinary course, and not be set down in the new trial paper.

ON the last day of last Hilary term, the Hon. Mr. Baron Bayley resigned his seat as one of the Barons of the Court of Exchequer, and was soon afterwards created a baronet. He was succeeded by John Williams, Esq., one of

his majesty's counsel learned in the law, who, on being called to the degree of serjeant at law, gave rings with the motto "Tutela legum?" he afterwards received the honor of knighthood.

In the following vacation—

Sir THOMAS DENMAN, Knight, Lord Chief Justice of the Court of King's Bench, was created a peer, by the title of Baron Denman, of Dovedale, in the county of Derby.

Sir John Campbell, Knight, his Majesty's Solicitor-General, was promoted to the office of Attorney-General, vacant by the resignation of Sir William Horne, Knight: and C. C. Pepys, Esq., one of his Majesty's counsel learned in the law, was appointed Solicitor-General, and afterwards received the honour of knighthood.

Mr. Serjeant Jones obtained his majesty's license to assume the surname of Atcherley, in pursuance of the will of his late maternal uncle.

In Easter Term—

On the 29th of April, Mr. Justice JAMES PARKE, Mr. Justice ALDERSON were removed, the former from the Court of King's Bench, the latter from the Court of Common Pleas, to the Court of Exchequer: and Mr. Baron VAUGHAN was removed to the Court of Common Pleas, and Mr. Baron WILLIAMS to the Court of King's Bench.

THE Judges who sat in the Court of Common Pleas during the foregoing term (except that, from the 29th of April, Mr. Baron VAUGHAN took the place of Mr. Justice ALDERSON) were—

Lord Chief Justice TINDAL,
Mr. Justice PARK,
Mr. Justice GASELEE,
and
Mr. Justice ALDERSON.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.—1834.

BACHELOR and Another *v.* VYSE.—p. 552.

Where the sheriff sells under an execution more than sufficient to satisfy the debt and costs, he is liable in trover for the excess.

Where a trader whose goods are under seizure quits his home, it is for the jury to say whether he departs with the *bonâ fide* intention to endeavour to procure the means of removing the execution, or whether, having gone for that purpose, he stays away for the purpose of avoiding his creditors.

THIS was an action of trover brought by assignees of a bankrupt against a sheriff to recover the value of certain goods of the bankrupt alleged to have been sold under execution after the issuing of the commission. The cause was tried before Lord Chief Justice Tindal, at the sittings at Westminster after last Hilary term. The bankruptcy was disputed. On the part of the plaintiffs the debt and trading were proved; and, in order to establish an act of bankruptcy, evidence was given of the bankrupt's having, whilst a person was in possession of his effects under two executions, left his home and gone to London. The executions were for 763*l.*, and the sheriff sold to the extent of 1,059*l.*, being an excess of 295*l.* over and above the sum directed to be levied, and costs. No evidence whatever was offered on the part of the defendant. On the part of the plaintiffs, it was contended that trover would lie for the excess. His lordship left it to the jury to say whether the bankrupt's motive in absenting himself from home was *bonâ fide* with the intention to endeavour to procure the means of discharging the executions, or with a view to conceal himself from his creditors. The jury found for the defendant.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi that this verdict might be set aside, and a new trial had. To shew that trover was maintainable for the excess, he cited *Stead v. Gascoigne*, 8 Taunt. 527, where it was held, that, if a sheriff legally take goods in execution, the proprietor whereof afterwards becomes bankrupt, and the sheriff sells at one time, after the bankruptcy, (a) enough to satisfy both that execution and also another execution,

(a) A sale *after* the bankruptcy has since been decided to be void as against the assignees though the execution were delivered to the sheriff *before*—See *Balme v. Hutton*, 3 Moore & Scott, 1, 1 Crompt. & M. 262, 9 Bing. 471; *Garland v. Carlisle*, 4 Moore & Scott, 24, 2 Crompt. & M. 31.

which, being delivered to him after the bankruptcy, is void, the bankrupt's assignees may recover in trover for such of the goods as were sold after the sheriff had raised money enough to satisfy the first execution. He also submitted that the direction of the Lord Chief Justice was rather too limited, inasmuch as the bankrupt might have gone to London for a lawful purpose, and *stayed* there with a view to avoid his creditors.(a)

Mr. Serjeant *Talfourd* now showed cause. *Stead v. Gascoigne* was but little argued; and there is a manifest distinction between that case and the present: there, there was a broad line of demarcation between the property sold under the first execution, which was good, and that sold under the second, which was void; whereas here the *seizure* was legal as to the whole. [Lord Chief Justice TINDAL referred to *Norman v. Bell*, 2 Barn. & Adolph. 190, where a toll of corn had been customarily taken by dipping into the sack so as to bring out a certain quantity, and the collector varied from the proper mode (by *sweeping* instead of *lifting* the toll), so as to take more; it was held that trover lay against him for the excess.] In that case the original act of taking was wrongful. In seizing under an execution, it is utterly impossible to determine what will be a sufficient seizure. Then, there being no evidence of any creditor being delayed, the bankrupt's going to London did not amount to an act of bankruptcy. In *Fisher v. Boucher*, 10 Barn. & Cress. 704, where a trader, being under apprehension of arrest, gave directions to his servant to deny him in case A., a sheriff's officer, called, it was held, that, the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house.

Mr. Serjeant *Wilde* and Mr. Serjeant *Coleridge*, in support of the rule. The action is clearly maintainable. If the sheriff has sold sufficient to satisfy the execution, and the defendant in the execution demands the rest, and the sheriff refuses to stay his hand, would he not be liable to him in trover.

Lord Chief Justice TINDAL. The law allows the sheriff to *seize* a reasonable quantity of the debtor's goods: but he must know when he has *sold* enough to satisfy the execution. *Stead v. Gascoigne* is a direct authority. The case certainly was not much argued; but it was treated as an authority by Mr. Justice Littledale in *Norman v. Bell*. I think the case should go down to be reconsidered, on payment of costs.

Rule absolute, on payment of costs.

DOE d. BRITTLEBANK v. ROE.—p. 562.

Service of a declaration in ejectment on the daughter of the tenant in possession is not good service, unless it be shown to have come to the hands of the tenant.

MR. *Clarke* moved that the service of the declaration and notice in ejectment might be deemed good service. The affidavit upon which he moved stated that the declaration and notice had been served upon the daughter of the tenant in possession upon the premises, and the nature and intent thereof explained to her; and that the tenant had absconded to avoid her creditors, and had been absent some months.

It not appearing that the declaration had ever come to the hands of the tenant—

Clarke took nothing.(b)

(a) See *Cumming v. Bally*, 4 Moore & Payne, 36, 6 Bing. 363.

(b) See *Doe d. Thomas v. Roe*, 1 M. & Scott, 435, and *Doe d. James v. Roe*, Id 597.

SWAINE and Others v. STONE.—p. 584.

A rule absolute may be drawn up during term on an order of a Judge dated in vacation.

AN order of a Judge had been obtained in vacation for a reference to the Prothonotary to compute the principal and interest due on a bill of exchange. The Secondary objecting to draw up a rule in term, on the ground that it had never been the practice to do so—

Mr. Serjeant *Wilde* applied to the Court to give a direction to the officer on the subject. He submitted that many difficulties would necessarily arise if these orders were not made rules of Court.

THE COURT (after consulting the other Judges) said that they thought it desirable, that, when brought to the office, the order of the Judge should be made a rule of Court.

Rule accordingly.

EICKE v. NOKES.—p. 585.

In an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant in an examination before the commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated.

ASHLIN v. LANGTON and Two Others.—p. 719.

Where a joint warrant of attorney is given by two or more persons, one of whom is an infant, the court will order it to be vacated as against the latter, and to stand against the other parties.

Mr. *Mansel*, on a former day, obtained a rule nisi to set aside a warrant of attorney, on the ground that one of the parties was an infant at the time it was executed.

Mr. Serjeant *Wilde* was now about to show cause: but the Court called on—

Mr. *Mansel* to support his rule. He referred to *Saunderson v. Marr*, 1 Hen. Blac. 75, where it was held that a warrant of attorney given by an infant is absolutely void, and the Court will not confirm it, though the infant appear to have given it (knowing that it was not valid) for the purpose of collusion: and to *Wood v. Heath*, 1 Chit. Rep. 708, where a judgment entered up on a warrant of attorney was set aside because one of the parties was an infant at the time of the execution of it. And he contended upon the authority of the case of *Baldwin v. Atkins*, 2 Dowl. P. C. 591, that the judgment must strictly follow the warrant of attorney; which being impossible in this case, by reason of the infancy of one of the parties, no judgment could be entered up on it at all.

PER CURIAM. Upon the authority of *Motteux v. St. Aubin*, 2 Hen. Blac. 1133, we think the warrant of attorney in this case may be vacated as against the infant, and allowed to stand as against the other parties. The rule therefore will be discharged with costs as to the two adults, and the name of the infant may be expunged.

Rule accordingly.

WOOD v. FROST.—p. 746.

The court rescinded a rule for judgment on a false plea of *nul tiel record* to a *scire facias*, on the ground that four days had not been suffered to intervene between the delivery of the issue and the rule to produce the record.

THE plaintiff brought a *scire facias* on a judgment of this court more than twenty years old. The declaration was delivered on the 2d June; on the 10th the defendant pleaded *nul tiel record*; and on the 11th (yesterday) the issue was delivered, and Mr. *Butt*, on the part of the plaintiff, upon an affidavit that the plea was false and pleaded for the mere purpose of delay, obtained a rule (drawn up peremptorily to show cause on the 12th) for judgment: and the officer was directed to produce on this day the record of the judgment in the original action. The secondary having accordingly produced the record, Mr. *Butt* (no counsel appearing to show cause) made his rule absolute.

Mr. *Comyn*, who had been instructed to oppose the rule for judgment, in the course of the day, moved that it might be rescinded, on the ground of irregularity in the proceedings. He contended that the rule to produce the record should have been a four day rule after the delivery of the issue; and that, this, being the case of a judgment on which the plaintiff had thought fit to sleep so long, the application was one that the court would not be disposed to favour, in violation of the established practice.

Mr. *Butt*, *contra*, submitted that the constant practice, where a plea appears upon the face of it to be a sham plea and pleaded for the mere purpose of delaying the plaintiff, was, to permit judgment to be signed, treating the plea as a nullity; and that, in the present case, the falsity of the plea clearly appeared, as well from the affidavit upon which the original motion was founded, as from the record of the judgment that had been produced.

LORD CHIEF JUSTICE TINDAL. The practice of the court requires that there shall be four days between the delivery of the issue and the production of the record. In the present case, four days have not intervened; and no reason has been suggested to induce the court to depart in the particular case from the ordinary rule. The plaintiff might have brought his action earlier.

The rest of the Court concurring—

Rule rescinded.

DOE d. SUMMERVILLE v. ROE.—p. 747.

The statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, for expediting the remedy of the landlord where his right of entry accrues during or immediately after an issuable term, does not apply to the case of a tenancy under an agreement expiring the day before the first day of the term.

THE 11 Geo. 4 & 1 Will. 4, c. 70, s. 36—after reciting that landlords to whom a right of entry into or upon any lands or hereditaments might accrue during or immediately after Hilary and Trinity Terms respectively, were therefore unable to prosecute ejectments against their tenants so as to try the same at the assizes immediately ensuing, whereby much delay was occasioned in the recovery of the possession of lands and tenements wrongfully withheld by tenants against their landlords—enacts, “that, in all actions of ejectment thereafter to be brought in any of his Majesty’s Courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments where the tenancy shall expire or the right of entry into or upon such lands or hereditaments shall accrue to

such landlord *in or after* Hilary or Trinity Terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire or right of entry accrue as aforesaid, to serve a declaration in ejectment intituled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto within ten days in the court in which such action may be brought; and proceedings shall be had on such declaration, and rules to plead entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term: Provided always that no judgment shall be signed against the casual ejector until default of appearance and plea within such ten days, and that at least six clear days' notice of trial shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried: provided also that any defendant in such action may, at any time before the trial thereof, apply to a judge of either of his majesty's superior courts at Westminster, by summons in the usual manner, for time to plead, or for staying or setting aside the proceedings, or for postponing the trial until the next assizes: and that it shall be lawful for the judge in his discretion to make such order in the said cause as to him shall seem expedient."

Mr. *Milner* moved for judgment against the casual ejector, in pursuance of the above provision, under the following circumstances:—The premises were demised to the tenant in possession by a written agreement dated the 21st of May, 1830, for one year, and so on from year to year, and the tenancy had been put an end to by a regular notice to quit. He submitted, that, as the year would only be completed on the 21st, the landlord's right of entry did not attach till the 22d, the first day of the term, and consequently the case was within the act, which being remedial should be liberally construed.

PER CURIAM. The construction contended for would be rather too liberal: the 20th was the last day of the tenancy.

REGULÆ GENERALES.

FINES AND RECOVERIES.—p. 749.

IT IS ORDERED that, from and after the last day of this term, where such parts of the affidavit verifying the certificate of acknowledgment taken in pursuance of the late act of parliament respecting fines and recoveries as state "the deponents knowledge of the party making the acknowledgement, and her being of full age," cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person whom the person before whom the affidavit shall be made shall consider competent so to do.

AND IT IS FURTHER ORDERED, that, where more than one married woman shall at the same time acknowledge the same deed respecting the same property, the fees directed by the said rules to be taken, shall be taken for the first acknowledgment only; and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one half of the original fees; and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property. And where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET.

MEMORANDUM.

THE Judges who sat in the Court of Common Pleas during the foregoing term were—

Lord Chief Justice TINDAL. Mr. Justice PARK. Mr. Justice GASELEE, and
Mr. Justice BOSANQUET.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench.

BY S. NEVILE,

ESQ., OF THE INNER TEMPLE,

AND

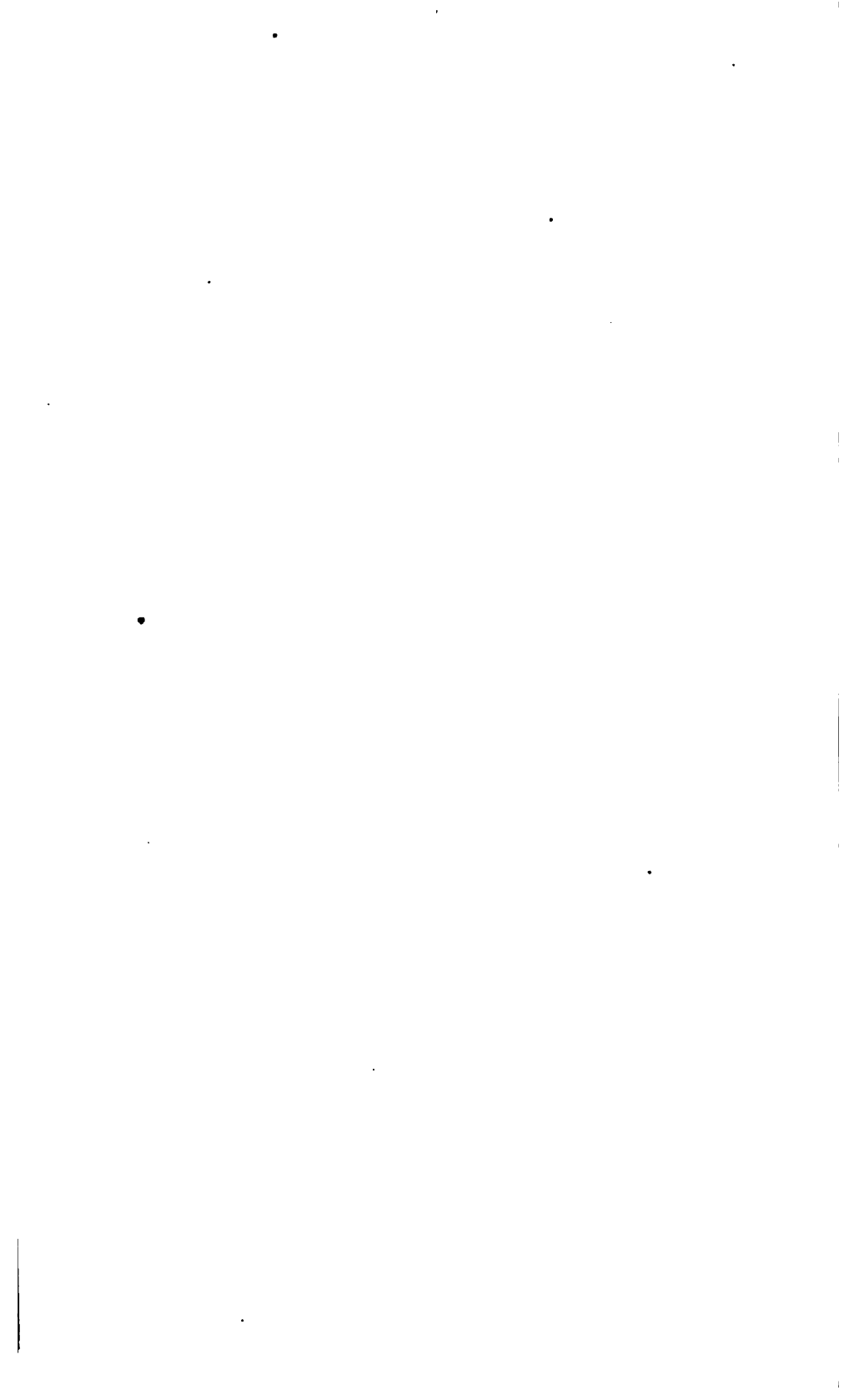
W. M. MANNING,

ESQ., OF LINCOLN'S INN, BARRISTERS-AT-LAW.

VOL. IV.

CONTAINING CASES IN MICHAELMAS, HILARY AND EASTER TERMS,

1834-5.



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C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Michaelmas Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.—1834.

The KING v. MILLS.—p. 6.

The court will not grant a rule nisi to remove the depositions taken before a coroner, and to bail a party charged upon the coroner's inquest with manslaughter, without an affidavit of what took place before the coroner.

ALEXANDER moved for a rule to show cause why a certiorari should not issue to remove the depositions taken in this case before a coroner of the West Riding of Yorkshire, and also why the defendant should not be permitted to put in bail before a justice of the peace of the county of York. It appeared from an affidavit made by the defendant, that he was a boy of about 14 years of age, and was at present in custody in York Castle, charged with manslaughter, upon the verdict of a coroner's jury, and that he had surrendered himself the moment he was aware the verdict had been given; that on the 5th of November he was in company with several other boys of his own age, and while they were amusing themselves together, the deceased ran after him, and while so running fell down; that the fall of the deceased, which was the occasion of his death, had not been caused by the defendant, who was merely running away to escape punishment. [Lord DENMAN, C. J. Is there any affidavit of what took place at the coroner's inquest?] No; but the depositions taken by the coroner will, of course, be produced to the Court if the rule be granted, and the necessity for such an affidavit is therefore obviated.

Lord DENMAN, C. J. The Court cannot grant the rule upon the present affidavit. We are bound to suppose that proper evidence has been given before the coroner's jury, and that they have found a verdict on premises sufficient to warrant the conclusion at which they have arrived.

TAUNTON, J., PATTESON, J., and WILLIAMS, J., concurred.

Rule refused.

The application was afterwards, in the same term, renewed upon affidavits stating what was proved before the coroner's jury, from which it appeared that the manslaughter was of a venial description. The Court granted the rule, and, in consideration of the near approach of the vacation, gave permission that the depositions should be submitted (when returned) to a judge at chambers.

RUPPELL and Another v. ROBERTS and DEMPSEY.—p. 31.

A., at the suggestion of B., by letter, orders a cargo of timber of C. The invoice is made out in the name of A., and a bill of exchange is drawn by B. on A., for the amount of the freight, which is paid by A.

In an action brought by C. against A. and B. for the price of the goods, it is competent to C. to show that A. and B. were jointly interested in the purchase.

ASSUMPSIT for goods sold and delivered, and on the common money counts. Plea, by Dempsey, the general issue. Judgment by default against Roberts. At the trial before Lord Denman, C. J., at the London sittings after the last term, the plaintiffs sought to recover 530*l.* 15*s.* the price of a cargo of timber shipped by them in April, 1834. Dempsey was a timber broker at Liverpool, at whose suggestion Roberts wrote a letter, ordering the timber. Roberts accepted and paid a bill of exchange drawn by Dempsey for the amount of the freight. The invoice was also made out to Roberts. Evidence was given to show that the defendants were *jointly* interested in the shipment. It was objected on behalf of Dempsey, that as the plaintiffs had originally contracted with Roberts, they could not now make Dempsey a party to the contract. Lord Denman overruled the objection, and a verdict was found for the plaintiffs. Leave was however given to the defendant Dempsey to move to set the verdict aside, and enter a nonsuit.

W. H. Watson now moved accordingly. The order for the goods—the invoice for them—and the bill of exchange for the payment of the freight, are all made out in the name of Roberts. This was clearly a contract with Roberts; and the plaintiffs cannot now treat another person as a joint contractor. It is wholly unlike the case of a concealed partner. [PATTERSON, J. Suppose the case of a secret partner,—would the circumstance of the letter, bill, and invoice, being in the name of one partner, make any difference? This seems to have been an agreement that the name of one should be used for *both*.] It is wholly unlike the case of parties trading under the name of one as the style of the firm.

The order for the timber, which was above the value of 10*l.*, being of the value of 530*l.*, was given *in writing*. The admission of the evidence was allowing the plaintiff to vary the contents of a *written* instrument by parol evidence. [PATTERSON, J. This is an action for goods sold and delivered. TAYLOR, J. The statute of frauds has nothing to do with the question.]

By the COURT—

Rule refused. (a)

The KING v. REDFERN.—p. 198.

A prosecutor is entitled to a *certificate* from the Crown Office of an indictment having been found, upon payment of the customary fee for the *certificate*, without paying for a *copy* of the indictment also.

In this term Jones obtained a rule calling upon the Solicitor of his Majesty's Treasury and Mr. Belt, one of the clerks in Court in the Crown Office, to show cause why Mr. Belt should not deliver to the prosecutor, or to his attorney or agent, a certificate of this indictment having been found by the grand jury in this Court, on payment of the usual fees for the *certificate* only. The grand jury of Middlesex, on the 10th of November, found a true bill for perjury against the defendant. The prosecutor, wishing to issue a warrant to appre-

(a) And see *Paterson v. Gandasequi* (*Gandasegui*), 15 East, 62; *Addison v. Gandasequi* (*Gandasegui*), 4 Taunt. 573 (where, in the marginal note, read "B. debits A." for "B. credits A."); *Thomson v. Davenport*, 4 Mann. & Ry. 110, 9 Barn. & Cressw. 78.

hend the defendant, applied to Mr. Belt at the Crown Office, for a certificate of the indictment having been found, upon payment of the usual fee for such certificate only. The practice in the Crown Office being to furnish a copy of the indictment together with the certificate, and to charge fees in respect of each, Mr. Belt refused to give the certificate except upon payment by the prosecutor of the fees for the copy of the indictment, (which he was ready to furnish,) as well as those for the certificate itself.

Campbell, A. G. now showed cause. It has been the immemorial custom, that a copy of the indictment as well as the certificate should be paid for. The indictment and the certificate may be considered as one instrument. It is necessary that the jury should have a copy of the indictment in order that he may be able to determine what amount of bail should be required.

Jones in support of the rule. The practice in the Crown Office is unjust, and ought not to continue. The reason which is assigned fails, as it is not now necessary to produce a copy of the indictment to the judge.

Lord DENMAN, C. J. after consulting with the officers of the Crown Office, said:—The course of office appears to be for the prosecutor to take out a copy of the indictment, though when the parties come before a judge he has only an *abstract* of the indictment. There is, therefore, no use whatever in having a *copy* of the indictment. The prosecutor in all cases has a copy of the indictment which he has himself preferred, and the judge can hold the party to bail upon the *certificate* alone. The reason suggested for furnishing the copy of the indictment,—that otherwise the learned judge would not know what bail to require,—is good; but it appears that the judge has only an *abstract* of the indictment, and not a *copy*, when the parties are bailed. I do not, therefore, see why the present practice should continue.

The other Judges concurring,

Rule absolute.

The KING v. The Justices of KENT.—Ex parte TENTERDEN Select Vestry.—p. 299.

The magistrates are *bound*, under 59 Geo. 3, c. 12, to appoint all persons nominated and elected by the parishioners, to be members of the select vestry, and have no discretion to reject any person so nominated and elected.

An inhabitant may be a member of a select vestry, although he be a magistrate acting within the parish.

An overseer may be a select vestryman, by virtue of an election by the parishioners, although he be also a member of the select vestry by virtue of his office.

LEESON v. SMITH.—p. 804.

In order to take a case out of the statute of limitations a payment of 12s. *as interest money* was proved:—This does not justify a verdict finding a debt of 13*l.* 16s.

A verdict for nominal damages only could upon this evidence have been sustained, *semble*.

Where, upon shewing cause against a rule for a nonsuit or new trial, it appears that the verdict has been entered for an amount not warranted by the evidence, the court will make the rule absolute, unless the parties *consent* that the damages shall be *reduced*.

ASSUMPSIT for money lent, and interest. By the particulars annexed to the record the money (15*l.* 12s.) appeared to have been lent more than six years before action brought, and credit was given for two payments of interest within the six years. Pleas: 1st, the general issue; 2nd *actio non accrevit infra sex annos*. At the trial before the under-sheriff of Derbyshire, 1

September, 1834, the plaintiff's niece gave the following evidence:—"The plaintiff sent me, in September, 1829, to ask him for his interest money; I delivered the message to the defendant. He gave me 12s; I gave the 12s. to my uncle." On cross-examination the witness said, that she merely asked the defendant for her uncle's interest money, and that the defendant did not tell her any thing about it. John Leeson, the plaintiff's brother, gave evidence as follows:—"I met the defendant last Christmas; I said, 'Thomas, my brother James wants to see you, he begins to think you long.' The defendant said: 'I should have been there before now if I had any thing to come with, but times are hard with me. I was rearing a beast towards it, but I have had the bad fortune to lose it.'" This was the whole of the evidence for the plaintiff. It was contended on the part of the defendant that there was no evidence to go to the jury of the existence of any debt, and that the plaintiff ought to be nonsuited. The under-sheriff told the jury that there was no distinct proof of any debt,—that John Leeson's evidence was inadmissible to take the case out of the statute of limitations,—but that they might consider how far the payment of the 12s. for interest, afforded an inference that there was a then existing debt. The jury found a verdict for the plaintiff for 18l. 16s. In the course of this term, *Hughes* obtained a rule nisi for a nonsuit or a new trial, on the ground of misdirection, and of the verdict being against evidence.

N. R. Clarke now showed cause. The evidence was sufficient to take the case out of the statute, since it was an admission of a debt upon which interest to the amount of 12s. was due.

Hughes, contra. It lay upon the plaintiff to take the case out of the statute. The evidence was not sufficient for that purpose. The evidence of John Leeson was inadmissible; for by Lord Tenterden's act, 9 Geo. 4, c. 14, s. 1, every *acknowledgment or promise*, to take a case out of the statute, must be in writing and signed by the party chargeable thereby. The evidence of the first witness was too vague and uncertain to be left to the jury. Every acknowledgment, to take a case out of the statute, ought to be an admission of the existence of a certain amount of debt; that amount to be either specified or to be capable of being clearly deduced by calculation. Supposing the 12s. to have been paid in respect of a debt really due, yet as neither the rate of interest, nor the time in respect of which it was due, was mentioned, the jury had no data from which to calculate the amount of the debt. But there was no admission of any debt being due; for the expressions "my uncle's interest money," might merely mean that the defendant had money to pay over to the witness's uncle which he had received as his *agent*. Upon such uncertain evidence, the under-sheriff was not warranted in leaving the case to the jury.

Supposing it should be held that there was in this case a sufficient acknowledgment of a debt of some *unascertained* amount, the plaintiff could be entitled at most to nominal damages only.

LORD DENMAN, C. J. It is clear that the verdict is at all events for too much: we cannot however *reduce* the damages without the consent of both parties, and therefore the rule must be made absolute for a new trial. It must be understood that we give no opinion as to the admissibility of the evidence of John Leeson.

LITLEDAL, TAUNTON, and PATTESON, J^s. concurred. Rule refused.

Ex parte the Inhabitants of CARLTON HIGH DALE.—p. 312.

The court will not grant a mandamus requiring the justices at sessions, to direct the putting in suit of a bond given by a high constable for the due performance of his office.—for the purpose of procuring reimbursement to a parish upon which the high constable has levied excessive rates in disobedience of an order of sessions.

PADDON v. BARTLETT and Another.—p. 321.(a)

To debt for twenty years' rent, at 80*l.* a year, upon a lease, the defendant pleaded the statute of limitations; and further as to 1420*l.*, part of the demand, that 17½ years ago the plaintiff by deed assigned his reversion, and that no part of the 1420*l.* had accrued before the assignment: verdict for the plaintiff upon the first issue, and for the defendant upon the second:—Held, that the defendant was entitled to the *postea*.(b)

CROWDER, in this term, had obtained a rule calling upon Mr. Hockin, the plaintiff's attorney to show cause why he should not deliver over to Messrs. Egan and Waterman, the defendant's attorneys, the *postea* in this cause, and why he should not pay the costs of this application.(c) The rule was obtained upon an affidavit, which stated that the declaration was in debt for 1600*l.*, being 20 years' rent at 80*l.* a year, upon an indenture of lease dated 2nd February, 1812, whereby the plaintiff demised to the defendant for 21 years; that the defendants pleaded, first, *non est factum*; secondly, *actio non accrevit infra sex annos*; and thirdly, as to 1420*l.* part of the rent for the space of 17½ years ending 2nd February, 1883,—that the plaintiff, by indenture of 30th June, 1815, had assigned all his estate and interest in the demised premises to certain persons, and that no part of the 1420*l.* became due from the defendants to the plaintiff at any time before the day and year last mentioned; that the plaintiff replied to the second plea, *actio accrevit infra sex annos*; and to the third, *non est factum*(d); that the case was tried before Lord Denman, C. J., at the last assizes for the county of Devon, when a verdict was found for the plaintiff upon the first two issues, and for the defendants upon the third; that the learned chief justice thought that the plaintiff was not entitled to any damages: that Messrs. Egan and Waterman, after the first four days of the term, applied to the associate for the *postea*, for the purposes of enabling them to tax the defendants' costs, but were informed, that the *postea* had been delivered to Mr. Hockin, the plaintiff's attorney; that they then wrote to Mr. Hockin, giving him notice that if the *postea* was not returned in the course of the day to the associate, or sent to their office, they should make an application to the Court upon the subject; that on the same day, they gave notice of taxation, and that taxation was attended by Mr. Hockin, who produced the *postea* with a verdict indorsed for 180*l.*(e) debt, damages 1*s.*, costs 40*s.*; but that the *postea* has not been returned to the associate, or sent to the office of Messrs. Egan and Waterman.

(a) This case was determined on the *last* day of term, contrary to the rule not to hear matters of law on the last day of term.

(b) Vide *tamen post*, 375, note (b).

(c) Quere, whether the rule should not have been,—to amend the *postea* according to the learned judge's notes, by entering a verdict for the defendants upon so much of the second issue as related to the first 2½ years, or to the first 14 years of the term.

(d) If the plea had stated an assignment by the *defendants*, though by deed, the replication would have been "non assignaverunt." Vide 3 Neville & Manning, 50, note (e); *Doctrina Placitandi*, 261; 1 Lutw. 662; *Cowlishaw v. Cheslyn*, 1 Crompt. & Jerv. 48; *Stephen on Pleading*, 3d edit. 196, 198.

(e) This indorsement appears to be informal. Upon the facts as stated in the *defendant's affidavit*, the entry of the verdict should have been 1st, that the lease was the deed of the defendants; secondly, that the action did accrue within six years; thirdly, that the assignment was the deed of the plaintiff,—and that the jury assessed the damages of the plaintiff at 1*s.* for the detention of the debt, i. e. 180*l.*, being that portion of the debt demanded which was confessed by the third plea, and which remained unimpugned by the general finding of the jury upon the first and second issues. The jury would be bound in law to find *some* damages, (*post* 578 (a);) and as none were proved, the proper course would be for the associate to enter a finding of 1*s.* damages. But though the *judgment* of the Court, upon the finding, would necessarily be,—that the plaintiff do recover the sum of 180*l.*, parcel of the debt demanded,—it was irregular to introduce that sum into the *postea*,—as it would form no part of the finding of the jury, any more than in the case of an action of debt on bond, with no other plea than *non est factum*.

Newman showed cause. The defendants established their defence to the extent of part only of the demand. The third plea, (the issue raised upon which was found for the defendants,) applied only to 1420*l.*; whereas the demand, as laid, and as *prima facie* proved by the production of the deed, was 1600*l.* Upon the face of the record the plaintiff has established his claim to the extent of 180*l.*, being the residue of 1600*l.*, after deducting 1420*l.*; and consequently he, and not the defendants, is entitled to the *postea*.

Crowder, *contra*. The plea of the statute of limitations denied any cause of action within six years; but as it appeared by the production of the existing lease that the rent had been accruing annually during the last six years, that issue was of course found for the plaintiff; and had there been no other plea covering the last six years the verdict must have been entered for a debt to the amount of the rent for that period, and damages for the detention of it. But the third plea sets out an assignment of the reversion, 17 $\frac{3}{4}$ years before its expiration, and the issue on that plea was found for the defendant; consequently the result on the whole record is, that the plaintiff is entitled to no damages, because there was no debt due. Although the plea of the statute was separately pleaded from the other pleas, the effect must be precisely the same as if there had been but one plea, which would have run thus; as to the first 14 years, the statute of limitations; and as to the last six years, the assignment of the reversion 17 $\frac{3}{4}$ years ago. The true effect of finding in favour of the plaintiff the issue on the plea of the statute of limitations is only that he is entitled for the last six years, all previous rent being covered. But by finding for the defendants on the third issue, the jury have found that as to the last six years and upwards, the plaintiff is not entitled to recover, by reason of the assignment of the reversion. Looking therefore at the whole record, it will appear that the defendants have answered the claim for rent to the whole extent. [PATTERSON, J. Who entered the finding of damages?] It is believed that it was entered by the plaintiff's attorney. [TAUNTON, J. This is an action of debt, and therefore the *damages* entered are only one shilling; but the associate alone has a right to do that. If the entry of 1*s.* damages (a) was made by the plaintiff's attorney, he has done a thing equally wrong in principle as if he had entered 1000*l.* damages.]

Lord DENMAN, C. J. We are of opinion that the rule must be made absolute to the full extent. The defendants established their defence, and were entitled to the *postea*. Rule absolute. (b)

(a) Without a finding of some damages and costs, the verdict would have been imperfect, (Bentham's case, 11 Co. Rep. 56 a.) and before the passing of 6 Geo. 4, cap. 50, the omission could not have been supplied by writ of inquiry, as such a proceeding would have ousted the party of his *attain*t. (Ibid. And see Cheyney's case, 10 Co. Rep. 118 b; Herbert v. Waters, Carth. 362; Kynaston v. Mayor of Shrewsbury, 2 Stra. 1052; 1 Wms. Saund. 195 b.) But as writs of *attain*t are taken away by that statute, sect. 60, it would seem that all defects in verdicts may now be remedied by writ of inquiry, without awarding a *venire de novo*, (and thereby disturbing that which is *well* found) except as to matters directed to be inquired of (as in *replevin* under 17 Car. 2, c. 7), by the jury impanelled to try the issue.

(b) This decision is probably in accordance with the *merits* of the case, as they were presented at *nisi prius*, but it does not seem to be warranted by the finding of the jury, as disclosed by the defendant's affidavit. If upon the issue joined on the statute of limitations, the plaintiff proved no acknowledgment reviving the *whole* liability, the verdict on that issue ought to have been entered for the plaintiff as to the last six years, as to so much (if any) of the by-gone rent as the defendants had *acknowledged* within six years,—and for the defendants as to the *old* rent *unacknowledged*. If the first 2 $\frac{1}{2}$ years' rent had been in the latter predicament, the whole claim would have been barred by the verdict, viz. 2 $\frac{1}{2}$ years by the statute of limitations, and 17 $\frac{3}{4}$ years by the assignment. On the other hand, if the plaintiff proved a distinct legal recognition of the *whole* within six years, the entry of the verdict on the second issue *generally* for the plaintiff, was correct; and in that case the verdict upon the last issue would neither in form nor in substance establish any justification of the non-payment of the 2 $\frac{1}{2}$ years' rent accruing due before the assignment; the liability in respect of which 2 $\frac{1}{2}$ year's rent was not otherwise contested by the

MEMORANDA.

TRINITY VACATION, AND MICHAELMAS TERM, 1834.

SIR Charles Christopher Pepys, Knt. his Majesty's Solicitor-General, was appointed to the office of Master of the Rolls, vacant by the death of Sir John Leach, Knt.

He was succeeded in the office of Solicitor-General by Robert Mounsey Rolfe, Esq.

His Majesty was pleased to appoint William Erle, and Frederick Thesiger, Esqs. to be his counsel learned in the law; and Matthew Davenport Hill, Esq., received a patent of precedence to rank next after Mr. Thesiger.

On a subsequent day in the vacation, his Majesty was pleased to appoint Creswell Creswell, Esq., his counsel learned in the law.

In Michaelmas term, these gentlemen were respectively called upon to take their seats within the bar of the several Courts.

defendants than by the first plea and that part of the second plea which applied to the earliest portion of the rent,—all which was found against them.

C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Hilary Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.—1835.

DODSON v. MACKEY.—p. 327.

In a letter written to the plaintiff within six years, the defendant says, "I can never be happy until I have not only paid you every thing, but all to whom I owe money;" and, "Your account is quite correct; and Oh! that I were now going to enclose you the amount of it." Held, that this was evidence to go to the jury of an acknowledgment, taking the case out of the statute of limitations.

Held, that such promise, accompanied by this expression, "It is impossible to state to you what will be done in my affairs at present; it is difficult to know what will be best, but immediately it is settled, you shall be informed;" is an absolute unconditional promise, and not a qualified or conditional promise.

Whether proof of such letters, together with proof of a bill drawn more than six years ago, by the plaintiff on the defendant, and accepted by the latter, would entitle the plaintiff to recover more than nominal damages, *quære*.

ASSUMPSIT, (before the new rules came into operation,) by the drawer against the acceptor of two bills of exchange for 50*l*. each, falling due in October, 1826, and January, 1827. Pleas: the general issue and the statute of limitations. At the trial before Lord DENMAN, C. J., at the last sittings in London, the plaintiff first produced the bills, and proved the acceptance. He then put in two letters, written and signed by the defendant, and dated respectively the 21st April, 1828, and 22d November, 1830, for the purpose of showing an acknowledgment, so as to take the case out of the statute. The first of these letters was addressed to the plaintiff, and after adverting to a letter received by him from the plaintiff, but which was not in evidence, it contained the following (among other) expressions: "I can never be happy until I have not only paid you every thing, but all to whom I owe money. It is impossible to state to you what will be done in my affairs at present. It is difficult to know what will be best, but immediately it is settled, you shall be informed;" and, "your account is quite correct; and, Oh! that I were now going to enclose you the amount of it." The other letter, which was addressed to a Mrs. W., inclosing a remittance on account of a debt due by the defendant to Mrs. W., and in allusion to a debt due to a Mrs. G., and threatened proceedings by that lady, said, "If she will only have patience, I will in time pay every farthing, as also Miss Dodson, (the plaintiff,) what I am indebted to her." It being left to the jury to say, whether the letters amounted to an

acknowledgment of, and an absolute promise to pay, a debt; and if so, whether the acknowledgment was of a debt to the amount of the bills,—the plaintiff had a verdict for 140*l.*; but the learned chief justice gave the defendant's counsel leave to move for a nonsuit, or to reduce the amount given by the jury to nominal damages only.

Wordsworth now moved accordingly.

I. The defendant is entitled to a nonsuit. There was no sufficient and unqualified acknowledgment to take the case out of the statute. If there was a sufficient *acknowledgment*, there was no *promise to pay*. And if there was a promise to pay, it was a conditional or qualified promise; whereas the promise, as laid in the declaration, was absolute; *Fearn v. Lewis*, 6 Bingh. 349, 4 Moore & Payne, 1; *Haydon v. Williams*, 7 Bingh. 163, 4 Moore & Payne, 811; *Brigstocke v. Smith*, 1 Crompt. & Mees. 483. Even in a case where there was a composition deed, which had been executed by a defendant, and in the recital of which it was acknowledged that there was a debt due from the defendant to the plaintiff,—not, however, specifying the amount,—it was held that there was no sufficient acknowledgment to take the case out of the statute; *Kennett v. Milbank*, 8 Bingh. 38, 1 Moore & Scott, 102.

II. Supposing, however, that the letters constitute a sufficient acknowledgment and promise to pay, to take the case out of the statute, still, as there was no amount specified, the plaintiff could recover no more than *nominal* damages. *Dickenson v. Hatfield*, 5 Carr. & Payne, 46, is upon this point a stronger case than the present.

Lord DENMAN, C. J. It was left to the jury to say whether these letters amounted to an acknowledgment, and a promise to pay an existing debt, and the jury decided that it was so. My brothers agree with me that it was properly so left. There can be no doubt that the first letter contained a sufficient promise. It was also put to the jury to say, whether the promise was *conditional*, and they decided rightly, as we think, that it was not so. There is no ground, therefore, for entering a nonsuit.

But upon the second point we must take time to consider. The case of *Dickenson v. Hatfield*, which was decided by Lord Tenterden, is certainly very like the present case. I own that I should have had no doubt, but for that case, that the question was for the jury.

LITTLEDALE, J. and WILLIAMS, J. concurred.

Rule for a nonsuit refused.

On a subsequent day in the term, Lord DENMAN, C. J. said that upon the second point, the Court thought that there ought to be a rule for a new trial, or to reduce the verdict to one for nominal damages. Rule nisi accordingly.

MOODY v. DICK.—p. 349.

The Court will not grant a new trial upon an affidavit by the defendant, stating that he was kept in ignorance by his late attorney of the state of the action, that he had a good defence upon the merits, and that the verdict passed against him by reason of the negligence of such late attorney. Semble, that the defendant's remedy is by an action against the attorney for negligence.

This cause came on to be trial before Lord Denman, C. J. at the last sittings for Middlesex, when the plaintiff had a verdict.

Alexander now moved for a new trial, upon affidavits stating that the defendant had been kept in ignorance of the state of the action, by the attorney whom he then employed; that he had a good defence upon the merits, and that the verdict had gone against him by reason, merely, of the negligence of his late attorney.

The COURT said, that no sufficient ground for depriving the plaintiff of his verdict had been shown,—supposing the affidavits to be perfectly correct. They suggested, however, upon the same supposition, that the defendant might have a good cause of action against his late attorney. Rule refused.(a)

The KING v. The Inhabitants of LLANFIHANGEL-ABERCOWIN.—
p. 355.

Where fraud is not expressly found by the sessions, this Court cannot *infer* it from any state of facts.

But in case where the facts stated were such as to render it almost certain that the decision of the justices at sessions must have proceeded on the ground of fraud, the Court sent back the case to be re-stated.

The KING v. ADEY and Others.—p. 365.

A notice of appeal against an order for stopping up a highway, is sufficient if it state that the appellants are aggrieved by being compelled to go a greater distance to the next market town from their respective residences than they would have gone if the road intended to be stopped up were put and kept in a proper state of repair.

It need not expressly state that they are aggrieved by the order.

HALL v. MIDDLETON.—p. 368.

Upon a motion for a rule nisi for a new trial of a cause tried before an under-sheriff, the party making the application should produce a copy of the under-sheriff's notes, verified by affidavit,—or an affidavit stating a refusal by the under-sheriff to give a copy of his notes, and bring before the Court the facts proved at the trial.

The KING v. The Justices of CUMBERLAND.—p. 378.

Where a certain number of days' notice of an intention to do an act is required, the day of the service of the notice is *excluded* from the computation, and that on which the act is to be done is *included*,—unless there be some special provision requiring a different mode of computation.

Therefore notice to magistrates of an intention to apply on the 25th day of the month, for a certiorari to remove an order made by them for the allowance of accounts of surveyors of highways, served upon the 20th of the same month, is not a sufficient notice within 13 Geo. 2, c. 18, s. 5, requiring six days' notice to be given.

CRESSWELL, on the 25th of last November, obtained a rule calling upon three justices of Cumberland to show cause why a certiorari should not issue to remove into this Court an order made by them at a special sessions held at Carlisle on the 25th of the preceding October, allowing the accounts of the surveyors of the highways, within Orton Quarter, in the parish of Orton, and all proceedings had thereon. This rule was obtained upon affidavits, one of which stated, that each of the three justices had been on the 20th November then instant served

(a) And see P. 8 Edw. 3, fo. 33, pl. 34; Registr. Brev. 113 a; F. N. B. 96 E.; Anon. 2 Roll. Rep. 499; *Latuch v. Pasherante*, 1 Salk. 86; Anon. ib. 88 pl. 7; *Robson v. Eaton*, 1 T. R. 62; *Brown v. Neave*, Wightwick, 122; Bac. Abr. Actions on the case (F. 2); Com. Dig. Action on the case for deceit (A. 6); 1 Vin. Abr. 576.

with a true copy of a notice (dated on the preceding day), that application would be made for such writ of certiorari to the Court of King's Bench, on the 25th November then instant.

W. H. Watson now showed cause, and objected that the notice served on the 20th, of an intention to move on the 25th of the same month, was not a good notice within 18 Geo. 2, c. 18, s. 5, requiring six days' notice to be given to magistrates; *Rex v. Justices of Glamorganshire*, 5 T. R. 279; *Rex v. Justices of Kent*, 3 Barn. & Adol. 250.

Cresswell contra. The two cases which have been cited are inapplicable. There is no decision as to the mode in which the six days are to be computed. The day on which the notice was served, and also the day on which the motion is to be made, must be *included* in the computation. It is clear that the day on which the notice is served is to be included; *Castle v. Burditt*, 3 T. R. 623; *Lester v. Garland*, 15 Vesey, 248; *Hardy v. Ryle*, 4 Mann. & Ryl. 295, 9 Barnw. & Cressw. 603; *Pellew v. Hundred of Wondford*, 4 Mann. & Ryl. 130, 9 Barnw. & Cressw. 134. There are many instances in practice-in which it is held that the computation must be made with *both days inclusive*. By 9 Geo. 1, c. 22, s. 8, giving a remedy against the hundred in certain cases, it is required that the party injured shall give notice within two days after the commission of the offence by which he is injured, and must be examined upon oath, *within four days* after notice touching his knowledge of the offenders. These four days, it has been decided, must be taken inclusively both of the day of the notice and of the day of examination. This decision is consistent with that on the prior statute; *Norris v. Hundred of Gawtry*, Hobart, 139. [LITTLEDALE, J. The common rule is, that one day is to be taken inclusive, and one day exclusive. That is the case with respect to an eight day rule.] By the rule of H. 2 Will. 4 Reg. VIII., (a) the Court have ordered that the first day shall be taken *exclusively*, the last day *inclusively*. Upon the authorities, therefore, the day of service is included, and by the rule of Court the day of motion is to be included; consequently this notice was sufficient.

Lord DENMAN, C. J. In *Rex v. Justices of the West Riding of Yorkshire*, 1 Neville & Manning, 426, 4 Barn. & Adol. 685, a question arose, as to whether a notice which had been there given, of an intention to appear against an order of two justices for the diversion of three footpaths, was a sufficient notice under the 55 Geo. 3, c. 68, s. 3, which requires ten days' notice of appeal to be given. It was contended, that both the day on which the notice was served, and that on which the sessions commenced, ought to be *excluded* from the computation, and that, therefore, a notice of appeal served on the 25th June, the sessions commencing on 5th July, was insufficient. The court, however, held, that as nothing was expressed in the act as to the mode of computation, and as it did not require ten *clear days* (b) notice, one day ought to be excluded, the other included. The officers of the court inform us, that it is the constant practice, in making computations of this sort, to exclude one day, and to include the other, except where another mode of computation is specially required. I think, therefore, that the notice in this case was insufficient, and that the rule must be discharged.

LITTLEDALE, J., and WILLIAMS, J., concurred.

Rule discharged.

(a) By which it was ordered, that "in all cases in which any particular number of days, not expressed to be *clear days*, is prescribed by the rules or practice of the Courts, the same shall be reckoned *exclusively* of the first day, and *inclusively* of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned *exclusively* of that day also."

(b) And see *Gould v. Hole and White*, 4 Mann. & Ryl. 301, n.

The KING v. The Justices of SOMERSETSHIRE.—p. 394.

The Court refused to award a mandamus, commanding justices to enforce, by issuing a warrant of distress, a highway rate assessed upon land which had never been rated before, and the liability of which to be rated was denied.

And the prosecutor having, previously to the motion for a rule for a mandamus, merely proposed to call a meeting for the purpose of obtaining an indemnity for the magistrates, without actually offering a sufficient indemnity, the rule was discharged with costs.

ERLE, in the last term obtained a rule, calling upon Thomas Henry Mirehouse, clerk, and Charles Abraham Elton, Esq., two justices of the peace for the county of Somerset, to show cause why a writ of mandamus should not issue, commanding them to make and issue their warrant for levying a distress upon the goods of James Maclean, the sum of 1*l.* 6*s.* 9*d.*, assessed upon him in respect of lands in the parish of Clevedon, in the said county, for and towards the amending the highways in that parish.

The affidavits upon which the rule was obtained, and those sworn in opposition to it, disclosed the following facts :

By an act of 39 Geo. 3, (A. D. 1799,) for inclosing certain commons and moor lands in the parish of Clevedon, commissioners were appointed to carry the act into effect, and were authorized and required to set out such public carriage roads over the moors, &c., intended to be inclosed, as they should think necessary, which roads, when made, were to be repaired in the same manner as other public roads in the parish of Clevedon were by law to be repaired : and also to set out such public bridle-roads and foot-ways, and private roads and ways, and other conveniences, in, over, and upon the moors, &c., as they should think requisite ; and the same were to be repaired by such persons and in such manner as the commissioners should direct and appoint.

In 1801, the commissioners, by their award, set out certain drove-ways and private occupation-roads, (the expense of repairing which they directed should be defrayed by means of an assessment upon the occupiers of the newly-inclosed lands,) but set out no public roads, none such being in their opinion necessary. It did not appear that there had been any public road over the moors and commons at any time before the inclosure. Until 24th March, 1834, the occupiers of the newly-inclosed lands, though assessed to all other parochial rates in the parish of Clevedon, had never been assessed in the general highway-rates of the parish, nor have they ever been called upon to perform any statute-duty upon the public roads of the parish, or to pay any composition in lieu thereof. They have repaired their own roads out of the proceeds of assessments made amongst themselves, and have had a district surveyor of their own. The statute-duty having been performed by the occupiers of the remainder of the parish, and the roads being so far out of repair, and even if the occupiers of the newly-inclosed lands had performed statute-duty, a highway-rate would have been requisite, the parish surveyors gave notice that they should, on the 24th March, 1834, apply to the magistrates, at a special sessions of the highways, to be held on that day, for the division of Bedminster, in the county of Somerset, for a highway-rate to be made on all the occupiers of lands, &c. within the parish. On the 24th March, an application was accordingly made to the justices by one of the overseers, who stated that all the duty required by 13 Geo. 3, c. 78, had been duly performed, and that the moneys authorized by that statute to be collected and received, had been duly applied and expended, and that the highways were so far out of repair, that a rate was absolutely necessary. An order was, upon this application and statement (which were recited in the order,) made by two justices. An assessment upon *all* the occupiers within the parish, which had been previously prepared, (and which bore no date, except that the title stated that it was a rate for the repair of the roads of Clevedon, "for the year 1834,") was

on the same day, and at the same special sessions, presented to two other magistrates for their allowance, and was signed and allowed by them. It did not appear upon the face of the allowance, that the two magistrates, who so signed and allowed, acted in the capacity of justices of the peace. In this assessment, Maclean was rated at 1*l.* 6*s.* 9½*d.*, for part of the newly-inclosed lands. No notice of the special sessions held on the said 24th March was given to any of the county magistrates, by the constable of either of the hundreds within the division of Bedminster. The clerk of the justices of the division had, at the commencement of the year, (according to the usual custom within the district,) issued to each justice of the division, a printed statement of the times and places when and where the justices would, during the whole year, meet in petty and special sessions, and in this statement the 24th March was mentioned as a day on which to hold a special sessions. No other notice had been received by any magistrate. Maclean having refused to pay the 1*l.* 6*s.* 9½*d.*, the surveyor obtained a summons requiring him to appear before the justices to shew cause why he refused to pay such sum. Maclean appeared at a meeting of justices, held 5th May, at which meeting Mr. Mirehouse and Mr. Elton were the only magistrates present. One of the surveyors having produced the assessment and proved a refusal by Maclean to pay the amount, Maclean objected that the occupiers of the newly-inclosed land (supposing them to be liable at all to contribute to the *highway rates* of the parish, which was questioned,) had not been called upon to perform *statute-duty*, and he also objected that the assessment was illegal for want of a *date*. Maclean informed the magistrates, that in the event of their signing a warrant to distrain upon his goods for the rate, an action of trespass would be immediately commenced against them by him. It being admitted that Maclean had never been called upon to perform *statute-duty*, the magistrates expressed a doubt as to the validity of the rate, and said that they should take time to consider of the matter. On the 24th May, Maclean was served with a second summons, and he in consequence appeared on the 26th May, at a meeting of justices, at which Mr. Mirehouse and Mr. Elton were again the only justices present. One of the parish surveyors preferred an information and complaint on oath, against Maclean for non-payment of the assessment, and applied for a distress-warrant. Maclean admitted that he had refused to pay the rate, and objected to the assessment as illegal, on the grounds mentioned on the previous occasion; and upon being asked by the surveyor, whether, if the rate were abandoned he would perform *statute-duty*, he denied his liability to contribute in any way to the repair of the public highways of the parish. He again threatened an action in case a distress warrant should be granted. On the other hand Macey, an attorney, who appeared for the parish, told the magistrates, that in the event of their refusing to grant a warrant, an application for a mandamus to compel them to do so, would be made to this Court. No adjudication was at any time come to by the magistrates upon the general question, whether the newly-inclosed lands were ratable to the highways, though they expressed it as their belief that they were so ratable; but they suggested to the parties that the proper tribunal for deciding that question was the sessions upon appeal. At the meeting on the 26th May, Macey, in answer to a question from the two justices, stated his *belief* that the parish would indemnify the magistrates against any action to be brought against them by Maclean; and on a subsequent occasion he said that he had the authority of the parish *for offering to call a vestry* meeting, for the purpose of giving such indemnity to the magistrates, if they would immediately issue their warrant, but no formal indemnity was ever offered, nor did it appear that any vestry was at any time assembled, for the purpose of considering the matter of indemnity. Mr. Mirehouse and Mr. Elton therefore fearing that an action would be brought against them by Maclean, and fearing that by reason of the *statute-duty* not having been called out and performed, the result of that action might be unfavourable to them, refused to grant a distress warrant.

Sir *John Campbell* and *F. N. Rogers* now showed cause. This Court will not compel magistrates to do an act which will expose them to an action, the result of which may be doubtful; *Rex v. Justices of Buckinghamshire*, 2 Dow. & Ry. 689, 1 Barn. & Cressw. 485; *Rex v. Newcombe*, 4 T. R. 368. It is quite clear, that if the warrant which it is now sought to compel these magistrates to issue, were issued and acted upon, an action would be brought against them; and it seems equally clear that there exists a *reasonable doubt* as to the result. There are several objections to the assessment, of which these magistrates were, at the time of the application for the distress-warrant, informed, and they would therefore clearly be liable for damages, if any of those objections should prove fatal to the assessment. In *Stanley v. Fielden*, 5 Barn. & Alder. 425, Bayley, J., says "A magistrate is not amenable for granting a warrant, if at the time of granting it he has documents before him (which are the acts of other magistrates,) from which it appears he was justified in granting the warrant. But if the want of jurisdiction is manifest from all the proceedings before him at the time, then he grants the warrant at his peril." The observations of Lord Ellenborough, in *Lowther v. Lord Radnor*, 8 East, 119, are to the same effect. Now here, there were defects in the proceedings, which made the jurisdiction of the justices at the least doubtful; and of these defects the magistrates were well aware at the time they were called upon to grant the warrant. First, it did not appear upon the face of the allowance, that the two persons who signed it acted in the capacity of justices of the peace. *Rex v. Fylingdales*, 1 Mann. & Ry. 176, 7 Barn. & Cressw. 438, shows that the authority of magistrates ought to appear upon the acts done by them. Secondly, the magistrates assembled on the 24th March had no jurisdiction to make the order for the assessment, because the special sessions had not been duly convened. Formerly it was held, that each magistrate acting within the district should have a notice of the holding of special sessions, proceeding directly from the constable of the hundred; and though the rule has since been somewhat relaxed, it is still necessary that the notice should emanate from the constable. Here, the notice was given by the magistrates' clerk, and this has been held to be insufficient. Thirdly, the order of assessment is bad, inasmuch as the supposed facts, of the statute-duty having all been called out and performed, (which is recited in it,) is untrue; and the incorrectness of this recital was known to these two magistrates at the time of the application for the warrant. Until the statute-duty is all performed, or a composition in lieu thereof is paid, received, and expended, or unless it is shown that the roads are so far out of repair that the statute-duty and composition money would be insufficient for the repair of the roads, justices have no power to order an assessment to be made for the purpose. Again, another objection taken is, that the assessment is without a *date*. But the principal question in this case is, whether this district is liable to contribute in *any way* to the repair of the highways of the parish. [Lord DENMAN, C. J. I certainly do not see what ground exists for an exemption of this district.] This is a question which cannot be decided here now, and it is a question which the justices could not be called upon to decide. The proper tribunal for the discussion and decision of that question is the Court of Quarter Sessions. No indemnity was offered in such a form that the magistrates could be expected to expose themselves to an action upon the faith of it.

Erle, contra. With regard, first, to the indemnity. The offer which was made by Macey was sufficient. He offered to call a vestry^(a) for the purpose of giving to the magistrates a regular indemnity; and the prosecutor now repeats the offer, and is willing that this rule shall be enlarged, and that its fate shall depend upon the production of a sufficient indemnity. (This offer was not acceded to.) The substantial question

(a) *Quære*, whether the vestry had power to bind the parish by an agreement to indemnify. Vide *Rex v. Guyer*, ante.

is, whether these moor lands are liable to the highway-rate; and there seems to be no ground whatever for an exemption of this district from the duty of contributing to the repairs of the highways of the parish. If the occupiers of these lands are liable to contribute, and the rate was properly made by persons having jurisdiction, then this Court will compel the magistrates to issue their warrant for the purpose of enforcing the payment of the rate. The objection that the statute duty was not called out and performed, is answered by the statement, upon affidavit, that even though the statute duty had been all performed, a rate would still have been necessary. An offer was made to Maclean to abandon the rate, if he would perform the statute duty; and he then refused to accept the offer on the ground of a total exemption. The objection that the sessions at which the order of assessment was made were not duly convened, comes with a bad grace from the magistrates, who must themselves have adopted the mode of giving notice described in the affidavits, as preferable to that which, it is contended, is the *proper* mode of giving notice. It is evident that all the magistrates must have had notice of these special sessions, and that is all that is really required. Another objection is, that the order for the allowance of the assessment does not appear to be made by the two magistrates in the capacity of justices of the peace. It appears however, on the face of it, to have been made at a *special sessions*; and the Court will infer from that fact that the two magistrates who signed it acted *as magistrates*. The cases of *Lowther v. Lord Radnor* and *Stanley v. Fielden* are not in point. In those cases the objection was that the magistrates had issued a warrant of distress, they themselves having at the time no jurisdiction. Here, the magistrates are called upon to act under an order of other magistrates, made a long time before, and the defects suggested are the want of jurisdiction in the *other* magistrates. The proceedings produced before these two magistrates would be a sufficient answer to an action of trespass brought against them for issuing their warrant. All the necessary facts were sworn to. The validity of the preliminary documents could not be questioned. *Fawcett v. Foulis*, 1 Mann. & Ryl. 102; 7 Barn. & Cress. 394. With regard to the general question as to the liability of the newly-inclosed lands to be rated, it is submitted that the appeal to the Court of Quarter Sessions could not be the proper mode of trying the question. Such a proceeding would have been nearly nugatory; for if, upon appeal, the sessions had declared the rate bad, another would have been made, and the party would have stood in precisely the same situation as before, because, upon a point of this sort, the decision of the sessions is not final.

Lord DENMAN, C. J. This is an application for a mandamus to magistrates to enforce a rate by a warrant of distress. If that rate is for any reason invalid, the parties interested have a remedy by appeal. That is the remedy pointed out by the act of parliament, and we must, in the first instance, suppose it to be an ample remedy. If the rate includes the newly-inclosed lands, (as is the case with this particular rate,) the owners of those lands may appeal. If, on the other hand, a rate should be made which did not embrace the newly-inclosed lands, then the rest of the parish, being interested in throwing a portion of the burden upon the owners of those lands, might in their turn appeal; so that the act of parliament has pointed out a full and satisfactory mode of correcting any mistake of this sort. Then the justices in special sessions having made this rate, the question is, whether we ought to order these magistrates to enforce it by a warrant of distress? It would strike me that on every such occasion the proper tribunal should be appealed to in the first instance by one side or the other; that is the proper mode of trying such a question. I think that there is very considerable reason for doubting whether this district is or is not liable to be rated. That doubt ought to be resolved by the sessions on appeal.

We do not know on which ground the alleged exemption of this district rests, and therefore we do not know that we should not expose the magistrates to an action in which they would be liable to damages, if we were to compel them to

issue a warrant of distress in this case. It is unfortunate, seeing that there is a bona fide disposition to try a question of public importance, as this certainly is, that those who have brought the question here have not taken care to put themselves clearly right with the magistrates. It appears to me that they ought in the first instance to have obtained the consent of the vestry to indemnify the magistrates; and they ought to take care that every part of the legal machinery is perfectly right, and capable of acting without exposing them to danger. I therefore am of opinion that the magistrates are quite justified in saying—"Whoever is right in point of law, there is the fact of exemption for forty years, and therefore we shall not do any act upon our own responsibility;" and they are justified also in refusing to act, from those doubts that arise with respect to the allowance of the rate and the non-performance of the statute duty.

Under all the circumstances, therefore, I think we should be doing a very violent act in calling on these magistrates to issue a warrant of distress, when personal consequences to themselves would in all probability ensue.

LITTLEDALE, J. I am entirely of the same opinion. It appears that for a considerable number of years past the moor lands of the parish have not contributed to the highway-rate. The inhabitants seem to have had some doubt among themselves, in consequence of which the moor lands were not included in the rate. For some reason, however, the persons in the other part of the parish thought those lands ought to contribute in aid of that highway-rate, as well as the other lands in the parish. With this difference of opinion, it is not extraordinary that the rest of the parish should require the magistrates to rate those lands, and that the proprietors of such lands should endeavour to resist that rate. The matter ought to have been put in a proper train of litigation as far as it could be done. If a rate had been made, either including or excluding these lands, the party who was dissatisfied might have appealed, and the sessions would have investigated the matter. It is not to be expected in such a dispute as this, that the magistrates will take upon themselves to decide it; but an appeal should be had to the sessions. That certainly would not have been final; but if the particular rate had been confirmed, the party interested in enforcing such rate, might afterwards have compelled the magistrates to issue their warrant of distress. If parties call upon magistrates to issue a warrant of distress to enforce the payment of a rate, the validity of which they acknowledge to be in dispute, they ought to take care to indemnify the magistrates against the consequences of an action. It ought, therefore, to be, not merely an offer of indemnity, or an expectation that the party would give it, but an actual bona fide indemnity; and if they had been assured that such an indemnity would be given, it is probable the magistrates might have issued their warrant. Instead of that, there is no actual offer of indemnity, but an intimation held out, on the part of Mr. Macey, that probably an indemnity would be given on the part of the parish. There are contradictory affidavits on that subject as to what the offer really was that was made by Mr. Macey; but this is clear—that no actual indemnity was offered. There seems to have been a reasonable doubt in the minds of these magistrates as to whether the rate was valid or not. I give no opinion as to whether the moor lands are to be rated or not; but if the magistrates have a *reasonable doubt*, until that question is settled I do not see how we are to compel them to issue this warrant of distress; for besides the general merits which are meant to be tried on this occasion, the magistrates, on being called upon to show cause against a rule for a mandamus, may, on investigating the matter further, offer any number of formal objections which they consider to be deserving of consideration. I do not mean to say that the objections in this case are well founded, but on the part of the magistrates a great many objections to the form of the proceedings on this rate are offered. These are endeavoured to be answered by Mr. Erle; but the mode in which they are presented to the Court on one side and on the other, shows they are subjects to be discussed. Mr. Erle may be right in saying that the objections would turn out

to be *unfounded*; but are the magistrates to be at the expense of litigating that? Though they are thought to be clear now, they may be the subject of much consideration; and in the end it is impossible to say whether they may turn out to be well founded or not. If *any* of these objections were good, the magistrates would be liable to an action, whatever might be the general merits of the case.

I think, under all the circumstances, that the rule ought to be discharged, with costs.

WILLIAMS, J. I am of the same opinion, and not a little so in consequence of the fact that this is not the only mode of raising the question. The statute of Geo. 8, seems to me to contemplate that questions of this sort should be decided by the Court of Quarter Sessions on appeal. The question might be raised in this manner with equal convenience, whether the rate included or excluded the debatable district.

The only doubt which I have had is as to the costs. Upon the whole matter, I think that as no indemnity was *offered* to the magistrates, they ought not to have been brought here, and that this rule, therefore, ought to be discharged with costs.

COLERIDGE, J. I am quite of the same opinion with the rest of the Court. This Court, I apprehend, will never sanction a magistrate in abstaining from doing any act in his office of magistrate on the ground of objections not sustainable, from a wish to evade a proper share of the responsibility attached to that office; but I apprehend that it is a settled rule of this Court, that where magistrates are acting with good faith, where they are threatened with an action, where there is no indemnity offered to them, and where there are reasonable grounds to suppose that such an action might be maintained with success, the Court will never compel magistrates to issue their warrant of distress, and subject themselves to that action.

Now in this case there is no ground for saying that there was any want of good faith on the part of the magistrates. Then, with respect to there being reasonable grounds for apprehending an action, it appears that they have been threatened, and also that no satisfactory offer of indemnity has been made to them. My opinion does not proceed on the supposed exemption of the moor lands. I do not think the Court are sufficiently in possession of all the circumstances to be able to decide that point. As far as I have formed any opinion about it at present, I should incline to think that the general liability clearly attaches upon those lands; but of course I express no opinion upon that at all. It appears to me that there are undoubtedly several objections *sustainable in point of argument*, and that it is a sufficient answer to this application. The Court is not called upon to pronounce any opinion upon them. One objection I would mention, because I would not be supposed to assent to the argument of Mr. Erle respecting it. I refer to the construction put by him upon the 45th section of 18 Geo. 8, c. 78. This is the case of a large district in a parish in which nothing whatever has been done in the way of calling out the statute-duty; and I cannot at present subscribe to the doctrine that the magistrates can in such case be warranted in directing an assessment.

I quite agree that the rule ought to be discharged; and I think that as the magistrates have been improperly brought here, and brought at a considerable expense, they ought to have their costs. Rule discharged with costs. (a)

(a) And see *Underhill v. Ellicombe*, Maclel. & Younge, 450; *Chauter v. Glubb*, 4 Mann. & Ry. 334, and 9 Barn. & Cressw. 479; 3 Neville & Manning, 70; *Carlton High Dale*, Ex parte, 4 Neville & Manning, 313.

REECE v. TAYLOR and Another.—p. 469.

To trespass for an assault and false imprisonment, the defendant pleaded that he was in lawful possession of a house, and that the plaintiff was unlawfully therein, and had been requested to depart, but had refused, whereupon the defendant gently laid his hands on him to remove him; that thereupon the plaintiff assaulted him in the presence of a policeman, wherefore he caused him to be taken to a police office. Replication, *de injuria*. The defendant proved all the matters of the plea, except the *assault* by the plaintiff:—Held, that the plaintiff was entitled to recover damages for the *imprisonment*.

TRESPASS for an assault and false imprisonment, and for carrying the plaintiff from a certain house and shop through the public streets to a police office. Pleas: first, not guilty; and secondly, by the defendant Taylor, that he was lawfully possessed of the house and shop, and that the plaintiff was unlawfully therein making a great disturbance against the will of Taylor; that Taylor requested him to depart, which he refused to do, whereupon Taylor gently laid hands upon him to remove him out of the house and shop; that thereupon the plaintiff, in the presence of a police officer, assaulted Taylor, upon which Taylor gave him into custody, and caused him to be carried from the house and shop along the public streets to the police office. Replication: *de injuria*. At the trial before Lord Denman, C. J., at the Westminster sittings after the last term, it appeared that Taylor was in the possession of the house, and that the plaintiff was unlawfully there, and was asked to depart; that upon his refusing to do so, Taylor called in a policeman, who, under the directions of Taylor, and upon a charge for an assault, conveyed the plaintiff to the police office; but it was not shown that any assault had been in fact made by the plaintiff on the defendant. The learned judge thought that the defendant Taylor was justified in removing the plaintiff from his house, but that he had failed to show a justification of the taking through the streets to the police office, and that therefore the plaintiff was entitled to recover damages in respect thereof. The jury found a verdict for 50*l.* damages. In the early part of this term,

Maule moved for a new trial. The learned chief justice was wrong in directing the jury that the plaintiff might recover in respect of the taking to the police office. That was matter of *excess*, and in order to enable the plaintiff to recover in respect of it, should have been replied by way of new assignment. Under *de injuria* the plaintiff could not recover for this excess. [WILLIAMS, J. Your general replication puts in issue all the facts of the plea. Now, in that plea, there is a statement of an assault by the plaintiff on the defendant, in the presence of a policeman, which statement is necessary to justify all the trespasses complained of in the declaration, except the mere removing out of the house. You failed in proving that. Was not this good ground for the plaintiff having damages? Lord DENMAN, C. J. I acted upon the ground which my brother mentions.] It is not denied that the plaintiff showed a right to recover damages—so far as the question depended upon the *evidence*—for the assault may not have been commensurate with the justification; but the argument now submitted to the Court is, that upon the *pleadings*, the plaintiff was debarred from recovering for this *excess*, for that it ought to be *replied*. [LITTLEDALE, J. The observations of the judges in *Cockcroft v. Smith*, 1 Salkeld, 641, amount to this, that under the plea of son assault demesne, the defendant must show an assault by the plaintiff *commensurate* with the act complained of by the plaintiff. According to what is there said, you cannot *sustain your plea* of son assault demesne, unless you show a *commensurate* assault.] That is so, but the defect cannot be taken advantage of unless the plea be properly replied to. [LITTLEDALE, J. I admit that the practice is with you.] In *The Six Carpenters' case*, 8 Co. Rep. 146,—[LITTLEDALE, J. That case does not at all turn upon the manner of pleading.] Excess is *affirmative* matter, and must be averred by replication. Upon these pleadings the plaintiff was entitled to judg-

ment for the whole matter or none. [WILLIAMS, J. The defendant having failed to prove all the facts in the plea, which were necessary to justify the trespass complained of, is not the plaintiff entitled to damages? Can you make it a ground of complaint, that the part of the trespass which was in fact justified, was withdrawn by the learned judge from the consideration of the jury? Lord DENMAN, C. J. There are clearly two distinct sets of facts complained of, and two distinct parts of the justification. The possession of the house was a justification of one only, and therefore in respect of the other, which was not justified, the plaintiff was entitled to damages.] It was all done at once, and constituted but one trespass—not justified to the full extent, it is admitted—but still it was but one act of trespass. [LITLEDALE, J. You are bound to prove the whole of the allegations in your plea, or so much of them as constitutes a defence to the action. This you have failed to do. WILLIAMS, J. *Spilsbury v. Micklethwaite*, 1 Taunt. 146, decides, that where two facts are pleaded, which are equally of themselves defences to the action, proof of one is sufficient. But here, the assault which you failed to prove, was a necessary part of the defence. You have not supported your plea. LITLEDALE, J. It was incumbent on you to prove the assault, in order to show that you were warranted in imprisoning the plaintiff. Until you have proved the allegations in the plea, you cannot raise the question of excess.]

PER CURIAM—

Rule refused.

PERRING v. KYMER.—p. 477.

Upon a statement of counsel that he had moved for a rule to set aside an award under a mistaken supposition that an affidavit deposing to certain facts had been sworn, the Court, on the day after granting a rule nisi, gave leave for the rule to be drawn up as upon reading such affidavit, on condition that it should be sworn on that same evening.

FOLLETT, S. G., applied to have a rule nisi to set aside an award, which he had obtained the day before, drawn up as upon reading an additional affidavit which had not yet been sworn, but which it was intended to obtain if the Court would grant the application. He had made the motion for the rule nisi in the idea that the affidavit (the substance of which had been stated to him) was sworn, and under this impression he had mentioned to the Court certain of the facts intended to be deposed.

Lord DENMAN, C. J. I certainly think that there is good reason to abide by the general rule, that the affidavits must all be prepared at the time of making the motion to the Court. However, if your affidavit is made and filed to-night it may perhaps do. (a)

The other judges concurring.

Leave granted.

GOSBELL v. ARCHER.—p. 485.

Upon a sale of land by auction, a written contract is signed by the purchaser, whose signature is attested by the auctioneer's clerk, thus,—“Witness, J. N.” The clerk also signs a receipt for the deposit and the moiety of duty, and afterwards pays over the deposit to the vendor, whose attorney subsequently writes to the attorney for the purchaser

(a) The rule would be drawn up as having been pronounced on the day on which the affidavit was sworn, not as having been pronounced on the day on which the motion was originally made, as otherwise the rule would appear to have been granted before the Court had any ground for so acting.

that they cannot make out a marketable title, and that they advise the purchaser to relinquish his purchase. Held, that the vendor was not bound by the contract. Upon the abandonment of an unwritten contract for the sale of land, on defect of title, the deposit money and money paid by the purchaser to the auctioneer for the purchaser's moiety of the auction duty, may be recovered. But expenses of investigating the title cannot be recovered without proof of a written contract binding on the vendor; nor interest upon the deposit.^(a) Whether a signature by J. N., who is authorized to sign a contract as agent for one of the parties to a sale of land, thus, "Witness J. N." will be sufficient to bind the principal where there is no other signature to which these words can be referred as attesting such signature, *quære*.

ASSUMPSIT on a sale by auction of an estate to the plaintiff, claiming the amount of the deposit paid, the moiety of auction duty paid, interest, and expenses of investigating the title;—with counts for money lent, money paid, money had and received, for interest, and on an account stated. Plea, the general issue. At the trial before Lord Denman, C. J., at Guildhall, in February, 1834, the following facts appeared.

The defendant being mortgagee and trustee for sale, directed the property in question to be put up for sale by Mr. Mills, at the Auction Mart in London. The property was accordingly put up for sale on the 29th of August, 1832, subject to certain printed particulars and conditions of sale, amongst which were the following.

"The highest bidder shall be the purchaser, and a moiety of the auction duty shall then be paid by him:" "Every purchaser shall immediately pay down a deposit of twenty per cent. into the hands of the auctioneer, and sign an agreement for payment of the remainder to the vendors, on or before the 29th day of September next, at which time the purchases are to be completed, and the respective purchasers are to have possession." "Within twenty-one days of the day of sale the vendors shall, at their own expense, prepare and deliver an abstract of their title to each purchaser, and deduce a good title to the lots sold."

The plaintiff was the highest bidder for lot 2, described as a freehold estate, comprising a dwelling-house, &c., for 400*l*. He paid the deposit of 20*l*. per cent. and a moiety of the auction duty, and receipts were given for the same.

"Auction Mart, 29th Aug. 1832.

"£80

"Received of Mr. Henry Gosbell, eighty pounds, in part payment of deposit and half duty on property purchased by him this day, as per agreement.^(b)

"For Mr. Mills, Joseph Newman."

"£5: 16*s*. 8*d*."

"Received of Mr. Henry Gosbell, five pounds sixteen shillings and eight pence, the deposit due on the purchase of lot 2 at Mr. Mills's sale on the 29th August, at the Auction Mart.

"For Mr. Mills, Joseph Newman."

Newman was Mills's managing clerk, and had authority from him to give such receipts.

The plaintiff also signed the following agreement on the back of the particulars and conditions of sale:

"Auction Mrt, 29th Aug. 1832.

"Lot 2. I have this day become the purchaser, of, &c., mentioned in the within particular, at 400*l*., and have paid into the hands of Mr. John Mills 80*l*. as deposit and in part payment of the purchase-money, and also 5*l*. 16*s*. 8*d*., being one moiety of the auction duty; and I do agree to pay the vendors the remaining sum of 320*l*. on the 29th day of September next, and in all respects

(a) This action was probably commenced before the 3 & 4 Will. 4, c. 42, came into operation, as otherwise it would have been competent to the jury, under sect. 28, to give interest on the deposit.

(b) There is nothing to connect this receipt with any particular agreement.

to fulfil on my part the within conditions. Witness my hand this 29th day of August, 1832.

"Witness Joseph Newman.

Henry Gosbell."

150*l.* was paid by Mills to Messrs. Browne, solicitors, as agents for the defendant, and as part of the deposit money paid upon the various lots sold.

3d July, 1838. Messrs. Browne, as the attorneys for the vendor, wrote to the attorney for the plaintiff, as follows:—

"Archer and others and Gosbell.

"We had better admit that we cannot make out our title to this property as freehold, so as to render it marketable, and if therefore your client will not take it as it appears on the abstract, the better way will be for him to relinquish his purchase, and we presume we must pay your charges, which we trust will not be much, and you can then return us our abstract.

"We wish for your client's immediate determination, as we mean finally to settle this long-standing affair."

No sufficient title has ever been made to the property. In addition to the deposit and the moiety of auction duty, the plaintiff claimed 6*l.* 19*s.* 8*d.* for interest thereon, and 30*l.* 11*s.* 2*d.* for expenses incurred by him in investigating the title, and in endeavouring to get the purchase completed.

The plaintiff obtained a verdict for 85*l.* 16*s.* 8*d.*, being 80*l.*, the amount of the deposit, and 5*l.* 16*s.* 8*d.*, the moiety of the auction duty, on the count for money had and received, and the defendant had a verdict upon the other counts. Leave was given to the plaintiff to move the Court to increase the damages by adding the amount of the expenses, viz. 30*l.* 11*s.* 2*d.*, and 6*l.* 19*s.* 8*d.* for interest. A rule nisi accordingly was afterwards granted, with leave to the parties to state a case for the opinion of the Court. The facts were accordingly stated in substance as above, in a special case, in which the question submitted was, whether the plaintiff was entitled to recover the 30*l.* 11*s.* 2*d.*, and 6*l.* 19*s.* 8*d.*

Pollock, A. G., for the plaintiff. It has never, since the decision of *Wilde v. Fort*, 4 Taunt. 334, been doubted that if a vendor fails to show a clear title, the vendee has a right to recover the deposit, interest, and expenses incurred in the investigation of the title. The only question, therefore, which can arise is, whether there is in this case a valid contract of sale under the statute of frauds, so as to constitute the relation of vendor and vendee. Undoubtedly the contract which was signed by the plaintiff was not signed by the defendant himself in person: and the question must therefore be, whether the signature by Joseph Newman is sufficient, either by reason of a previous authority or of a subsequent recognition, to satisfy the statute. The fact of his having signed in the character of *witness* is not of itself material. In *Sugden's Law of Vendors and Purchasers*, 7th ed. 90, 9th ed. 101 (citing *Welford v. Beazely*, 3 Atk. 508, and referring to 9 Ves. 251), it is said: "If the party know the contents of the agreement, a subscription *as witness* is sufficient." Newman, it cannot be doubted, was fully aware of the contents of the agreement which he had thus signed as a witness. In *Coles v. Trecothick*, 9 Ves. 234, 1 Smith, 233, the clerk to the seller's agent signed thus: "Witness E. P., for Mr. S., agent for the seller," (a) and this was held sufficient under the statute of frauds."

Then was Newman clothed with sufficient *authority* to sign for the defendant? Mills was undoubtedly agent to the seller, and might have signed for him; and Newman, as his clerk, must be taken to have been authorized to act for him in the matter. But supposing that there was no previous authority (and perhaps it must be admitted that Newman could not, at the time of signing, have bound the defendant): there was a subsequent recognition by the defendant, which

(a) Here the words plainly indicated that E. P. was not *attesting* an act done by another, no such act being mentioned, but was expressing his own assent to the contract, as subscriber for the vendor. Vide post, 595 (b).

had reference back to the time of signing, so as to make the contract good under the statute of frauds.

If A., entirely without authority, makes a contract in writing for the purchase of goods by B., and B. subsequently ratifies the contract by parol, such ratification renders A. an agent sufficiently authorized to make the contract under the statute of frauds; *Maclean v. Dunn*, 4 Bingh. 722, 1 Moore & Payne, 761; *Soames v. Spencer*, 1 Dowl. & Ryl. 32. It would therefore appear from these two cases that a ratification by parol is sufficient. Now here, Newman signs also receipts for the deposit, which money is paid over to Messrs. Browne, the agents of the vendor. The receipt of money goes far beyond any verbal ratification. In addition to this, the contract was ratified by the letter written by Messrs. Browne, wherein they admit that there had been a sale to the plaintiff, which they were unable to complete, and acknowledge a consequent liability to pay the charges of the plaintiff's attorney.

Thesiger, contra. It is admitted by the plaintiff that the signature of a clerk to the auctioneer is not binding, unless there be evidence of the vendor's assent. This was decided by *Coles v. Trecothick*, supra, 593, (and see *Blore v. Sutton*, 3 Merv. 237.) The defendant, on his part, admits that a subsequent assent is equivalent to a previous authority. The question therefore is simply whether there has been any subsequent ratification. It has been contended that the ratification was made first by the receipt of money; and, secondly, by the letters of Messrs. Browne. The receipt of money was not sufficient for this purpose. The signing of the receipt by the auctioneer's clerk was done in the character of agent of an agent, and the receipt of the money by the defendant, (supposing that to be the fact, which is not clear,) can in no way whatever be regarded as a recognition of authority in the clerk to sign a contract for the defendant.

If the receipt by an agent be sufficient, then in all those cases where the auctioneer receives a deposit the contract would be ratified. The receipt of money is not sufficient:—the ratification must be in writing. Then as to the supposed ratification by letter. It is impossible that this letter written by an agent can amount to a recognition by the principal. It is clear that under the statute of frauds you cannot pray in aid any parol evidence, except as to the authority of the agent. In these letters there is nothing to shew what the property was, and parol evidence must therefore be given as to the property which is the subject-matter of the contract. [Lord DENMAN, J. The argument is, that the letters set up the authority of the party who signed the contract.] It is attempted to make the letter of the agent set up by the authority of the clerk to the auctioneer, as agent of the vendor. In *Boydell v. Drummond*, 11 East, 142, it was held, that a signature by the defendant in a book, entitled "Shakespeare's subscribers;—Their signatures," which did not refer to a printed prospectus which contained the terms of the contract, but which was delivered at the time to the subscribers to the Boydell Shakespeare, could not be connected with the prospectus so as to take the case out of the statute of frauds. And the reason was, that such connection could only be established by parol evidence. In this case all that is said is, "We had better admit that we cannot make out our title to this property as freehold." The letter has no closer reference to the contract than the book of subscribers' names in *Boydell v. Drummond*.

Pollock, A. G., in reply. If this be not a written contract binding upon the parties, what right has the plaintiff to recover the deposit? If a letter be written containing the terms of the contract, and a letter is returned in answer assenting to the terms, the two may be connected by parol, and may be given in evidence as forming a contract. So here the letter and the agreement may be connected and given in evidence. In *Boydell v. Drummond* there was no reference to any prospectus. In the letter in this case both parties are named, and it is apparent from it that an abstract has been delivered, and that a pur-

chase had been made. The particulars of sale shew the subject-matter and terms of the contract, and the letter relinquishes that contract. These two documents shew a contract and a recognition of it.

Lord DENMAN, C. J. This is an action to recover back the deposit and moiety of auction duty paid at an auction, interest, and expenses of investigating a title, where the defendant had sold an estate to which he could not make out a good title. The plaintiff has a verdict for the deposit and moiety of auction duty. In order to see whether or not he is entitled to recover the interest and the expenses of investigating the title, an agreement is resorted to which is within the fourth section of the statute of frauds,—which says “that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith,(a) or some other person thereunto by him lawfully authorized.” It is quite clear that in the first instance there was no such agreement, or any memorandum or note thereof, signed by the party, or by any person by that party *previously* thereunto lawfully authorised; but it is contended that there is a subsequent act of a party lawfully authorized, equivalent to the act of the party himself, which recognizes that agreement and ratifies it, and thereby ratifies the agency of the party who signs it. *Maclean v. Dunn* shews that where a party ratifies the contract afterwards, he thereby ratifies the agency of the party making the contract. But then the question is, whether this case can be said to go to that extent?

Here, there is the signature of a person not as a party or agent, but as a *witness*. I confess I should wish to have some clear and decisive authority to shew that such a signature could bind the party in any other character than that of witness. Lord Eldon says, in *Coles v. Trecothick*, *supra*, 593, (what was not necessary for the decision of the case) that “where a principal or person to be bound signs, what he cannot be, as witness, he cannot be understood to sign otherwise than as principal.(b) I must own that this appears to me to be open to much doubt. A party who was merely required to attest the execution as a witness, might be drawn in to become what he never contemplated, a party to a contract of which he was ignorant. It appears to me this has never been decided in any case, and I should pause before I adopted that dictum. But, supposing, it were possible that a party could, by signing as a witness, be bound as a principal, the question, is whether there is that ratification which is necessary to shew that the signing party had authority to sign on behalf of this defendant. With regard to the letter referred to, it is possible that the party writing that letter may have been totally *ignorant* of the *particulars* of any contract, although he might know that there existed some contract which could not be carried into effect, and therefore he might justly presume that the charges which had been incurred must be paid by his client. Would it not be letting in all the mischief which the statute of frauds was designed to prevent, if this letter were to be considered as a ratification binding the party to all the particulars of such a contract? This letter is not a ratification of the agreement, but an abandonment of it, and was written merely from a

(a) Under these words it has been considered sufficient to show the signature of the party *against* whom the contract is sought to be enforced; so that where a contract between A. and B. is signed by A. only, it is competent to A. to repudiate the contract or to compel its execution by A. at his election. It seems, however, to be questionable whether the real meaning of the legislature may not have been to require the signature of every person who, before the statute, would have been a party “to be charged,” i. e. “liable to be charged” with the contract. And see *Ferrer v. Owen*, 1 Mann. & Ry. 222, 7 Barn. & Cressw. 427.

(b) Where a principal signs as “witness,” and there is no act of *any other person* to be attested, his signature would be altogether nugatory, if it were not intended to *testify his assent to the contract*. Vide *supra*, 593 (a).

prudential view of the whole matter without reference to the *terms* of the contract at all.

LITLEDALE, J. I am entirely of the same opinion. Although the plaintiff is entitled to recover the deposit, it does not follow that he can recover the expenses of investigating the title, and interest on the money due to him. The two claims stand on different grounds. The plaintiff is entitled to recover the deposit money, because that is money actually paid by the plaintiff to the defendants upon the faith that the contract should be performed, and the receipt of which his agent had acknowledged; and therefore when he disclaims, by his agent, the intention or ability to carry that contract into effect, he holds the money in his hands without consideration, and is bound to return it; and if he do not, it can be recovered as money had and received. But the question, whether the plaintiff is entitled to recover any thing for *investigating the title*, and the *interest* of the money due, is a very different one. For this purpose the plaintiff must show that the defendant entered into a valid *contract*, whereby he had stipulated to make a good title to the plaintiff. This is proposed to be done by putting various things together. The first matters brought forward are two receipts, signed by Newman, who was clerk to the auctioneer. The case states that the clerk had authority to give the receipts, that is, because this would be in the ordinary course of business. The auctioneer is the person who receives the deposit money, and his managing clerk would be the person through whose hands the money would go, and therefore he is strictly the person to give the receipt. Then the next thing produced is a contract for a purchase, signed by Gosbell, in which the amount of the purchase-money is mentioned, and the property is sufficiently ascertained by a reference to the particulars of sale, upon the back of which that contract is written. There is a complete execution, by the plaintiff, of a contract, which in itself is sufficient to satisfy the statute of frauds. Then it is contended that the signature of Newman is sufficient to bind the *defendant*; for that being the clerk of the auctioneer who is one of the agents for the principal, he must be considered, as having signed it on account of the principal. I do not find that any such rule is laid down by Lord Eldon in *Coles v. Trecothick*. He says, it is true, that where a principal, or party to be bound, signs what he cannot be a witness to, he cannot be understood to sign his name otherwise than as a principal; and therefore if a party who is to be bound signs it as a witness, he must be understood to sign it as a principal, for as a witness he ought not to sign it. Now the signature in that case was thus—"Witness E. Phillips, for Mr. Smith, agent for the seller." Therefore though the person signing in that case calls himself a witness, it is evident that he could not have signed as such, since he signed for another person and it was the same thing as if he had signed merely, "E. Phillips for Mr. Smith, agent for the seller." That is therefore a different case from this, in which Newman does not appear on the face of the instrument to sign in any other character than as a witness. This case does not appear to me to fall within the rule laid down in *Coles v. Trecothick*.

Then it is said that the letter of Messrs. Browne, abandoning this purchase, is to be treated as a ratification of what has been done previously. A ratification of what? I do not see what it is to ratify. There is nothing to ratify but Newman's receipt of the money. It cannot ratify Newman's having signed his name as a clerk to the agent; for, in my opinion, that signature by Newman is not a signing as an agent, but as a witness. And besides, the letter (supposing that it were considered as having reference to the property in question) is an *abandonment* of the contract, and could by no means operate as a *ratification* of a contract, which, without a ratification, was imperfect, and not in compliance with the statute of frauds. Newman's receipt of the money does not appear to me to amount to anything towards recognizing or admitting that the agreement was binding.

WILLIAMS, J. I am of the same opinion. I observed that Mr. Attorney-

General assumed that Newman, at the time of signing the instrument, was cognizant of the contents of that document. Neither by internal evidence, nor by any allusion apparent on the face of the document itself, is there anything whatever to show that there was any such knowledge; and to shew by parol that he had that knowledge, would be one of the mischiefs which the statute was intended to prevent.

With regard to the other point,—as to the receipt for the money by the auctioneer having been signed by that same witness,—that seems to me to come to nothing, because that was an act in the mere ordinary course of business, on a sale by auction at the mart. Therefore the question comes to this, whether or not the letter of Browne, the attorney, in which he admits the inability of the vendor to make out a marketable title, and proposes that the plaintiff should relinquish his purchase, implies that every preceding step up to that time had been so taken as to bring the case within the statute of frauds, and to make it a contract which might by law be enforced. It does seem to me that it would be making strained inferences indeed, if we were to say that by that letter it was intended to say that Newman, the clerk of the auctioneer, was the agent of the defendant in this case, authorized to sign this agreement, not as a witness, but as an agent on behalf of one of the parties; because I perfectly agree that except there be something to show that the term “witness” was there by mistake, and that really he was agent for a party to the contract, it is impossible to say that this could be a signature by him as a party, or agent of a party.

Verdict for the plaintiff upon the counts for money had and received; for the defendant upon the other counts.

FILMER *v.* LYNN.—p. 559.

A., the wife of B., orders goods of C. to be sent to the house of D., a relation of A.'s. C. on the following day sees B., and B. accepts a bill for the price, which he pays at maturity. At the time of paying the bill B. orders goods of C. to a small amount for himself. A. subsequently orders other goods of C. to be sent as before to the house of D. Held, that there was evidence to go to a jury of B.'s having so conducted himself as to lead C. to believe that A. had B.'s authority to order the last-mentioned goods.

ASSUMPSIT for goods sold and delivered. Plea: non assumpsit. This case was tried before the under-sheriff of Middlesex, in Michaelmas vacation, when the following facts appeared:—

The plaintiff is an upholsterer in Berners-street, and the defendant a gentleman holding a situation in Chelsea Hospital, and residing in Pimlico.

In October, 1883, the wife of the defendant, accompanied by her sister, called on the plaintiff, and after representing herself to be the wife of the defendant, stating that she wished to have some goods, which she specified, sent to her mother in King-street, Commercial-road, and that her husband would pay for them. The plaintiff on the following day saw the defendant on the subject, but what passed between them did not appear. The goods were sent to King-street as ordered, and the defendant accepted a bill for the amount. The bill becoming due in May, 1884, was paid by the defendant, who on that occasion ordered an article of the plaintiff for himself, the price of which was 1*l.* 4*s.* This article was furnished by the plaintiff, and the price was tendered by the defendant before the trial, and was subsequently paid into court.

In June, 1884, the defendant's wife, accompanied as before by her sister, again called at the shop of the plaintiff, and ordered some more goods to the amount of about 1*l.* in the defendant's name, to be sent to the house of her mother, then residing in Burdett-place. The goods were sent by the plaintiff, and it was to recover the value of them, and of the article furnished to the defendant, that this action was brought.

At the times when these transactions took place, the defendant and his wife were together in harmony, but in October, 1834, the defendant turned his wife out of his house for some alleged misconduct, and at the end of November served the plaintiff with a written notice, dated November 22d, in which he stated that his wife has left him, and that all persons selling or lending to her, or trusting her, would do so at their own peril, for that he would not be accountable to them.

The defendant denied his liability beyond the 1*l.* 4*s.* which he had paid into Court; and he contended that the above evidence was not proof of agency. The under-sheriff left it to the jury to say whether the defendant had so conducted himself as to lead the plaintiff to believe that his wife had his authority to order the goods in question; and he told them, that if the defendant had so conducted himself, he was in point of law liable, notwithstanding that he might not in point of fact have authorised her to do so. The jury, under this direction, found a verdict for the price of the goods, 12*l.* 7*s.*

Godson, in the early part of this term, obtained a rule nisi for a new trial, on the ground of misdirection; and on the last day of the term,

Gunning shewed cause. The direction of the under-sheriff was quite correct. It is not necessary in cases of this sort that direct evidence of authority in the particular transactions should be given. In *Todd v. Robinson*, Ryan & Moody, N. P. C. 217, it appeared that the defendant, a tradesman in Yorkshire, had in several instances employed one Womac, who resided in London, as his agent, to order goods to be sent to him by the plaintiffs (wholesale dealers in London) on credit. Six parcels so ordered were received and paid for by the defendant. Womac afterwards, in the defendant's name but without his authority, ordered other goods of the plaintiffs to be sent by the usual conveyances, and intercepted them for his own use. The action being brought to recover the price, the defendant denied his liability, but under the direction of Abbott, C. J., the plaintiff had a verdict. His lordship's language, in addressing the jury, was as follows:—"The liability of the defendant depends on the question whether the defendant has by his own acts or conduct constituted Womac his general agent to order goods. The authority actually given in each particular instance to Womac, can (may) only be known to the defendant himself (and Womac). The plaintiffs can only look to the *appearances* held out by him: and it is for you to say whether the defendant, by his own act and conduct, had induced the plaintiffs to believe that Womac was his agent for the purpose of ordering these goods. If you think he has so authorized the plaintiffs to treat Womac as his agent, then the defendant is answerable, notwithstanding he may in this particular instance have given Womac no such instructions." In *Gilman v. Robinson*, Ryan & Moody, N. P. C. 226, in which the same question arose upon a similar state of facts, to an action brought by another party against the same defendant, Best, C. J. ruled in the same way as Abbott, C. J. in the last-mentioned case.

The language used by the under-sheriff in this case was in effect the same as that of Abbott, C. J. in *Todd v. Robinson*. *Neal v. Erwing*, 1 Esp. N. P. C. 61. A wife may be presumed to be servant or agent to her husband, as well as any other person. It was not objected at the trial that there was no case to go to the jury, nor was there any motion for a nonsuit, and the amount of the verdict is such that the Court will not grant a new trial, on the ground that the verdict is against the evidence. [Lord DENMAN, C. J. We certainly should not interfere on that ground. The only question must be, whether there was any evidence to go to the jury.]

Godson, contra. From what is said in 1 Starkie on Evidence, second edition, p. 32, and the cases there referred to, it would appear that *authority* in one person to order goods for another on credit, is not to be inferred from the adoption of a *single* order, but from *general* employment,—from habit—and from the course of dealing. Here there is but a single instance in which the

defendant adopted the act of his wife, and this, it is submitted, was not evidence proper to be left to the jury at all. It is a strong circumstance also here, that the goods were ordered to be sent to the house of a third party, not of the defendant. The notice given by the defendant in November, 1834, not to trust his wife, was not evidence of a previous authority to order goods other than necessities; though it appeared to be considered such at the trial. The question was, whether there was evidence of agency *at the time of giving the order*. There was no evidence whatever of any conduct on the part of the defendant to lead the plaintiff to suppose that he might trust the wife on the occasion of the second order.

Lord DENMAN, C. J. The defendant's counsel should have insisted on his right to a nonsuit, and then the question would have come more properly before us, I think, however, that there was evidence of some circumstances bearing upon the question of agency, which was more fit for the jury than for the under-sheriff.

The other Judges concurred.

Rule discharged.(a)

(a) As to the evidence of assent which shall render the husband liable for the price of goods ordered by the wife, see *Montague v. Benedict*, (Benedick), 3 Barn. & Cressw. 631; *Montague v. Baron*, 5 Dowl. & Ryl. 532; *Montague v. Espinasse*, 1 Car. & Pay. 356, 502; *Seaton v. Benedict*, 5 Bing. 28, and 2 Moore & Pay. 66; *Hunt v. De Blaquiére*, 5 Bing. 550, and 3 Moore & Pay. 108; *Clifford v. Layton*, Mood. & Malk. 101, and 3 Car. & Pay. 15.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Easter Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.—1835.

Sir ROBERT CLAYTON, Bart. v. GREGSON.—p. 602.

In an action for breach of a covenant, in a lease of coal-mines, to get the whole of the veins of coal lying under certain closes, "not deeper than or below the *level* of the bottom of the mine" at a certain point, evidence is receivable to show that by the *miners* in the *neighbourhood*, the word "level" is used in a certain peculiar sense.

COVENANT upon an indenture of lease of certain coal-mines and lands and tenements, in the parishes of Blackford and Arlington, Lancashire. One of the covenants on the part of the defendant was, that he would, before the 30th December, 1832, get the whole and every part of the demised mines, beds, and veins of coal, lying in or under the messuages, tenements, closes, &c. therein-before mentioned to be situate in Blackrod, *not deeper than or below the level of the bottom of the said mine, bed, or vein of coal called the Arley Mine, under a certain part or point* (marked in the plan thereupon indorsed with the letter A.) of the close in Blackrod aforesaid, called the Nearer Oldfield. The covenant then goes on more particularly to describe the point stated to be marked "A." in the plan, and provides that for all such parts of the several demised mines as the defendant therein covenanted to get, the reserved rent (which was at the rate of so much *per acre* of coal) should be paid whether the coal were gotten or not. Breach: that the defendant did not, before 30th December, 1832, get the whole of the mines under the said closes, &c. in Blackrod, not deeper than or below the level of the bottom of the said mine, called the Arley Mine, under the said point marked A.; and that on 30th December, 1832, 100 acres of each of the several mines lying not deeper than or below as aforesaid, remained ungotten; and thereupon 62,000*l.*, being according to the rate *per acre*, became due to the plaintiff.

At the Lancashire spring assizes, in 1834, the cause was tried before Alderson, J., when a verdict for 1*s.* damages was taken by consent, upon breaches of other covenants; and upon the breach above-mentioned, the main question ultimately turned upon the meaning of the expression "not deeper than or below the *level* of the bottom of," &c. The plaintiff contended that the word "level" must, in the absence of any latent ambiguity, necessarily be taken to mean "*horizontal level*," and that therefore the defendant was bound by the covenant

to get all such parts of the mines as were not below the horizontal level of that point of the bottom of the Arley mine, which corresponded to the point of the surface of the earth marked "A." in the plan. The defendant's counsel contended, that in the understanding of *miners* the expression had a different meaning, and that this being a mining lease, the expression ought to be taken in its technical and not in its popular sense, and they proposed to call witnesses acquainted with the art of mining, as it was exercised in the neighbouring country, to show the peculiar meaning attached to the expression by miners; 3 Starkie on Evidence, 1028, et seq., (a) and Smith v. Wilson, 3 Barn. & Adol. 728, and other cases were cited. The learned judge, though not free from doubt upon the question as to the admissibility of this evidence, rejected it. It was then agreed between the parties, that according to the construction put upon the covenant by the *plaintiff*, he was entitled to 22,000*l.* damages, but that, according to the defendant's construction of it, the damages ought to be 5000*l.*, and no more. It was further agreed, that the question as to the admissibility of the evidence, should be submitted to this Court, upon a motion to reduce the damages, or for a new trial, and that in case this Court should be of opinion that the evidence ought to have been received, a legal arbitrator should be appointed to hear the evidence, and to determine whether the defendant's construction of the covenant was or was not correct, according to the understanding of miners; the verdict to be reduced to 5000*l.* or to stand for 22,000*l.* accordingly. This arrangement having been communicated to the judge, his lordship directed the jury to find a verdict for 22,000*l.*, which they accordingly did.

In Easter term, 1834, *F. Pollock*, obtained a rule nisi to reduce the damages to 5000*l.*, or for a new trial.

Coltman and *Cooling* now showed cause. Unless upon looking at the terms of the covenant, taken by itself or in connection with the rest of the deed, the Court can perceive an ambiguity, parol evidence ought not to be received. Where words of doubtful import are used, evidence may be received for the purpose of applying the instrument to its proper subject-matter; and in general, where terms are used in a peculiar sense by mercantile men, parol evidence may be received to interpret them; but this exception to the general rule is, even in the cases of mercantile contracts, limited to those cases in which, upon the face of the contract, something of a doubt is raised by the use of the words. Where in a mercantile contract, or in a contract made between persons of a particular class, words are used which are ordinary expressions, having in the English language a precise and well-known meaning, evidence cannot properly be received for the purpose of showing that amongst the merchants, or the particular class of persons, those words are used in a *distorted* sense. This limitation of the rule above alluded to, is in itself founded on good sense, and is to be deduced as a rule of law from the observations of the Courts and judges in *Baker v. Payne*, 1 Vesey, sen. 456, *Blunt v. Cumyns*, 2 Vesey, sen. 331, *Anderson v. Pitcher*, 2 Bos. & Pull. 164, *Cross v. Eglin*, 2 Barn. & Adol. 106, *Attorney-General v. Cast Plate Glass Company*, 1 Anst. 39. The rule, indeed, with this limitation, is in effect a branch of the rule, that where an ambiguity appears upon the contract, parol evidence may be received for the purpose of directing its application. There are certain cases, as that of *Smith v. Wilson*, 3 Barn. & Adol. 728, (in which evidence was received to show that by the custom of the country where a certain lease of a rabbit warren was made, a "*thousand rabbits*" meant 1,200 rabbits,) which have decided that where terms of *number* and *measure* are used in contracts, evidence may be received to show that by the custom of the particular country or trade, they are used in a peculiar sense. But terms of number and measure stand alone in this respect, the rule with regard to them having been relaxed, probably owing to certain *acts of*

(a) Of the 1st edition; in vol. ii. p. 547, et seq. of the 2d edition.

parliament having treated them as capable of bearing various senses, according to the subject-matter, the trade, or the locality.

Sir *F. Pollock*, (with whom were *Wightman* and *Addison*,) *contra*, was, in the early part of his argument, stopped by the Court.

LORD DENMAN, C. J. We are all of opinion that the evidence was receivable. "Level" does not appear to me to be in itself a word which has any particular meaning attached to it under *all* circumstances; and therefore in order to know what these parties meant, the evidence should have been received. With the *effect* of the evidence, when received, we have nothing to do. It is enough to say that the word *level*, being used by parties with reference to that which is in the nature of a *trade*, in which it may, consistently with its general meaning have a *peculiar* meaning, it was necessary to hear from witnesses what the meaning was. I am not sure that the doctrine has not been carried further than that. It is not necessary to go further, however, in a case of this sort, where the word is both to a certain degree ambiguous, and is clearly a technical term with reference to the subject-matter.

LITTLEDALE, J. I do not think this is a question so much about latent ambiguity as it is about the construction of a word in the English language. I do not think it can be said, that in ordinary language the word "level" invariably means "horizontal" or "horizontal line." It is like many other words in our language, which have various meanings, according to the subject-matter to which they are applied, or the parties by whom they are used. The same word may have twenty different meanings.

PATTESON, J. This is the case of a mining lease, and the word must be construed, *secundum subjectam materiam*,—as a mining word. We do not know what that meaning is:—Evidence ought therefore to be received. (And see *Hob.* 169; 1 *Roll. Abr.* 86; 1 *Danv. Abr.* 161.)

COLERIDGE, J. concurred.

A question having been put to the Court, as to the form of the rule,

LORD DENMAN, C. J. We have nothing to say, except that the inquiry should proceed. The evidence appearing to us to be receivable, for the purpose of showing in what sense the parties to this instrument used the term, it must be referred to the arbitrator, to decide upon the effect of the evidence.

PATTESON, J. The question is not to be confined to the ordinary meaning of the specific word "*level*" at all; it is here necessary to ascertain what the meaning of the term is *locally*.

BRAITHWAITE v. COLEMAN.—p. 654.

In an action on a bill of exchange, by indorsee against drawer, evidence was given of a conversation between the defendant and J. S., in which the defendant had said, in allusion to the action, that he had several defences—that the plaintiff had not sent *the letter* to him *in time*. This having been left to the jury, after objection, as evidence of due notice of dishonour, and the jury having found a verdict for the plaintiff,—it was held, by LITTLEDALE, J., PATTESON, J., and COLERIDGE, J., (LORD DENMAN, J., dissentiente,) that the jury were not warranted in presuming that the plaintiff had given *due* notice.

A defendant can set off those debts only which were due to him from the plaintiff at the time of action brought, as well as at the time of plea pleaded.

A plea of set-off on a bill of exchange, payable to the order of the defendant and accepted by the plaintiff, is not supported by evidence of a bill answering to the description in the plea, which at the time of action brought was in the hands of a third party, although before plea pleaded the bill had got back to the hands of the defendant.

ASSUMPSIT. The declaration contained a count on a bill of exchange drawn by the defendant and indorsed to the plaintiff—a count on a guarantee—and the common money counts. Pleas: first, non-assumpsit; and secondly, a set-off on a bill of exchange for 100*l.*, drawn by the defendant, payable to his own

order, and accepted by the plaintiff. At the trial before Lord Lyndhurst, C. B. at the Hertford Spring Assizes, 1834, the only proof of notice of dishonour of the bill mentioned in the declaration, was a conversation between the defendant and one Dagley, to whom the defendant had said that he had several grounds of defence, one of which was, that Braithwaite (the plaintiff) had not sent *the letter* to him *in time*—by which Dagley understood that a letter, containing notice of the dishonour of the bill, had been sent by the plaintiff too late. It was objected on the part of the defendant, that this was no evidence of notice, because, if it proved anything, it was that the notice had not been given in time. The learned chief baron was of opinion that it was evidence for the jury to consider whether notice had been given in due time. The defendant tendered in evidence, in support of his plea of set-off, a bill of exchange for 100*l.* This bill had been indorsed to, and at the time of the commencement of the action was in the hands of, a third party who had commenced an action upon it against the plaintiff; but at the time of the trial, and before plea pleaded, the bill had got back into the hands of the defendant. This bill the lord chief baron refused to receive in evidence, saying that the plea would not be proved, since the allegation in the plea was, that before and *at the time of the action brought*, the plaintiff was indebted to the defendant upon a bill of exchange; but his lordship gave the defendant leave to move to enter a nonsuit upon this point. The jury found a verdict for the plaintiff. In Easter term last, *Platt* applied for a rule nisi for a nonsuit or for a new trial, on the grounds that there was no proof of notice of dishonour, and that the evidence of the bill of exchange for 100*l.* was improperly rejected. With respect to the latter point he contended, that when the defendant again got possession of the bill of exchange, he was *remitted* to his former right of action. The court^(a) granted him a rule nisi for a new trial on the *first* point, and refused the rule nisi for a nonsuit on the *second* point. Against the rule nisi for a new trial,

Channel (with whom was *Thesiger*) now showed cause. The question was left to the jury to say whether they were satisfied that due notice had been given. The question therefore now is, whether there was *any* evidence to go to the jury. The defendant says he has several defences, the first of which is that the plaintiff did not send *the letter* to him *in time*. This shows that the plaintiff had sent *some* letter, and that the plaintiff had given *some* notice. The postmark on the letter would have shown whether it was sent *in time* or not; but the defendant does not produce the letter, which is in his possession. As against him therefore it is but reasonable to infer that the letter was sent in time.

Platt and *Wallinger*, in support of the rule. No evidence was given that the letter spoken of was sent *by the post*. All the evidence was an admission by the defendant that some letter was sent, which had not been sent in due time. The whole of an admission must be taken together; *Randle v. Blackburn*, 5 Taunt. 245. Supposing therefore that what the defendant said amounted to a statement that he had received notice, it at the same time expressly negatived the receipt of *due* notice. There was not therefore any evidence whence the jury could infer that due notice had been given. Suppose the defendant had said to the plaintiff—"You sent you notice on the 28th of November;" could it be inferred from this that the notice had been sent on the 26th? *Lawson v. Sherwood*, 1 Stark. N. P. C. 314, goes further than this case. That was an action by the indorsee against the indorser: A witness stated that two or three days after the dishonour of the bill, notice was given by letter to the defendant; notice in two days being in time, but notice on the third too late. Lord Ellenborough held that it could not be left as a question to the jury whether notice was given in time, although the defendant had had notice to produce the letter. [Lord

(a) Lord Denman, C. J., Littledale, J., and Parke, J.

DENMAN, C. J. In that case the question arose upon the statement of the *plaintiff's witnesses*; here, it arises from the assertion of the *defendant*].

LORD DENMAN, C. J. The statement of the defendant ought certainly to be taken altogether. But the jury were, in my opinion, warranted, if they disbelieved that part of his statement (a) which related to *the time* of sending the notice, in rejecting it as untrue.

LITLEDALE, J. I confess that it seems to me that the jury were *not* warranted in finding that the notice had been sent in due time.

PATTESON, J. I think this evidence is not proof of due notice. It does not appear that the defendant had the means of producing the letter. Suppose it was dated in time, and sent too late by a private hand: If the defendant in that case had produced the letter, dated at the proper time, he would have destroyed his own defence.

COLERIDGE, J. The whole statement must go to the jury. But then, are they justified in presuming from that statement that the notice was sent in due time? It seems to me that this evidence did *not* warrant the jury in finding that the notice was sent in due time Rule absolute for a new trial. (b)

In the matter of HENRY ROSS, Gent. one, &c. and JOSEPH HODGSON, Gent.—p. 763.

A person who has been regularly admitted as an attorney, but who is off the rolls by reason of his having neglected to take out his certificate for one whole year, is not an "*unqualified person*" within the meaning of sect. 11 of 22 Geo. 2, c. 46.

But he may be proceeded against by virtue of the general jurisdiction of the court over its officers, if he takes upon himself to act as an attorney. *Semble*.

Whether a person who has been struck off the roll *for misconduct*, would be an "*unqualified person*" within 22 Geo. 2, c. 46, s. 11, *quæra*.

W. TRIMINGHAM v. G. TRIMINGHAM.—p. 786.

Where all matters in difference are referred to an arbitrator, an award directing the execution of general releases closes all accounts between the parties up to the time of submission.

ALL matters in difference between these parties having been referred to two arbitrators, they awarded that 723*l.* 6*s.* was due from G. T. to W. T., and directed that general releases should be executed by both parties. A portion of the sum awarded being unpaid, and an additional sum having become due from G. T. to W. T., the present action was brought, and all matters in difference between them were referred to Simpson, one of the former arbitrators. Simpson entered into a claim which had existed at the time of the former submission, and awarded partly in respect of that claim. Upon affidavits stating the above facts, *Cresswell* obtained a rule to set aside the award, on the ground that the arbitrator had gone into matters decided upon by the former award, and which he could not lawfully re-open. Simpson who made an affidavit in answer, stated that he had not, upon the second reference, entered into any matter before decided upon or before discussed. The other arbitrator (under the first submission) also made an affidavit, confirming that of Simpson.

Campbell, A. G., in showing cause, referred to and relied on the affidavits in answer.

Cresswell, contra. The affidavits are artfully framed to evade the real ques-

(a) And see *Berman v. Woodbridge*, 2 Dougl. 788.

(b) A *stet processus* was subsequently entered by consent.

tion before the Court. [PATTESON, J. All that the deponents swear is, that the items were not *gone into* upon the former reference, not that they *might* not have been gone into.] The first award orders general releases. Every thing, therefore, which might have been gone into under that reference, must be taken to have been decided on: *Wharton v. King*, 1 Mood. & Rob. 96; *Birks v. Trippet*, 1 Saund. 28 c.

Lord DENMAN, C. J. (stopping *Cresswell*.) It is perfectly plain, that where general releases are awarded, it must be taken that the whole accounts(a) between the parties are settled. Rule absolute.

DOE on the demise of (Admiral) DOUGLAS and Wife v. ELIZABETH LOCK.—p. 807.

A., tenant for life, is empowered to make leases, provided "the ancient and accustomed reservations be thereby reserved," and provided "they be granted in the same manner and form, and with and under such and the like reservations, covenants, conditions, and agreements as are usually and customarily contained in leases of the same kind in the respective parishes and places in which the premises are situate."

Upon the question as to the validity of a lease granted by A., other leases of lands in the same parish are admissible in evidence for the purpose of showing whether the lease in question satisfies the second proviso.

Semble, that the true criterion of a reservation of the ancient and accustomed rent under the first proviso is,—the reservations contained in the lease made of the premises next preceding the creation of the power.

Dubitatur, whether a *quarterly* reservation of rent, which had been previously reserved *half-yearly*, will vitiate the lease.

It is no objection to such a lease, that in former leases a right of re-entry was reserved, in the event of there being no *overt* distress on the premises, and that in the lease under the power the word "*overt*" is omitted.

The omission to reserve a heriot, where a heriot has been accustomedly reserved, would vitiate the lease.

But a reservation of a heriot of "the best good of the person or persons who for the time being shall be tenant or tenants in possession of the demised premises," is sufficient, though the reservation in former leases was, "of the best good of A. B. (the cestui que vie and lessee) or, such person as shall be in possession of the premises as tenant, by virtue of the lease."

A clause, purporting to *reserve* and *except* to the lessor the power of hunting, &c., over demised premises, enures as a *grant* from the lessee to the lessor of a *right* or *privilege*, and not as a reservation or exception.

A clause in the lease, purporting to *reserve* underwoods and underground produce, enures, not as a reservation but as an exception.

Where former leases contained an exception of "all and all manner of timber trees, *and trees likely to prove timber*," a lease under such power, containing an exception of "all timber trees, *bodies* of pollard and other trees whatsoever," granted at the same rent, was held to be void,—on the ground that the *subject-matter* of the demise is increased by the alteration in the exception, and that no further rent is reserved in respect of such addition to the subject-matter of the demise.

EJECTMENT for messuages and lands at Porlock, in the county of Somerset, tried before Alderson, J., at the Bridgewater Assizes, 1831, when a verdict was taken for the plaintiff, subject to the following case:

21st February, 1765, William Blathwayt being seised in fee, devised the premises to Mary his wife for life, remainder to William his son, in fee.

(a) i. e. up to the time of the *submission*, not to the date of the *award*: vide *Samson v. Pitt*, Cro. Eliz. 432; *Webb v. Ingram*, Cro. Jac. 663; *Alabaster v. Clifford*, 1 Roll. Abr. 244, translated 3 Vin. Abr. 45, pl. 23; S. C. per nomen *Allaboyter v. Clifford*, Hutton, 29; *Robinett v. Cobb*, 3 Lev. 188; *Nicholas v. Chapman*, 3 Lev. 344, 361; *Simon v. Gavil*, 1 Salk. 74; S. C. per nomen *Squire v. Grevil*, 6 Mod. 34; S. C. per nomen *Squire v. Grevett*, 2 Lord Raym. 964; *Pickering v. Watson*, 2 W. Bla. 1117; *Perry v. Nicholson*, 1 Burr. 278; *Doe d. Williams v. Richardson*, 8 Taunt. 697.

May, 1787. The testator died seised, leaving his widow, Mary Blathwayt, him surviving.

December, 1827. Mary Blathwayt died, aged 107.

March, 1796. William Blathwayt, the son, devised his remainder to his wife Frances (one of the lessors of the plaintiff) for life; and Frances, after the death of William Blathwayt, the son, which happened in the year 1806, intermarried with Admiral Douglas, the other lessor of the plaintiff.

The defendant is the widow and executrix of John Lock, who was steward to Mary Blathwayt, and claims to hold the premises, or some part of them, under certain leases granted by Mary Blathwayt in execution, as the defendant contends, of a power of leasing contained in the will of William Blathwayt (the father,) which, as far as the present question is concerned, was in the following terms:

"I give and devise unto my wife Mary Blathwayt, all that my manor or reputed manor of Porlock, and the several capital messuages, mansion houses, and other messuages and tenements, farms, lands, arable, meadow, and pasture, and wood grounds and hereditaments, with their and every of their appurtenances, situate, &c. in the parish of Porlock, in the county of Somerset; and also all and singular, &c.—(the will then describes property in the city of London and the parishes of Clerkenwell and St. Luke's in the county of Middlesex,)—to hold to her and her assigns, from and immediately after my decease, for and during the term of her life, in lieu and in full recompense and bar of all dower, &c.; and from and after the decease of my said wife, I give and devise all and singular my said manor, messuages, &c. to my eldest son and heir apparent, to hold to him, his heirs and assigns for ever: Provided always, and my will is, that my said wife shall have full power and authority, from time to time, during her life, to grant leases of my said houses and premises in and near London, for any term or number of years not exceeding 21 years, to commence and take place in possession and not in reversion, and also to demise and grant leases of all and every the estates and lands lying within my manor of Porlock, for the term of fourscore and nineteen years, determinable on one, two, or three lives, in possession, reversion, or remainder, or such part or parts thereof as now is or are, or hath or have been anciently demised and granted for one, two, or three lives, in possession or reversion, so as there be no more than three lives in being at one time, and so as the ancient and accustomed yearly rent and reservations be thereby reserved; and also to demise and grant leases of all other my said farms, lands, and premises within the parish of Porlock, for any term or number of years not exceeding twenty-one years, whereon shall be reserved the utmost and most improved rent that can or may be had or gotten for the same, and without having, receiving, or taking any fine for doing thereof, and so as that the tenants or occupiers thereof be not dispunishable of waste; all and every such several leases of my said houses in or near London, of my estates at Porlock held for ninety-nine years determinable on lives, and of my said farm, lands, and estates, being from time to time made and granted, in the same manner and form, and with and under such and the like reservations, restrictions, covenants, conditions, and agreements, as are usually and customarily contained in leases of the same kind, in the several and respective parishes and places where the said premises are situated, and all and every the tenants and lessees from time to time executing counterparts of such leases."

By the first lease, under which the defendant claimed, dated 20th April, 1804, Mary Blathwayt demised to John Lock for 99 years, if three persons therein named should so long live,—one of whom is now alive.

By a second lease in reversion, dated 4th November, 1820, Mary Blathwayt demised unto the defendant, for the term of 99 years, immediately after the determination of the estate then subsisting therein, if three persons therein named should so long live,—one of whom is now alive.

The only old lease now existing of the premises in question, was one pro-

duced by the plaintiffs from the muniment room of the estate, bearing date 15th April, 1756.

By this lease certain reservations and exceptions were made which were not contained either in the lease of 1804 or in that of 1820. Thus, in the lease of 1756 the rent was reserved at two *half-yearly* payments, in those of 1804 and 1820, at four *quarterly* payments. Again, the lease of 1756 contained a power of re-entry in case the rent should be in arrear *twenty-one* days, and there should be no overt distress upon the premises; but the leases of 1804 and 1820 gave the right of re-entry if the rent should be in arrear *twenty* days, and there should be no distress,—omitting the word “overt.” By the lease of 1756 a heriot was reserved of the best good of W. Frost, (the lessee), *his executors, administrators or assigns, or of such person as should be in possession* of the premises, and entitled to the same by virtue of the lease. The lease of 1804 reserved a heriot of the best good of J. Lock (the lessee); and in the lease of 1820 it was of the best good of *the person or persons who for the time being, during the term, should be tenant or tenants in possession of the demised premises*. Again, the lease of 1756 contained an exception of all and all manner of timber trees, and trees likely to prove timber, then standing, or which during the term should stand, on the demised premises. The leases of 1804 and 1820 excepted all *timber trees, bodies of pollard and other trees whatsoever*, (“now or hereafter” in the lease of 1820,) standing or growing on the demised premises, with free liberty to the lessor, his heirs, &c., to cut and carry away the same. The lease of 1756 reserved right of egress and regress to take trees, quarries, mines, &c. The lease of 1804 did not reserve such right in respect of trees and quarries. The lease of 1756 reserved all mines and quarries of stone or slate. The lease of 1804 contained no reservation of quarries. The lease of 1820 was in this respect the same as that of 1756. The lease of 1756 contained a reservation of a *right to hunt, hawk, fish, or fowl*, upon the premises. The leases of 1804 and 1820 contained no such reservation, but reserved *all royalties*. The lease of 1756 reserved suit of mill to *the lord of the manor*. The other leases reserved it to the grantor, her heirs or assigns, or such person as should be *owner of the inheritance*. There were some other variations, which it is not necessary to mention.

For the plaintiff, it is contended, that the lease of 1804 was invalid, inasmuch as it contained no reservation of the *shrouds, limbs, or tops*, but only of the *bodies* of young trees, not having arrived at that age or maturity to be considered timber-trees; nor of the shrouds, limbs, or tops of pollard trees; nor any young trees of the timber kind, such as oak, ash, and elm, but only a reservation of timber trees and the *bodies* of pollard trees, and the *bodies* of other trees; and no reservation even of any timber trees, the bodies of pollard, or other trees themselves that should thereafter stand or grow upon the said demised premises; no reservation of any quarries of stone or slate, or of liberty to enter to take the same; no reservation of liberty to hunt, hawk, fish, or fowl upon the premises; no reservation of the rent *half-yearly*, but instead thereof *quarterly*; no reservation of the best good of the lessee, his executors, administrators, or assigns, or of such persons as should be in possession of the premises, and entitled to the same by virtue of the lease, for and in the name of a heriot; no reservation of a right of re-entry for the lessor, his heirs and assigns, in case the rent should be unpaid twenty-one days, and there should be no “overt” distress upon the premises whereby to levy the same, although the lease of 1756 did contain all these reservations.

And that the lease of 1820 was ineffectual and void, inasmuch as it contained no reservation of the shrouds, limbs, or tops, but only of the *bodies* of young trees not having arrived at that age or maturity to be considered timber trees; nor of the shrouds, limbs, or tops of pollard trees, nor of any young trees of the timber kind, such as oak, ash, and elm, but only a reservation of timber trees, and the bodies of pollard trees, and the bodies of other trees; no reservation of

liberty to hawk, hunt, fish, or fowl; nor of the rent half-yearly, but instead thereof quarterly; no reservation of the best good of the said Elizabeth Lock, her executors, administrators, or assigns, for or in the name of a *heriot*; no reservation of right of re-entry for the lessor, his heirs or assigns, in case the rent should be unpaid *twenty-one* days, and there should be no *overt* distress upon the premises whereby to levy the same, although the lease of 1756 did contain all these reservations.

The property of the lessors of the plaintiff in the parish of Porlock, consists of about 4000 acres. There are in the parish 500 acres the property of others, of which 100 or more belong to Lord King, and are commons; 100 acres of wood are Lord King's; some few acres are Sir Thomas Acland's; the rector has about 100 acres of wood, some common, and other lands; and there are a few other very small proprietors, of three or four acres each.

The defendant proposed to prove that the several leases were granted with such reservations, restrictions, covenants, conditions, and agreements as were usually and customarily contained in leases of the same kind, in the parish and place where the same were situated, and for this purpose tendered in evidence several leases granted by William Blathwayt of lands and tenements in Porlock. The learned judge was of opinion that the defendant was in this respect confined to former leases of the *same* property, but it is agreed that other leases of other lands within the same manor shall form part of this case, subject to the opinion of the Court on the admissibility of them in evidence; and the Court to be at liberty to draw any inference of fact which a jury might have done from the evidence hereinafter set out.

As to the reservations relative to trees, &c., contained in the leases of 1804 and 1820, the defendant contends that there is no *usual* reservation in this respect in leases of the same kind in the same parish, for that the reservation, where it does occur, is in these thirteen varieties. (The case here gives the thirteen varieties of reservations as to timber trees, which varieties are collected from fifty-three leases, and many of them differ more widely from the reservation in the lease of 1756, than do the reservations in the leases of 1804 and 1820.) And that in the three next mentioned, and in nine others, at least, in that parish, there is not any reservation of timber at all. (The case here gives the dates, names of tenants, and description of the property in the three leases.)

As to there being no reservation of any quarries of stone or slate, or of liberty to enter to take the same, the defendant says there are many leases of the same kind (by the testator and his father, the former owners,) of lands in the parish of Porlock, where mines, &c., are not excepted, namely,—(The case here specifies five leases.)

As to there being no reservation of the rent half-yearly, but instead thereof a quarterly reservation, the defendant says that there are many leases of the same kind in the parish of Porlock, made by the testator and his father, in which the rent is reserved quarterly. (The case here specifies seven leases, and refers to nine others as being to the same effect.)

As to there being no reservation of liberty to hunt, hawk, fish, or fowl, the defendant says, that in leases of the same kind in the parish of Porlock by the testator and his father, this liberty is not reserved in any other manner, and that in many leases it is altogether omitted. (The case here specifies five instances, and refers to forty-six others.)

In a lease, dated 1779, of a messuage with courtlage, garden, and orchard, containing one acre and a-half, with the appurtenances, (excepting all wood and right of common,)—mines, quarries, hunting, hawking, and shooting, and all other royalties whatsoever are reserved, and the same form of reservation occurs in four other similar leases.

As to the *heriot*, the defendant says that the reservation of a sum of money for a *heriot* is usual in leases of the same kind, and made by the testator or his father, of lands, &c., in the parish of Porlock, and that there are fifty such

leases,—as is also the reservation of the best beast or best good, with which there are forty-four leases, and of the best beast, or good, or money, with which there are thirteen leases; and that there are fourteen leases with the reservation of the best beast or best good of the party possessed of the premises, and entitled under the lease.

The defendant instances the following leases in which are reserved *money* heriots, the immediately preceding lease having reserved the best *beast* or the best *good*. (Five such instances are here given.)

As to the reservation of the right of re-entry, the defendant says there is no *usual* reservation in this respect in leases of the same kind in the parish of Porlock, and she produces the following instances of leases without such a reservation. (Two instances are here given in detail, and twelve others are referred to.)

The testator granted eighty-five leases, and there are one hundred and twenty-eight other leases granted by prior owners. And of the said eighty-five leases granted by the testator, forty-nine contain the said reservations of trees, &c.—forty-one contain the reservation of a right to hunt, shoot, sport, &c.—seventy-five contain a reservation of the rent half-yearly; and seventy-three contain the reservation of suit at the lessor's manor mill,—and eighty-one contain a reservation of a right to re-enter in case there should be no *overt* distress upon the premises.

And the plaintiff contended that two of these leases, dated February 17th and October 12th, 1779, were such leases as were *usually* granted by the testator in the manor of Porlock, and as evidence thereof produced from the lessors of the plaintiff's muniment-room two agreements found there with the two leases, each agreement bearing date the 13th October, 1778, and each made between and signed by the testator and Abraham Phelps, whereby the testator agreed to grant the said two leases to Phelps; each of which agreements contain the following clause:—

“The said Abraham Phelps agrees to execute a counterpart of such lease to Mr. Blathwayt, and to enter into such covenants as are *usual* and proper in leases of the like kind for the manor of Porlock.”

Copies of the several leases accompany the case.

If, under any of the circumstances hereinbefore stated, the Court shall be of opinion that the leases of 1804 and 1820 were invalid, then the verdict is to stand; otherwise, to be entered for the defendant.

The case was argued in Easter term, 1834.

Follett, for the plaintiff, in support of the objections stated in the special case, cited Co. Litt. 47 a; Doe d. Earl of Shrewsbury v. Wilson, 5 Barn. & Alders. 363, 381, 389; Smith v. Doe d. Earl of Jersey, (in error) 2 Brod. & Bingh. 473, 5 B. Moore, 332; Judgment of Lord Eldon in that case, 2 Brod. & Bingh. 606, 607; Smith v. Bole, Cro. Jac. 458; Doe d. Bartlett v. Rendle, 3 Maule & Selw. 99; Lord Mountjoy's case, 5 Co. Rep. 3 b, 5 b.; Tomlinson v. Day, 2 Brod. & Bingh. 680; Com. Dig. Copyhold (K), 20; Randall v. Scory, Cro. Car. 313; Sugden on Powers, page 630; Coxe v. Day, 13 East, 118; Doe v. Meyler, 2 Maule & Selw. 276.

Bere, contra, cited Doe d. Duke of Devonshire v. Cavendish, 3 Dougl. 48, 53, S. C. 4 T. R. 741, n.; Fancy v. Scott, 2 Mann. & Ryl. 335; Hay v. Coventry, 3 T. R. 83; Bradley v. Peixoto, 3 Ves. 323; Ware v. Cann, 10 Barnw. & Cressw. 433, 5 Mann. & Ryl. 341; Roe d. Brune v. Rawlings, 7 East, 237; Taylor d. Atkins v. Horde, 1 Burr. 121; Clun's case, 10 Co. Rep. 123; Dean and Chapter of Worcester case, 6 Co. Rep. 37, 38; Cruise's Digest, Franchise, 3 Cruise's Dig. tit. xxvii.; Wilkinson's Office of Coroner; Kable v. Hickringill, 11 Mod. 74; Dann v. Spurrier, 3 Bos. & Pul. 399, 403; Heyward's case, 2 Co. Rep. 35; Bac. Abr. Conditions (O) 1) 1 Bac. Abr. 652, 5th & 6th ed.; Williams on Executors, 1224.

Follett, in reply, cited *Pickering v. Noyes*, 7 Dowl. & Ryl. 49, 4 Barn. & Cressw. 639.

In the course of this term judgment was pronounced by Lord DENMAN, C. J. as follows:—

The question in this case is, whether the leases of 1804 and 1820 can be supported.

There is an existing life under each lease. Suppose, therefore, that the lease of 1804 should appear to be invalid, if that of 1820 should be valid and now in force, it would defeat the plaintiff's right of action.

The tenant for life was enabled to grant leases in possession or reversion; the lease of 1820 is made to commence "on the death of Benjamin Floyd or other sooner determination or avoidance of such estate or estates as are now granted therein and subsisting, and determinable on the death of the said Benjamin Floyd as aforesaid, for the remainder of a certain term of fourscore and nineteen years, by indentures of lease, &c." The case does not state whether Benjamin Floyd, or who else, is the existing life under the lease of 1804. If Benjamin Floyd be dead, the lease of 1820 took effect on his death: if he be still alive, then, (inasmuch as the lessors of the plaintiff repudiate the leases both of 1804 and 1820,) if that of 1804 be not a valid one, it is, at all events, at an end, as the estate thereby granted is determined by the death of Mary Blathwayt, the tenant for life; and therefore it is not, in strictness, necessary to inquire into the validity of the lease of 1804.^(a) We may also observe, that many of the cases cited arise upon *ecclesiastical* leases under the 1 Eliz. c. 19, s. 7, and 13 Eliz. c. 10, s. 3. The words of those statutes are in substance the same as those in the power created by the will of the testator, William Blathwayt, of 21st February, 1765, and the same reasoning will apply to both.

The power of leasing in this case embraces three different classes or descriptions of property.

First.—Premises in or near London,—for twenty-one years.

Secondly.—Premises in Porlock which have been anciently demised,—for ninety-nine years, determinable on two or three lives, either in possession or reversion.

Thirdly.—Other premises in Porlock,—for twenty-one years.

It is upon the second description that this case arises.

One provision as to these leases is,—“so as that the ancient and accustomed yearly rent and other reservations be thereby reserved.”

Some provisions applicable to the two other classes are stated, after which comes the following general clause applicable to all the three classes.

“All and every such several leases of my said estates at Porlock, held, or to be held for ninety-nine years, determinable on lives, and of my said farms, lands, and estates, being from time to time made and granted, in the same manner and form, and with and under such and the like reservations, restrictions, covenants, conditions, and agreements as are *usually and customarily* contained in leases of the same kind in the several and respective parishes and places where the said premises are situated.”

The second class of cases therefore contains two sets of provisions: 1st. That the *ancient and accustomed rent and reservations* be reserved. 2d. That they be granted in the same manner and form, and with and under such and the like reservations, covenants, conditions, and agreements, as are *usually and customarily* contained in leases of the same kind in Porlock. The first applying to what has been done as to the ancient rent and reservations on *the particular premises* leased, and the other as to what is the usual and accustomed course upon *other premises* in Porlock, without reference to any ancient usage. And unless both these sets of provisions be complied with, the lease cannot be supported.

One question for our consideration is, whether other leases of the same kind

(a) i. e. provided the lease of 1820 be valid.

in Porlock are admissible in evidence; and we have no doubt that they are so, for it is quite impossible to know what was the course and custom of covenants, agreements, &c. contained in leases of other premises in Porlock, unless the leases be resorted to; but then when that is done, the evidence thus obtained only applies to the *second* set of provisions, which we have before alluded to as contained in the latter part of the leasing power, and cannot affect the former part, which requires the ancient rent and reservations, because as to these it is clear, on the wording of the power, that the rent and reservations of the particular property are alone to be attended to. If the provision as to the ancient and accustomed rent and reservation shall be found to have been satisfied and complied with, it will then, and then only, be the subject of inquiry, whether the covenants, &c., contained in leases of other premises in Porlock, have also been adopted, so as upon the whole to make a complete and perfect lease, according to the two sets of provisos comprised in the power.

That being so, it becomes necessary to ascertain what are the ancient rent and reservations as to the particular tenement; and in considering that, the proper evidence is the last lease, as to which it was said by Lord Holt in *Orby v. Lord Mohun*, 2 Vern. 542, (reported also in 3 Chancery Rep. 56, and Prec. in Chancery, 257,) (which arose upon the construction of a power,) that shall be deemed the ancient rent which was the rent at the time the power was reserved, or when the last lease before was made, if the estate was not then under lease. In *Morrice v. Antrobus*, Hardres, 325, which arose upon a lease made by the Petty Canons of St. Paul's, for twenty-one years, where three other leases at less rents and with larger exceptions were referred to, Hale, C. B. said, that the *accustomed* rent mentioned in the statute ought to be understood of the rent reserved in the *last* lease, and not upon the first,—for that rent having been altered since, cannot be called the *accustomed* rent. But whether this position be right or not, the lease of 1756 is the only evidence there is of what had been the accustomed rent and reservations, and as this lease was granted nine years only before the date of the will, we may fairly conclude that it was the last lease before the will, and therefore must necessarily be attended to.

First, as to the rent: it is the same in amount in all the leases—of 1756, 1804, and 1820, and the general description of the premises is the same in all, subject only to the exceptions which will be hereafter noticed. But it is not merely the amount of the *ancient rent* reserved, but it must be reserved with all the *beneficial circumstances*; as was said by Lord Mansfield, in delivering the judgment of the Court in *Taylor d. Atkins v. Horde*, 1 Burr. 121. And the first point raised upon that is, that by the lease of 1756, the rent is payable *half-yearly*, whereas by those of 1804 and 1820, it is payable *quarterly*. On a quarterly reservation, if the tenant for life die in the *first* portion of the half-year, the remainder-man will receive both the first and second quarter's rent of the half-year, and will therefore be in the same situation as if the rent had been reserved half-yearly: but if the tenant for life die in the *second* portion of the half-year, the first quarter will be received by the tenant for life, and the second quarter only by the remainder-man, who will consequently be in a worse situation than if the rent had been reserved half-yearly. This however is only a "contingency," and may or may not happen; and it is to be seen whether that would avoid the lease. In Lord Mountjoy's case, 5 Co. Rep. 3 b, (ibid. 5 b, 4th point, (where tenant in tail, under a special act of parliament, in the time of Henry 8, was empowered to grant leases, rendering the true and ancient rent, the tenant in tail made a lease reserving the rent to be paid at *two feasts* of the year, where the old rent was payable at *four feasts*; and one of the points, which after many arguments and great deliberation and consideration were resolved, was, that "the reservation of the rent at two days, where the rent had been reserved payable at four days, makes the grant and render void, because it is ad nocumentum of the heirs in tail, which is restrained by the act; for it is

more beneficial for them to have it paid at four feasts than at two, and all beneficial qualities of the rent ought to be preserved and obeyed."

Now if this decision be correct, it seems difficult to say that a lease is void for reserving the rent at four days instead of two; the new lease need not be a fac-simile of the old one; all that is to be done is to see that the remainderman is not *prejudiced*, and there can be no doubt but a rent payable at four feasts is, upon the whole term created, more beneficial than if payable at two feasts, though there is a *possibility* that as to one quarter the remainderman may be prejudiced; but that is a *contingency*, and even if it does happen, there is the benefit of the quarterly instead of the half-yearly payments, during the rest of the term. But after all it may be said, that increasing the number of days of payment should be shown to be warranted by decided authority. The benefit to the successor is differently treated in *Baugh v. Haynes*, Cro. Jac. 76, on a lease made by a dean and chapter, where the former lease had reserved the rent at *four* feasts and a *heroit*, and the lease in question reserved the rent at *two* feasts without the *heroit*:—The Court held that the omitting the *heroit* did not avoid the lease, because only a *rent* was mentioned in the statute, and they said that a reservation at *two* feasts instead of *four* was no objection to the lease, for it was for the *benefit(a)* of the successor. So, in the *Dean and Chapter of Worcester's* case, 6 Co. Rep. 37, where the former lease made the rent payable at four feasts, and the lease in dispute at two, the Court held that it was sufficient if the accustomed rent be reserved yearly at *one* time, for the words of this act are—"whereupon the accustomed yearly rent or more shall be reserved," and therefore if the rent be yearly reserved, the statute is satisfied by reason of this word "*yearly*," and so there is a difference between this and *Lord Mountjoy's* case, for there wanted the word *yearly*, which explains the intention of the makers of the said act of 13th of *Elizabeth*. Co. Litt. 44 b, is in accordance with this latter doctrine. None of these cases however, show what effect has been given to the *increasing* of the number of rent days, 4 *Neville & Manning*, p. 820, note (b). In *Cook v. Younger*, Croke's Car. 16, the office of under-steward of the Courts of the manor of *Heysham*, and other manors of the Bishop of Gloucester, was anciently an office grantable for term of life with the fee of 3l. 6s. 8d. by the year, and it was granted by a former Bishop of Gloucester to the plaintiff for life, with the fee of 3l. 6s. 8d., payable annually at two feasts issuing out of the manors. The bishop died, and the plaintiff was ready to keep the Courts of the new bishop, but the defendant claiming under a grant from a new bishop, disturbed him from keeping them; and one of the objections to the grant to the plaintiff was, that the prescription was, that the office was grantable with a fee of 3l. 6s. 8d. *by the year*, whereas here the payment was appointed to be at *two* feasts:—But the exception was not allowed, and to confirm their opinion the case of the *Dean and Chapter of Worcester* was vouched, for the purpose of showing that the days of payment are not material where no less than the ancient rent is reserved yearly. It does not indeed appear by this report, how the *former* payments had been. As it is put upon the footing of prescription, it may be inferred that they were made yearly.

Of late two cases have occurred applicable to the present. In *Doe d. Earl of Shrewsbury v. Wilson*, 5 Bar. & Ald. 363, a power of leasing under a private act contained the following clause: "So as upon all and every such lease and leases there be reserved and made payable yearly, during the continuance thereof, the usual and accustomed *yearly* rents, boons, and services," &c., &c. A lease was made in 1785 under this power reserving the rent *half-yearly*. It appeared that in 1708 a lease, and in 1756 another lease, had been made of the same premises, in which the rent was reserved *half-yearly*; and amongst other

(a) A reservation at four feasts instead of two, whereby he would lose that benefit would therefore be to his *prejudice*.

objections urged against the lease of 1785, one was that the rent had been reserved *half-yearly*; whereas by the power it ought to have been reserved only *once a year*. The Court held the lease to be sufficient. But the principal ground on which they decided was, that the former leases, which were admitted in evidence, made the rent payable *half-yearly*, and the lease of 1785 mentioned the *usual and accustomed* yearly rent; and therefore that case does not assist the construction that is to be put upon the present leasing power, as to whether the reservation in the lease of 1756 as to the times of payment, is to be observed, any further than the general remark of Abbott, C. J.,—that the usual and accustomed yearly rent means the yearly rent of so many pounds, *by so many half-yearly or quarterly* payments in the year. It is to be observed, that he and Bayley, J., differ in their opinions as to a rent being made payable once a year, the former saying it is “not beneficial to the landlord,” and the latter that it is “more beneficial to the successor.” In *Doe d. Harris v. Moore*, 4 Tyrwh. 185, the leasing power in a marriage settlement of 1777, provided that there should be reserved, by half-yearly payments, the best and most improved yearly rents. In 1783 a lease was made, reserving the rent at the feasts of St. Philip and St. James (1st May), and St. Michael, (29th September). The Court held the lease void, for the reason, amongst others, that the half-yearly payments ought to have been on *usual* days of payment, and that it required a division of the rent as nearly as may be, into *two equal half-yearly* payments, which this did not, one interval being 151 and the other 214 days, though the usage of the country might make a different division. In *Doe d. Harris v. Moore*, Bayley, B. says, the tenant for life is not to throw on the remainder-man, without his sanction, the uncertainty of the chances which *may* turn out to his prejudice.

Amongst these conflicting authorities, it is very difficult to come to a conclusion on this part of the case. It is not, however necessary to do so, because there is another ground upon which we are enabled to give judgment.

Another objection is, that the lease of 1756 gives a power of re-entry if the rent be in arrear *twenty-one* days; whereas the leases of 1804 and 1820 give the right of entry after *twenty* days. The latter provision is *more* beneficial to the remainder-man.

Another objection is, that in the lease of 1756 the right of entry is, “if there be no *overt* distress on the premises,” which word “*overt*” is omitted in the two leases of 1804 and 1820. But we think that this is not a valid objection. The law recognizes a difference between a *pound overt* and a *pound covert*; but as to a *distress*, the law does not affix any particular meaning to the word *overt*. Is “*overt*” to be confined to what may be seen by walking over the lands and farm-yard, without going into any inclosed buildings? or does it extend to what may be seen by opening the outer doors of a house or other buildings? or what may be seen by opening inner doors, or by opening cupboards, chests, and boxes, which are not concealed and have no locks, or various other shades of being more or less overt? So many opinions may be formed about the extent of the meaning of the word, that we cannot attribute any legal effect to it.

As to the *heriots*. Under *ecclesiastical* leases, though *heriots* should have been reserved under former leases, it appears that the omission of *heriots* forms no ground of objection to a new lease, because it is only *rent* which is mentioned in the statute; but under the power now in question, inasmuch as *heriots* were reserved in 1756, the ancient reservations made in the new leases must be *heriotable*.

The *heriots* are different in all the three leases. Under that of 1756 it is the *best good* of William Frost or such person as shall be in possession of the premises. Under that of 1804 it is the *best good* of William Lock. Under that of 1820 it is the *best good* of the person or persons who, for the time being, shall be tenant or tenants in possession of the premises.

We by no means say that the lease of 1804 is objectionable; for as the pay-

ment of these heriots (should the heriot reserved be refused) can only be enforced by distress or action, as it is not a heriot by ancient tenure or custom, but only by deed, *Edwards and Another v. Mosely and Another*, Willes, 192, a distress may be made of the best beast of John Lock, if alive, or should he be dead or have parted with the premises, what *was* his best beast. But the lease of 1820 is in effect the same as that of 1756; and the only reason for not inserting the name in that of 1820, to correspond with the insertion of that of William Frost in that of 1756, seems to have been, that the lessee in that of 1820 was not one of the lives; whereas in that of 1756 William Frost, who was the lessee, was also one of the lives.

As to the reservation of suit to the mill, the difference is, that in the lease of 1756 the *lord of the manor* is mentioned, and in the other, the *owner of the inheritance*. That can make no difference.(a)

To the reservation of suit of court, no objection is made.

The rent, heriots, suit of mill, and suit of court, are the only things which, according to the legal sense and meaning of the word, are "reservations." That which relates to the privilege of hunting, hawking, fishing, and fowling, is not either a reservation or exception in point of law: Though words of reservation and exception are used, it is only a privilege or right *granted* to the lessor.

We think that what relates to the wood and the under-ground produce is not a reservation, but an *exception*. Lord Coke, Co. Litt. 47 b., says, "Note a diversity between an exception (which is ever of part of the thing granted and of a thing in esse), for which exceptis, salvo (post) præter, be apt words, and a reservation, which is always of a thing not in esse, but newly created or reserved out of the land or tenement devised." In Shepp. Touch. p. 80, it is said, "A reservation is a clause of a deed, whereby the feoffor, donor, lessor, grantor, &c., doth reserve some new thing to himself out of that which he granted before." And afterwards, "This doth differ from an exception, which is ever of part of the thing granted, and of a thing in esse at the time; but this is of a thing newly created or reserved out of a thing demised, that was not in esse before; so that this doth always reserve that which was not before, or abridge the tenure (i. e. "tenor") of that which was before." And afterwards, "It must be of some other thing issuing or coming out of the thing granted, and most part of the thing itself, nor of something issuing out of another thing." And afterwards, "If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing, this is a good reservation; but if the reservation be of the grass or of the venture of the land, or of a common or other profit to be taken out of the land, then these reservations are void." In Bro. Abr. Reservation, pl. 46, citing Doctor & Stud. lib. 2, it is said, that if a man leases land, reserving common out of it, or the herbage, grass, or profits of the land demised, this is a void reservation, for it is parcel of the thing granted; and it is not like the case where a man leases his manor and the like, *except* Whiteacre, for there the acre is not leased; but here the land is leased; therefore the reservation of the herbage, vesture, or the like, is void. It must be observed, however, that though in Co. Litt. 47 a, the distinction between a reservation and an exception is pointed out, yet in p. 143 a, speaking of the word *reservation*,(b) Lord Coke says, "Sometimes it hath the force of *saving* or *excepting*, so as sometimes it serveth to reserve a new thing, viz. a rent, and sometimes to except part of the thing in esse that is granted." But he does not go on to illustrate that position;(c) and as only two pages

(a) The only difference would be in *favour* of the new leases, as the right is preserved to the reversioner, being owner of the mill, though he may have parted with the *manor*.

(b) Or rather of the word "reserve," which is often coupled with the word "except," even in creating a mere exception.

(c) Lord Coke refers, however, to M. 35 H. 6, fol. 34, where the words are "Salvo servicio et redditu—debito et consueto," and where "salvo," though ordinarily a word of *exception*, was held to enure as a word of *reservation*; which is the *converse* of the above proposition.

before, in 142 a, he had said (to the same effect as he had done in the former reference in 47 a,) that a man upon his feoffment or conveyance cannot *reserve* to him parcel of the annual profits themselves,—as to *reserve* the vesture or herbage of the land, or the like, for that should be repugnant to the grant,—we cannot take this language of Lord Coke, in 143 a, as identifying an exception and a reservation. There are, however, some cases reported where, in the language of the Court, the word *reserve* is treated as meaning *exception*, as in Dyer, 19 a. That, however, is only general language, and it does not make them the same in point of law. In the very late case of *Fancy v. Scott*, 2 Mann. & Ryl. 335, the defendant pleaded that the plaintiff was tenant to the defendant of the close in which, &c. subject to a *reservation* to the defendant of all pits in the close, with liberty to carry away the produce of the pits. Bayley, J. said, it was not a *reservation*, but an *exception*, and held the plea bad; and the counsel for the defendant did not further press the argument. It may be said, however, that if the person who creates the power uses the word “reserving” in such a way as to make an exception a reservation, it must be so taken; but we think not necessarily. Powers are construed so very strictly in many respects, that they must be so throughout. But, besides, it is not necessarily to be taken that what relates to the wood and underground produce is a reservation. There are other legal reservations, besides rent, to satisfy the words “rent” and “reservations;” and when the testator, in the lease of 1756, mentions wood and under ground produce, he says, “*except* and always reserved out of this present demise and grant all,” &c. &c. and therefore if, in point of law, the matters are the subject of *exception*, they must be applied to the legal term used. And in the *Earl of Cardigan v. Armitage*, 3 D. & R. 414; 2 B. & C. 197, where Sir Thomas Denby enforced the *Earl of Sussex* of certain closes, *except* and always reserved out of the said feoffment to the said Sir Thomas all the coals in all or any of the said lands, together with free liberty to sink and dig pits, &c. &c.,—Bayley, J., in delivering the judgment of the Court, says that this constituted an *exception*; and he states the distinction between an exception and a reservation, and then goes on to point out the effect of an exception upon the statement in the pleadings.

Upon all these authorities, we are of opinion that what is said as to the wood and underground produce is not a *reservation*, but an *exception*, (vide 19 Vin. Abr. 116, 126; 3 Nels. Abr. 151; 3 Hughes's Abr. 1737;) and then it will be necessary to consider what effect this has upon the lease.

The mines, quarries, &c. need not be considered, because the lease of 1820 is, though not precisely in words, yet in substance, conformable to the lease of 1756, though, if the title of the defendant had stood upon the lease of 1804 alone, it might have been questionable.

In the lease of 1746 the exception is, of “all and all manner of timber trees, and trees likely to prove timber.” In the two other leases of 1804 and 1820, it is “all timber trees, bodies of pollard and other trees whatsoever.” By the lease therefore of 1756, the entire timber trees, and tress likely to prove timber, are excepted, whereas in the other leases the entire timber trees, but only the *bodies* of trees likely to prove timber, are excepted, leaving, therefore, the upper part of these trees from which lops, tops, and boughs might be taken, unexcepted; but then, in lieu of that, in the other two leases, the bodies of pollards and all other trees, including all such other trees as are not likely to prove timber, are excepted, and one would say, that in most cases the remainder-man would be a gainer by such substitution; but we cannot say so on any legal principle, and therefore that cannot be acted upon. Under the terms of the lease of 1756, the remainder-man would have a right to cut, take, and carry away the tops and boughs, and shrouds likely to become timber; but though he now loses that right, the *leasee* has no general right to do so; the right he has is, to have the benefit of those tops for fruit and shade, and to take them for certain descriptions of repairs.

A great variety of cases have occurred and several distinctions made, both formerly and in later times, where lands comprised in a power are demised along with other lands to which the power does not apply; or where the power is well executed as to part, and not as to the rest; or where part of the lands only are comprised in the power *as far as* demised under former leases; but this principle, at all events, seems to be established, that where lands are let at an ancient rent, and the new lease grants that which was not anciently let, in addition to what was granted before, and only reserves the same rent that was reserved before, the power is badly executed, and the lease is void for the whole. Even when an additional rent is reserved, where new land is added to the old, the lease is void for the whole, unless, perhaps, there be a distinct reservation for the new land, as appears by Co. Litt. 46, b., where it is said, "If twenty acres of land be accustomably letten, and a lease be made of these twenty, and of one more which was not accustomably letten, at the accustomable yearly rent and so much more as exceeds the value of the other acre, this lease is not warranted by the act; for the accustomed rent is not reserved, seeing part was not accustomably letten, and the rent issueth out of the whole." The same rule is laid down in Lord Mountjoy's case, 5 Co. Rep. 3, b, and also confirmed in the case of Doe d. Bartlett v. Hindle, 3 Maule & Selwyn, 99. But, as more distinctly applicable to the present case may be cited Smith v. Bole, Cro. Jac. 458. "A prebend was usually let with the exception of all crab trees, and such like trees, rendering 17*l.* a year; afterwards another lease was made, omitting the exception, at the ancient rent, and it was resolved that the lease was void, for there being more let than was anciently, viz. the trees and the profit of the trees, and the soil itself is excepted by this exception, so as every successor cannot have the benefit of the boughs and fruits yearly renewing; and the soil itself whereupon they grow is excepted, but by this new lease the trees and profits are let, and the soil itself, and so more being let than anciently it is not within the statute of 32 Henry 8, c. 28; and it is void by 13 Eliz. c. 10, for it is not the ancient rent where more is let than before." The same case is also reported in 3 Bulst. p. 290, per nomen Smith v. Bowles, but it is not there stated that the new lease was at the same rent. In the notes to Hargrave and Butler's Co. Litt. 44 b., n. 261, by Mr. Hargrave, it is said, "A prebendary makes lease for years, reserving the running of a colt, rendering rent: a new lease, rendering the same rent, without reserving the running of a colt—adjudged good; because, quoad this, it is neither a reservation nor exception. But if lease be made of a manor, *except the woods*, rendering rent, and after the expiration of it there is a new lease, rendering the same rent, without such exception, the second lease is bad. T. 18 Jac. B. R. case of Precentor of St. Paul's, Hale, MSS." There is, however, a case of How v. Whitfield, 1 Vent. 338, 339, which, if it were to be held as law, might seem to affect the generality of this proposition. A power was given to a lessee of five acres of land and his assigns, to let leases for twenty-one years, reserving the ancient rent. An assignee made a lease of the five acres, *inter alia*, reserving *proinde* the rent of 6*s.* a year, which was the ancient rent:—"As to reserving the rent *proinde*, the Court said, that it might be intended that the *inter alia* comprehended nothing but such things out of which a rent could be (i. e. agreeably to the power) reserved, and then the 6*s.* was reserved only for the five acres. However, the *proinde* might reasonably be referred only to the five acres, and not to the *inter alia*, and that a distinct reservation of the 6*s.* might be for the five acres." But in the report of the same case by Sir Thomas Jones, 1 Jon. 110, it is said the Court thought this to be a good exception, but that the defendant, (a) perceiving the opinion of the Court as to the great point, consented, upon payment of costs, that judgment should be given for the plaintiff. The case is also reported in 2 Shower, 57, where it appears to have been argued on another point, and Jones and Pemberton, justices, seemed to have entertained

(a) i. e. the defendant in replevin, who disputed the lease.

different opinions; and the case, as reported in *Ventris*, it should seem, cannot be relied upon.

A question, however, may arise as to this exception—whether the lops of the trees are *demised* at all, or whether there is not a mere *privilege* vested in the lessee by virtue of the demise to take the lops and shrouds of the trees likely to prove timber, for repairs and fuel? and then, if they be not *demised*, the ancient rent may be said to be reserved for the rest, which is really *demised*. But we are of opinion, that the lops of the trees likely to prove timber are *demised*. By a general demise of lands on which there are timber trees, without any exception, the timber trees are demised as well as the lands. It is true that the lessee has not the same extent of interest in the trees that he has in the lands; he has only a *particular* interest and a *special* property in them, and is entitled to the mast, and fruit, and shade of trees, and may also take them for repairs and fuel, (subject, as to fuel, to some observations;) and the lessor has the *general* ownership, right, and inheritance, and if they become disannexed from the inheritance, the lessor shall have them; and in the report of *Pomfret v. Rycroft*, 1 Ventr. 44, (and see 1 Saund. 321, S. C.) Twisden, J. says at the end of the report, which was to the use of a pump, that he conceived, that if the lessor cuts down trees growing upon the land demised, no covenant lies, yet the trees are demised with the rest. The same rule would hold as to the lops of trees. We do not think it material whether a *rent* could *issue out* of them; they form, along with the lands, one entire *subject of demise*; these lops and shrouds may perhaps be considered as amongst the *de minimis*, but that is not so; they may, in some cases, be of such value as may be worth attending to, and the want of power to cut them down is a prejudice to the inheritance, and the right to cut lops, tops, and shrouds, appears in several instances to have been the subject of inquiry. And it may be observed as to this, that if the whole of the trees likely to prove timber are excepted, the lessor and other future owners of the inheritance may cut both bodies, and lops and tops, when they please; but if only the bodies are reserved, they cannot cut the bodies down, for they cannot do so without also cutting down the tops, which they have no right to do, because the lessee would have an interest in them for repairs and fuel, and for the fruit, and shade for his cattle.

We are therefore of opinion, that inasmuch as the exception in the lease of 1756, as to the wood, is larger than the exception contained in the leases of 1804 and 1820, the premises cannot be taken to have been demised at the ancient rent, and that on this ground both the latter leases are void.

It becomes therefore unnecessary to consider what effect the other leases would have had. If the point had been necessary to be considered, it would have been impossible for the Court to have decided on the effect of such a mass of matter, and it must have gone to a jury. It may, however, be remarked that in the clause in the power which says that the leases are to be conformable to other leases in the parish, there is the word “reservations,” and it might be said to be necessary to inquire what the reservations were in other leases; but in our view of the case, the reservations cannot affect the decision, and if they could, the inquiry must have been limited to ancient reservations under leases of the same premises.

Judgment for the plaintiff.

BEARE v. PINKUS.—p. 846.

Where a plaintiff recovers a sum less than the amount for which he arrested and held the defendant to bail, and it appears that his only probable cause of action was not bailable, (being for unliquidated damages), the defendant is entitled to costs under 43 Geo. 3, c. 46, s. 3.

REX v. YOUNGHUSBAND.—p. 850.

Upon a motion for a criminal information against A. for challenging B., an affidavit, stating that in a correspondence between them A. had intimated an intention, after the settlement of accounts between himself and B., to require an apology for offensive expressions contained in a letter received by him from B., or "such satisfaction as is usual on such occasions between gentlemen;" and that afterwards C., a relation of A., came with a letter of B. in his hands,—settled the account by paying a balance due from A. to B.,—and, after saying that he had come in consequence of the letter in his hand, delivered a hostile message as from A.:—was held insufficient to connect A. with the challenge; and therefore the Court refused the rule. But the Court granted a rule nisi against C.

SIR W. Follett moved for a criminal information against Captain Younghusband, for challenging a person of the name of Jenkyns. It appeared upon the affidavit of Jenkyns that there were certain unsettled accounts between Jenkyns and Younghusband, which had been the subject of a correspondence between them. In one letter from Younghusband to Jenkyns, the former acknowledged the receipt of a letter from Jenkyns, and in allusion to part of that letter wrote to this effect:—"I do not intend further to allude to the offensive expressions contained in your letter, *until after the settlement of our accounts*; but I beg to say that I never intentionally insulted another, nor ever received an insult without requiring an apology, or that *satisfaction which is usual on such occasions between gentlemen.*" Jenkyns in reply stated, that his rule also was never intentionally to insult another, that he did not mean to insult him (Younghusband,) and hoped that he (Younghusband) would not insult him. Almost immediately afterwards, Captain Thomas Younghusband, a nephew of Captain Younghusband, called on Jenkyns,—settled the account between Captain Younghusband and Jenkyns by paying the balance due to Jenkyns,—and then, having in his hand a letter of Jenkyns's, which Jenkyns supposed to be the letter alluded to as containing the offensive expressions, said that he came on the part of Captain Younghusband in consequence of the receipt of that letter. He also, in answer to an inquiry whether he had seen the correspondence between Captain Younghusband and Jenkyns, said that he had. Jenkyns then said that he had quite made up his mind how to proceed if any hostile message were delivered. Captain Thomas Younghusband then wrote on a paper words purporting to be a hostile message from Captain Younghusband. There was nothing beyond the facts stated, to connect the message with Captain Younghusband.

LORD DENMAN, C. J. We think that the evidence falls short of what we ought to require before we grant a rule for criminal information.

Rule refused.

SIR W. Follett then applied for a rule against Captain Thomas Younghusband as the party who brought the message.

LORD DENMAN, C. J. We think that you may have that rule.

Rule nisi accordingly.

The KING v. Rev. JOHN NEALE, Clerk.—p. 868.

Where a vicar, after summons to the parish clerk to attend and answer a charge of intoxication, removes him upon insufficient evidence of the intoxication, the Court will issue a mandamus requiring a vicar to restore the clerk.

Quære, whether it would be sufficient ground to remove a clerk, that amongst his neighbours he was notorious as a drunkard, without proofs of particular acts of intoxication and indecorum?

If one act of intoxication be relied on, the intoxication and consequent incapacity of the

clerk to perform the duties of his office, when required to do so, should, at all events, be distinctly proved.

BIRD, Clerk, v. RELPH and Wife.—p. 878.

Under an inclosure act, lands are fenced in and allotted to the vicar and his successors, in lieu of tithes. The vicar dies, leaving the fences out of repair:—Held, that his executors were liable to be sued by the succeeding vicar, for dilapidations.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of King's Bench).

DAY v. ROBINSON.—p. 884.

Semble, that these words "You have robbed me of one shilling *tan-money*," are not actionable, as the Court cannot take notice that *tan-money* may be the subject of robbery.

The import of the term "*tan-money*" cannot be supplied by an *insuendo*, unsupported by a corresponding *inducement*.

No valid judgment can be given upon an assessment of entire damages upon several counts in slander, one of which counts discloses no cause of action.

And when a judgment had in fact been given for the plaintiff to recover damages so assessed, a *venire de novo*(a) was awarded.(b)

CASE for slander, by Robinson against Day. The first count of the declaration, after stating that Robinson had been employed by Day as his servant, and as such had conducted himself with honesty, fidelity, &c., and had gained the good opinion of his neighbours, preceeded as follows: And whereas also the plaintiff, before and at the time of, &c., had quitted and left the service of the defendant, and was recommended to, and was likely to be retained and employed by and in the service of E. Rawlins, as a servant, for certain wages to be therefore paid to him. Yet the defendant, well knowing the premises, but contriving, &c., to injure the plaintiff in his good name, &c., and to bring him into public scandal, &c., amongst all his neighbours, &c., and particularly with Rawlins, and to cause it to be suspected and believed, that while the plaintiff was in the service of the defendant, as aforesaid, the plaintiff had therein conducted himself dishonestly and unfaithfully, and had robbed the defendant, and was a dishonest and disreputable person, and therefore unfit to be employed as a servant, and to prevent Rawlins from retaining and employing the plaintiff in his service, as he otherwise might and would have done, and to vex, harass, &c. the plaintiff, heretofore, to wit, on &c., in a certain discourse which the defendant had with the plaintiff of and concerning the plaintiff, in the presence and hearing of divers, &c., falsely and maliciously spoke these false &c. words following; that is to say, "You" (meaning the plaintiff) "have robbed me" (meaning himself, the defendant,) "of a shilling." The second count stated the defamatory words as follows: "You" (meaning the plaintiff,) "have robbed me" (meaning himself, the defendant,) "of one shilling *tan-money*," (thereby meaning that the plaintiff had fraudulently and wrongfully taken and applied to his own use the sum of

(a) As to the necessity of awarding a *venire de novo*, vide post, 425 (a).

(b) In this case the *venire de novo* was awarded by a Court of Error; but the mode of correcting the defective finding would, strictly speaking, be the same, whether the defendant brought a writ of error or moved in arrest of judgment. In the latter case, however, the verdict might, in most cases, be set right by amending the *postea* according to the judge's notes, which from those notes it appeared that it could be inferred that the evidence would support an assessment of damages upon the good counts alone.

one shilling, being part of a certain sum of money, that is to say, the sum of 6s. 6d., which the plaintiff had received into his custody, as the servant of and for and on behalf of the defendant; and which money was so paid to the plaintiff for and on account of the defendant, as and for the produce of the sale of a certain quantity of a certain article called "tan," theretofore sold by the plaintiff for and on behalf and as the servant of him the defendant, and for which sum of 6s. 6d., the plaintiff, as such servant as aforesaid, was accountable to the defendant). The third count alleged, that the defendant, in a certain discourse had with Rayment Berrill, of and concerning the plaintiff, in the presence of the said Rayment Berrill and divers other persons, spoke the defamatory words following: "Robinson" (meaning the plaintiff) "has been robbing me" (meaning the defendant) "of tan-money;" (thereby meaning that the plaintiff had robbed the defendant of certain moneys of the defendant, which the plaintiff had received into his custody, as the servant of and for and on behalf of the defendant, &c.—substantially as in the corresponding part of the last innuendo in the second count,) "and has also robbed George Asplin's desk of money, two or three times," (thereby meaning that the plaintiff had, on two or three several occasions, feloniously stolen and taken away divers sums of money from and out of a certain desk used by one George Asplin, then being also a servant of the defendant,) "and I" (meaning himself, the defendant,) "have sent him" (meaning the plaintiff) "off;" (thereby meaning that the defendant had dismissed and discharged the plaintiff from the employ and service of the defendant, on account of the dishonest and unfaithful conduct of the plaintiff). The fourth count stated the defamatory words (which were alleged to have been spoken as in the last count,) as follows: "Robinson" (meaning the plaintiff) "has been robbing me" (meaning himself, the defendant,) "of tan money," (thereby meaning that the plaintiff had *cheated and defrauded* the defendant of certain moneys which the plaintiff had received into his custody as the servant of and for and on behalf of the defendant, &c.—substantially as before). The fifth count stated the defamatory words as follows: "Robinson" (meaning the plaintiff) "broke open and robbed George Asplin's desk, (thereby meaning that the plaintiff had feloniously stolen and taken away divers sums of money and other articles, from and out of a certain desk used by and in the possession of one George Asplin). The sixth count stated defamatory words to have been spoken by the defendant in conversation with one Lacy, as follows: "Ah! Mr. Robinson, indeed! He" (meaning the plaintiff) "has been robbing me," (meaning himself, the defendant,) "and I have sent him off," (thereby meaning that the plaintiff, while he was in the service of the defendant, had robbed, cheated, and defrauded the defendant, and that by reason of the dishonest and unfaithful conduct of the plaintiff, as such servant as aforesaid, the defendant had dismissed and discharged the plaintiff from the defendant's service and employ.) The seventh count was similar to the third, excepting in stating the words to have been spoken in a discourse with one Jones. The eighth count (also in a colloquium with Jones,) stated the words thus: "Robinson" (meaning the plaintiff) "has robbed me," (meaning the defendant; thereby meaning that the plaintiff had cheated and defrauded the defendant of certain moneys, which the plaintiff had received into his custody as the servant of, and for and on behalf of the defendant). The declaration stated as special damage, that Rawlins, who before and at the time of, &c., was about to retain and employ, and would otherwise have retained and employed the plaintiff as his servant for certain wages, wholly refused to retain or employ him.

Pleas; first, not guilty secondly, as to the words contained in the 1st, 2d, 4th, 6th, and 8th counts, and part of the words in the 3d and 7th counts, a justification.

Replication to the second plea, *de injuriâ*.

The jury found both issues for the plaintiff, damages, 150*l*.

Judgment was afterwards entered up^(a) in the Court of King's Bench for the plaintiff generally, 150*l.* damages, and 158*l.* costs.

Error having been brought, the case was argued in the last Trinity term, before TINDAL, C. J., Lord LYNDBURST, C. B., PARK, J., GASELEE, J., BOSANQUET, J., BOLLAND, B., ALDERSON, B., and GURNEY, B.

F. Kelly, for the plaintiff in error, was stopped by the Court, who called upon the counsel for the defendant in error to support the judgment.

Platt, for the defendant in error. It cannot be doubted that the first count is good. [TINDAL, C. J. It is clearly according to *Slowman v. Dutton*, 10 Bingh. 402, 4 Moor & Scott, 174, and *Tomlinson v. Brittlebank*, 1 Neville & Manning, 455, 4 Barnw. Adol. 860. But in some of the other counts, the innuendoes *change the sense* of the previous words, by the introduction of new and distinct facts, not alleged in the indictment. All the decided cases are against the introduction of new facts in the innuendo.^(b)] The innuendo may be rejected as surplusage. [TINDAL, C. J. That may be done where the words spoken import, in themselves, a criminal charge, and the innuendo introduces matter that is merely useless, and not in any way altering the nature of the charge which the words would import. But how are we to know that *tan money* can be the subject-matter of robbery? and even if we were to take notice of the meaning of *tan money*, the facts introduced in the innuendo shew that the defendant did not mean to impute robbery, but embezzlement.] The expression, "*one shilling tan money*," must mean something which may be the subject-matter of robbery. Suppose that the words had been, "You have robbed me of one shilling *pocket money*?" [ALDERSON, J. I do not know that these words would have been slanderous in themselves, but your innuendo introduces another meaning of the word "*rob*." PARK, J. And you show the words on the record not to charge a robbery.] If the innuendo is supported, it shews that the plaintiff had a good cause of action; but if, on the other hand, it is to be rejected, it cannot be looked to for the purpose of qualifying the meaning of the word "*robbed*." Rejecting it, there is a simple charge of robbery, which is actionable.

It is not, however, necessary to shew that the words in all the counts are actionable *in themselves*; for as special damage is laid, it is sufficient to shew that words actionable *with special damage* are stated. Whether the innuendoes be rejected or received, it is submitted that in every count there are clearly words which are actionable *with special damage*.

TINDAL, C. J. (after conferring with the other judges.) The special damage is stated as the result of the speaking of *all* the words in the several counts, not of the words stated in those counts only which are good. It is impossible, therefore, upon this *general* finding of the jury, that we can see that the damages have been given in respect of those counts only which are good, and of special damages resulting from the words stated in *those* counts. Part of the damage may be for the one count, and part for the other. In order, therefore, that the damages may be ascertained to be given for that part of the declaration which is free from the objection before adverted to, we think that a *venire de novo* must be awarded. Venire de nova awarded.^(a)

(a) Without any motion in arrest of judgment.

(b) Vide Com. Dig. tit. Action upon the Case for Defamation, (G. 8, G. 10); Bac. Ab. tit. Slander, s. 4; De Grey, C. J., in *Rex v. Horne*, 1 Cowp. 684; 1 Vin. Abr. 524, tit. Actions (for Words) (I b).

(c) As no writ of attain can now be brought, (6 G. 4, c. 50, s. 60), it would seem that the Court might have upheld the finding of the jury upon the issues, and have awarded a writ of inquiry to assess the damages only. Vide *Cheyney's case*, 10 Co. Rep. 118 b; *Herbert v. Waters*, Carthew, 362; *Kynaston v. Mayor of Shrewsbury*, 2 Str. 1052; 1 Wms. Saund. 195 b.

BURN and Another v. CARVALHO and Others, Assignees of FORTU-
NATO, a Bankrupt, (in Error).—p. 889.

The assignees of a bankrupt do not take under the assignment, property, the equitable title to which had been transferred before the bankruptcy.

But such equitable transfer must have been *complete* before the bankruptcy; it must have been a transfer of the whole or an ascertained part of specific property, and absolute, not contingent.

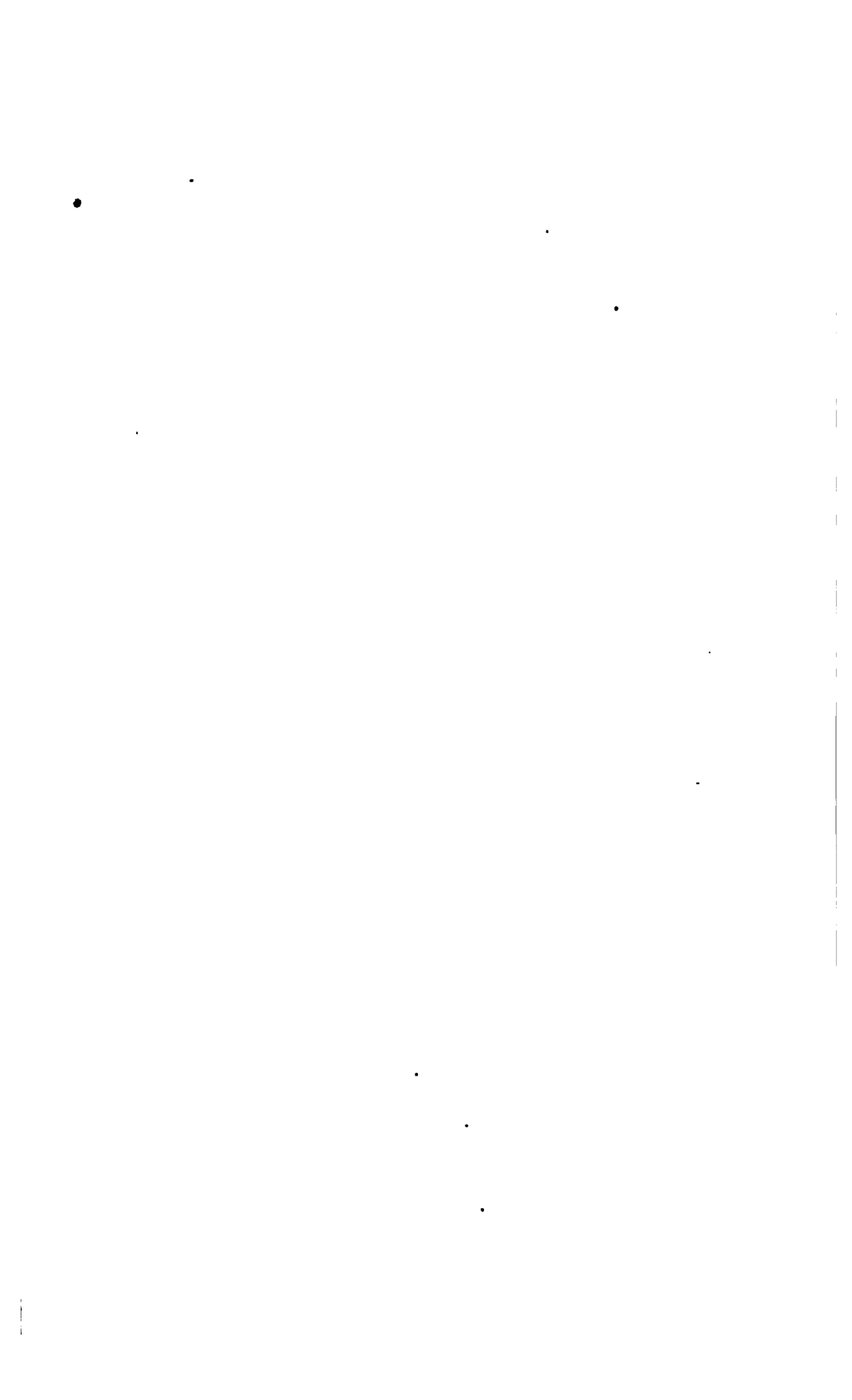
A. at Liverpool, having consigned goods to B., at Bahia, for sale on his (A.'s) account, draws bills on B. to be paid out of the produce of the consignment. A. negotiates the bills with C. in London. Upon B.'s refusal to pay the first of the bills, C. writes to A. as follows: "I request you to write to B. by the first vessel, with orders that, in case he does not pay your drafts, he shall immediately hand over such property as he may have of yours of an *equivalent value* to the bills not paid by him, to D. my agent at Bahia." A. answered, "Agreeably to your instructions, I will write to B. by brig W., directing him to hand over to D. property of mine in his hands to *cover the amount* of the bills that may eventually not be paid." A. accordingly wrote to B. this letter, which was not communicated to C., "I have engaged to C. that you shall pass into the hands of D., his agents, *all* the property which may exist in your hands for my account; you will arrange with D. the mode," &c. Before this letter reached Bahia A. became bankrupt; D. afterwards receiving goods from B. to an amount somewhat less than the bills unpaid, sold them, and remitted the produce to C.:—Held, that C. had not, at the time of the bankruptcy, such an equitable interest in the goods as would prevent A.'s assignees from recovering in trover.

Dubitatur, whether the last of the above letters was admissible in evidence; but held, that, whether admitted or not, the assignees might recover.

REPORTS OF CASES
ARGUED AND DETERMINED
IN
The Court of Common Pleas,
AND
EXCHEQUER CHAMBER,
DURING
Trinity, Michaelmas, Hilary & Easter Terms,
IN THE
FIFTH AND SIXTH YEARS OF THE REIGN OF WILLIAM IV.—1835-6.

BY JOHN SCOTT,
OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

VOL. II.



CASES
 ARGUED AND DETERMINED
 IN THE
 COURT OF COMMON PLEAS,
 IN
 Trinity Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.—1835.

COX v. PEACOCK, Executor, &c.—p. 125.

On a plea of *plene administravit præter*, the plaintiff is entitled to judgment of assets in futuro for debt and costs.

WILSON, for the plaintiff, upon a plea of *plene administravit præter*, prayed judgment of assets in futuro.—In *De Tastet v. Andrade*, 1 Chit. Rep. 629, n., the Court of King's Bench held, that, though an administrator in such a case is not personally liable to pay costs, yet that judgment might well be entered for them, to be recovered *de bonis testatoris quando acciderint*. Mr. Tidd, in the 9th edit. of the Practice, p. 980, cites a case of *Butt v. Deschamps*, where, after two arguments, and consulting with the judges of the Court of King's Bench, whose practice it had been to allow costs out of the future assets, and on looking into the precedents, this court held, that, when an executor or administrator pleads *plene administravit*, or judgments outstanding and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets in futuro, the defendant is not liable to costs. The precedents, however, will be found to contain an award of costs.(a)

TINDAL, C. J., observed that it would be convenient that the like rule should prevail in all the Courts, and therefore that the Court would speak to the other judges on the subject: and, on a subsequent day, he intimated that they were of opinion that the plaintiff was entitled to judgment of assets *quando acciderint* both for debt and costs.

Rule accordingly.

In the Matter of THOMAS LORD.—p. 131.

The Court will not entertain a motion touching the conduct of an attorney, unless it appears upon *affidavit* that he is an attorney of the Court, or that the transgression arises,

(a) See Tidd's Appendix to the 9th edit. of the Practice, pp. 187 to 190, where the precedents will be found generally to contain no award of costs on a judgment of assets in futuro, either on a plea of *plene administravit*, or of *plene administravit præter*.

in part at least, out of a cause before the Court: nor will the Court exercise its summary jurisdiction over an officer, unless in a case of palpable fraud.

GODSON, in Easter term, obtained a rule nisi to refer to the prothonotary certain accounts delivered to the applicant by his late attorneys, upon a suggestion of fraud.

W. H. Watson, contra, submitted that, as the affidavits upon which the rule had been obtained did not make it appear either that the parties against whom the application was made were attorneys of this Court, or that the accounts in question, or any part of them, arose out of any cause in this Court, (a) the Court could exercise no jurisdiction in the matter.

Godson, in support of his rule, contended, that, inasmuch as the names of all attorneys of the Court are entered on the roll, the Court would take judicial notice of the fact of a party whose name appeared upon that roll being an attorney of the Court. To show that part of the charges were for business done in this Court, he referred to one of the accounts which exhibited a charge for a summons before Gaselee, J., in an action of ejectment; but it did not expressly appear that the ejectment was pending here.

PER CURIAM. The Court will undoubtedly keep a strict watch over the conduct of its officers: but, unless a case of gross fraud be made out, and it is made to appear that some precise and beneficial object is attainable by a motion like the present, it will not be entertained. In this case we think we have no jurisdiction: the affidavits do not show that the parties against whom the application is directed, are attorneys of this Court; nor does it appear that the accounts relate to any cause before this Court.

Rule discharged, with costs.(b)

DOE d. THOMPSON v. ROE.—p. 181.

In the absence of any suggestion of collusion between the lessor of the plaintiff and the tenant, the Court will not set aside a regular judgment in ejectment, in order that the landlord may be let in to defend.

On behalf of a party who claimed to be the landlord of the premises for which this ejectment was brought (but not showing how or when he became landlord), after judgment (and execution) for the lessor of the plaintiff—

Atree, on a former day, obtained a rule calling upon the lessor of the plaintiff to show cause why the judgment should not be set aside, and he (the applicant) admitted to defend.—The affidavit upon which the motion was founded, stated that the landlord did not know or believe, nor had he any reason to believe, that a declaration in ejectment had been served on the tenants in possession; and that he was advised and believed that he had, as such landlord as aforesaid, a good title to the premises, and a good defence to the action, on the merits.

Bompas, Serjeant, showed cause. He produced an affidavit negating collusion between the lessor of the plaintiff and the tenants: and he relied on Doe d.

(a) In the matter of *Marris*, 2 Ad. & El. 582, the Court of King's Bench refused to call upon an attorney to repay money, or to account before the master, on the grounds merely that the attorney obtained such money from his client as if for the purposes of a suit, but that his bill was said not to account satisfactorily for the obtaining and application of such money, that the amount seemed immoderate, and that the client stated a case of fraud.

(b) The Court will not order an attorney to pay over a sum of money received by him in his character of an attorney, except upon the application of the *client* to whom the money is due. No rule will be granted at the instance of a third party. In re *Fenton*, 3 Ad. & Ell. 404.

Ledger v. Roe, 3 Taunt. 506, and *Goodtitle v. Badtitle*, 4 Taunt. 820, as authorities to show that the Courts will not, after the lessor of the plaintiff has obtained judgment and possession in an undefended ejectment, in the absence of collusion, let in a party to defend who claims to be landlord, or from whom his tenants had concealed the ejectment. "If" said the Court in *Goodtitle v. Badtitle*, "the lessor of the plaintiff had colluded with the landlord's tenant, we could have interfered. But here the case is the same as if the tenant had delivered over the possession wrongfully to another person. The landlord must bring an action of ejectment to recover it. How can we deal with the lessor of the plaintiff? He has not been to blame. If your tenant has done you wrong that is only a matter between him and you."

Atree, in support of his rule. In *Doe d. Shaw v. Roe*, 13 Price, 260, the Court of Exchequer set aside a regular interlocutory judgment (signed for want of appearance), and writ of possession executed, on an affidavit by the attorney for the landlord and tenant, that he received instructions for entering an appearance, but had neglected to do it, owing to matters personally affecting himself, which had prevented his attending to it. In *Doe d. Ledger v. Roe*, the landlord had by his own laches precluded himself from applying to the favour of the Court.

TINDAL, C. J. The tenant is bound to deliver the declaration and notice served upon him to the landlord under whom he holds, and whom he knows. In the present case, for any thing that appears, the party claiming to be let in to defend may be a devisee of the person under whom the tenants come in, or he may be the lord having the estate cast upon him by escheat. Collusion between the lessor of the plaintiff and the tenants being denied, I think we have no authority to interfere. The cases of *Doe d. Ledger v. Roe*, and *Goodtitle v. Badtitle*, are precisely in point. In *Doe d. Shaw v. Roe*, there was a mere slip on the part of the attorney, who had been duly instructed, but had neglected to enter an appearance to the action. The party here claiming to be landlord may bring another ejectment.

The rest of the Court concurring—

Rule discharged, without costs.

HAINES v. DISNEY.—p. 183.

Against a rule obtained by the sheriff under the interpleader act—Held, that the cause may be shown at chambers. *Sed quære*.

ARNOLD, on the part of the sheriff, obtained a rule under the interpleader act, 1 & 2 Will. 4, c. 58, s. 6; (a) the sum in dispute was but 12l. 3s. 8d.,

(a) Which—after reciting that "difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers"—enacts, that, when, any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of Court, as well the party issuing such process, as the party making such claim, and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff, or other officer, all or any of the powers and authorities thereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court."

and, this being the last day of term, he prayed that cause might be shown at chambers.

GASELEE, J., at first doubted whether a judge at chambers could entertain such a rule: but, after consulting with the rest of the Court, he said, that, although the application could not originally be made to a judge at chambers, they saw no reason why cause should not be shown there.

Rule accordingly.(a)

Ex parte QUICK and Others.—p. 184.

An abstract of a title to an estate sold by auction disclosed a conveyance in fee and a deed assigning terms to attend the inheritances dated in 1737 (showing some terms outstanding, which occasioned considerable expense), and a perfect title by possession for sixty years;—Held, that the costs thus occasioned were allowable on taxation:—Held also, that the costs of attested copies of the will of the vendor's father ought not to be allowed.

ON the taxation of a bill of costs of making title to certain property sold by auction, the prothonotary (for the purpose of taking the opinion of the Court) disallowed the costs occasioned by that part of the abstract which related to deeds and assignments of terms dated in 1737, it appearing that there was a perfect title by possession for sixty years; he also disallowed the costs of furnishing an attested copy of the will of the vendor's father.

Talford, Serjeant, having on a former day obtained a rule nisi to refer the bill back to the prothonotary to review his taxation in respect of the sums disallowed—

The prothonotary delivered the following statement:—

"The following is a short abstract of a title to an estate at A.

"1737—A conveyance in fee, and a deed assigning terms to attend the inheritance. These terms, being satisfied, were never afterwards questioned or dealt with. Subsequently, the property came into the possession of Lady Chichester, who by her will, dated in 1737, devised it, and through which will the vendor held the property. Lady Chichester had possessed the property several years, and her possession could be shown by leases granted by her as far back as 1761.

"In 1832, the owner, wishing to dispose of this property, instructed his solicitor to prepare abstracts for the purchasers. The abstracts so prepared commenced with the deeds of 1737, showing some outstanding terms; in consequence of which assignments were called for at considerable expense to the vendor.

"In the conditions of sale (prepared by the same solicitor) the following clause was inserted—"That the respective purchasers should be satisfied with an attested copy of the probate of the will of J. Quick, deceased (the father of the vendor), which, when required, should be furnished to them at the costs of the vendor; but, if the said respective purchasers should require an office copy of such will, such office copy should be furnished to them at his, her, or their respective expense."

(a) The attention of the Court was not called to the case of *Shaw v. Roberts*, 2 D. 25, where it was held that a rule under this clause of the act, granted in Court, cannot be discussed at chambers; nor to the different language of ss. 1, 2, and 3, relating to applications other than by sheriffs or officers, which give power to a judge at chambers, subject to a proviso in s. 4, "that every order to be made in pursuance of this act by a single judge *not sitting in open Court*, shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single judge." If the parties called upon (under s. 6,) decline to appear before a judge at chambers, it is difficult to perceive how any order could be made. The 6th section also places the costs in the discretion of the Court: could a judge at chambers exercise a discretion over the costs? particularly as it has only very lately been determined that judges at chambers can in any case give costs—*Doe d. Prescott v. Roe*, 2 M. & Scott, 119, 9 Bing. 104, 1 D. P. C. 274.

Merewether, Serjeant, showed cause. It was not necessary that the abstract should go further back than the will of Lady Chichester, under which, coupled with the leases granted by her in 1761, there would be a perfectly unquestionable title: neither was there any necessity for any attested copy of J. Quick's will. As to both, therefore, the prothonotary has exercised a discreet judgment.

Talfourd, Serjeant, in support of his rule. The vendor's solicitor having the deeds of 1737 in his possession, would hardly be justified in suppressing that part of the title. As to the second point, the only difference would be, that, if an attested copy of Quick's will had not been furnished, the whole of it must have been set out in the abstract.

TINDAL, C. J. Sixty years' possession would show a good title; and perhaps it might not be prudent to go further back. But I am not prepared to draw the line too tightly. The purchaser might bring an ejectment, and be turned round for want of the means of showing that the outstanding terms had been brought in. How can we say that the deeds of 1737 would not be called for? A single question very likely to be asked would have compelled the vendor to disclose those deeds. I therefore think the costs as to them should be allowed. With respect to the other point—the costs of the attested copies—I think they ought not to be allowed. The clause as to them in the conditions of sale is unusual.

The rest of the Court concurring, the rule was, with this modification, made
Absolute.(a)

ARDEN and Another v. GARRY. p. 186.

In the indorsement on a writ of summons, the residence of the attorney stated thus—"No. 1, Clifford's Inn Passage, Fleet Street, in the city of London," without mentioning the parish—is sufficient.

THE defendant was served with a writ of summons, indorsed—"This writ was issued in person by R. & C. Arden, who reside at No. 1, Clifford's Inn Passage, Fleet Street, in the city of London."

Humfrey, on a former day, upon an affidavit stating that Clifford's Inn Passage was in the parish of St. Dunstan in the west, obtained a rule calling upon the plaintiffs to show cause why the writ of summons should not be set aside for irregularity, on the ground that the indorsement was not in compliance with the 2 Will. 4, c. 39, s. 12, and the schedule No. 1, which provides that the indorsement on every writ issued by the authority of the act shall mention "the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be."

Talfourd, Serjeant, contra, referred to *Engleheart v. Eyre*, 2 D. 145, and *King v. Monkhouse*, 2 D. 221, where "Gray's Inn, London," and "Gray's Inn Square, London," were held sufficient descriptions of the residence of the party suing out the writ, to satisfy the statute.

Humfrey, in support of his rule. The cases cited are wholly inapplicable: Gray's Inn is extra-parochial, and though, strictly speaking, it is not within the city of London, it is within the ambit of that which is in common parlance styled London.

TINDAL, C. J. I think this indorsement is sufficient. The statute intended to provide for cities, towns, or parishes by themselves. To favour the construction contended for on the part of the defendant, we must read "and" for "or."

(a) In the course of the argument it was stated that the opinions of Mr. Preston and of two other eminent conveyancers had been taken upon the question. The former learned gentlemen was of opinion that the abstract properly embraced the deeds of 1737: the two latter, that the leases of 1761 and the will of Lady Chichester (1773) were sufficient.

VAUGHAN, J. I am not aware of any city that does not contain several parishes. The words of the statute are exactly complied with by giving the name of the city, or the town, or the parish.

The rest of the Court concurring—

Rule discharged, with costs.(a)

The SAME v. The SAME.—p. 188.

That a notice of trial before the sheriff is given for a day not fixed for trying issues, is no ground for moving to set it aside.

In causes to be tried before the sheriff, the issue must be delivered as in other cases.

WILDE, Serjeant, in Michaelmas term, obtained a rule calling upon the plaintiffs to show cause why the notice of trial given in this cause should not be set aside for irregularity, with costs. The irregularities complained of were—that no issue (properly so called) had been delivered—and that the notice was given for a day which the sheriff before whom the cause was to be tried had not fixed for trying issues.

Talfourd, Serjeant, showed cause. He submitted that the last objection was not one that the party could take on motion: the proper course being to treat the notice as a nullity. [To this the Court assented.] As to the first point, he contended that in causes directed to be tried by the sheriff, the issue need not be delivered in the same manner as is required in causes in the superior courts—referring to the 59th rule of Hilary term, 2 Will. 4, which provides, that “in all cases where the plaintiff in pleading concludes to the country, the plaintiff’s attorney may give notice of trial at the time of delivering his replication or other subsequent pleading; and, in case issue shall afterwards be joined, such notice shall be available; but, if issue be not joined on such replication or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid.”

Wilde, Serjeant, in support of his rule. There can be no reason why the defendant in a cause to be tried before a sheriff, should not have the same information, and conveyed to him in the same form, as in the case of a trial at Nisi Prius. Great confusion and uncertainty would inevitably result from the Court holding that the delivery of the issue may be dispensed with: the mode of proceeding in these inferior jurisdictions is in general already sufficiently loose.

TINDAL, C. J. The non-delivery of the issue is clearly an irregularity. The defendant is entitled to have the proceedings fairly copied before him. The schedules, Nos. 4, 5, 6, 7 and 8, to the general rules of Hilary term, 4 Will. 4, give the forms of the issue and proceedings where the cause is directed to be tried before the sheriff: and these were not intended to be a dead letter.

The rest of the Court concurring—

Rule absolute, with costs.(b)

INNES v. LEVI.—p. 189.

The only fee allowed by law to be taken by the officer from a party arrested, is 4d., the

(a) See *Yardley v. Jones*, 4 D. 45.

(b) See the 3 & 4 W. 4, c. 42, ss. 17, 18, by the latter of which it is provided that “the sheriff, or his deputy or judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are thereafter (by s. 23) given to judges at Nisi Prius.”

fee prescribed by the statute 23 Hen. 6, c. 9: if he take more, he is liable to be sued for the penalty imposed for extortion by the 32 Geo. 2, c. 28.

THIS was an action of debt against a sheriff's officer for extortion, under the statute 32 Geo. 2, c. 28, s. 1, which (amongst other things) provides, that "no sheriff, under-sheriff, bailiff, &c., shall demand, take, or receive, or cause to be demanded, taken, or received, directly or indirectly, any other or greater sum or sums of money than is or shall be by law allowed to be taken or demanded *for any arresting or taking*, or for detaining, or waiting till the person or persons so arrested or in custody shall have given an appearance or bail," &c. In the present case it appeared that the plaintiff was arrested within the distance of three miles from the sheriff's office; and that the fee demanded and received from him was a fee of 1*l*. One of the masters of the King's Bench, who had formerly been in extensive practice as an attorney, and who was called as a witness on the part of the plaintiff, proved that, when the arrest took place within three miles of the office, the officer was entitled to a caption fee of 10*s*. 6*d*., and to 1*l*. 1*s*. when the distance exceeded three miles: and, on his cross-examination he stated that he had very many times paid 1*l*. or 1*l*. 1*s*. to the officer on behalf of a defendant, and had the same allowed on taxation. On the part of the plaintiff it was contended that the only fee by law payable *by the party arrested* to the officer, was 4*d*., the fee provided by the statute 23 Hen. 6, c. 9. Bosanquet, J., before whom the cause was tried at the last sitting in London during the present term, told the jury that he thought the fee taken by the defendant on this occasion was larger than the law allowed. A verdict having been taken for the plaintiff for the amount of the penalty—

Bompas, Serjeant, on a former day, moved for a rule nisi to enter a nonsuit, on the ground that the fee taken was a legal fee; or for a new trial, on the ground that the verdict was against evidence.—The fee in question is totally distinct from the fee allowed as between party and party—the caption fee, which is payable in the first instance by the party who puts the sheriff in motion. This fee is given on the defendant's being admitted to bail (which was formerly a matter that rested entirely in the discretion of the sheriff,) and is clearly established by law. In *Martin v. Bell*, 6 M. & Sel. 220, it was held that the table of fees prescribed by the statute 32 Geo. 2, c. 28, does not apply to the sheriff's fee for an arrest, and that the evidence of what the law allows is what upon taxation by the master it is the practice to allow. And in *Martin v. Slade*, 2 New Rep. 59, it was held, that, in an action on the same statute, for penalties, against a sheriff's officer for taking a larger fee upon an arrest than is allowed by law, the plaintiff must prove the sum allowed by law, the statute 23 Hen. 6, c. 9, not being the rule: and that the Court will not set aside a nonsuit grounded on the want of such evidence, in order to enable the plaintiff to recover the excess under the money counts, since he might have obtained redress by a summary application. [PARK, J., referred to *Boldero v. Mosse*, 8 T. R. 417.]

It being suggested that the point had been brought under the consideration of the Court of Exchequer in the course of the present term, in a case of *Philpott v. Selby*, the Court said they would speak to one of the barons before they granted the rule.

Cur. adv. vult.

GASELEE, J., now delivered the opinion of the Court:—Upon inquiry concerning the case of *Philpott v. Selby*, we find that the Court of Exchequer have sent the cause down to a new trial, not from any doubt they entertained as to the statute 23 Hen. 6, c. 9, being unrepealed in this particular, but on the ground that the declaration contained no count precisely adapted to the state of facts proved. In the case of *Drew v. Parsons*, 2 B. & A. 562, 1 Chit. R. 295, where a sheriff claimed as of right, upon a warrant issued by him in execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law; it was held that the latter might maintain money

had and received for the excess paid above the legal fee, or might set off the same in an action by the sheriff against him. Abbott, C. J., there said: "It seems to me that the sheriff was only entitled to make the charge of 4d. for each of these warrants. If this case be not within the 23 Hen. 6, c. 9, the sheriff would not be entitled to any thing. The charge in this case may be reasonable, but it is contrary to law, and cannot therefore be allowed." And Holroyd, J., said: "The sheriff is not entitled to any fees except those given to him by some act of parliament: and the only act within which these warrants seem to be included is the 23 Hen. 6, c. 9. By that act, the bailiff is empowered to take only 4d. for each warrant. If so, unless some other act of parliament can be found to authorize a larger payment, the sheriff can make no further claim, for, no usage can prevail against the positive enactment of the legislature." In the subsequent case of *Foster v. Blakelock*, 5 B. & C. 328, 8 D. & R. 48, where it was held that the prohibition in the statute 23 Hen. 6, c. 9, against a sheriff's officer taking more than certain fees upon arrest, is confined to the fees to be taken from the party arrested, and does not extend to restrain the officer from suing for a reasonable compensation for work and labour at the hands of the party by whom he is employed, Abbott, C. J., says: "I agree in what has been said, that the sheriff can maintain no action for any fee beyond that which the statute allows him. But in this case I am of opinion that the bailiff could maintain an action against the party arrested to recover his fee of 4d., not more. The prohibition in the statute 23 Hen. 6, c. 9, against the sheriff taking more than 1s. 8d., and the bailiff 4d., is confined to the taking of fees from the party arrested, or those acting for him." On the authority of these cases, we are of opinion that the rule for entering a nonsuit should not be granted.

The rule was granted on the ground of the verdict being against evidence.

Rule accordingly. (a)

SYKES and Two Others v. HAIGH—p. 193.

Where an award directs a bond to be delivered to *the plaintiffs* on demand, a demand by one will not suffice, in the absence of a power of attorney from the others.

By an award the defendant was directed to deliver up to *the plaintiffs* on demand a certain bond. A demand was made by one of *the plaintiffs*, with the concurrence of the others. The defendant refusing to deliver it—

Tomlinson, for the plaintiffs, moved for an attachment.

PER CURIAM. The award directing the bond to be delivered to the plaintiffs on demand, the demand ought to be so made that the defendant may know it to be the joint demand of all the plaintiffs. There should have been a power of attorney.

Tomlinson took nothing.

FOWNES v. STOKES.—p. 205.

The defendant was arrested on the 12th May, carried to goal on the 15th, and a declaration delivered on the 28th:—Held, that an application on the 4th June, to discharge him out of custody, on the ground that he had been carried out of the county and there detained two days before he was taken to the county goal, was too late.

Quære whether this would be any ground for discharging the defendant, even had the application been made in time.

ADDISON, on the 4th inst., obtained a rule nisi for the discharge of the defendant out of the custody of the sheriff of Staffordshire, on the following grounds—1. That the defendant was arrested at the plaintiff's suit at Enville in the county of Stafford, and carried by the officer against his consent to Dudley in Worcestershire, a distance of nine miles, detained there from the 12th to the 15th May, carried thence by the same officer to Wolverhampton, and there delivered into the custody of a constable who conveyed him to Stafford Gaol—2, that the bailiff to whom the warrant was directed was not assisting in the arrest(a)—3, that the amount of the debt was not indorsed on the copy of the process served on the defendant, pursuant to Rule II. of Hilary Term, 2 Will. 4, the indorsement being "the plaintiff claims 200*l.* with interest from 10th November, 1833, at the rate of 4*l.* per cent. per annum, to the time of payment,"(b)—4, that the affidavit of debt was defective, the action being on a bill of exchange, and the affidavit omitting to mention the amount of the bill, but merely stating a certain sum to be due for principal and interest.(c)

Talfourd, Serjeant, now showed cause. It appeared from the affidavits that the arrest took place on the 12th May; that the defendant was carried to gaol on the 15th; that a declaration was delivered on the 28th; and that, although his attorney was aware of the supposed irregularity on the 14th May, the rule nisi for the defendant's discharge was not moved for until the 4th June—a lapse of twenty-one days. This, it was contended, was such an unreasonable delay as to deprive the defendant of all right to complain of an irregularity. *Firley v. Rallett*, 2 D. 708, was cited. There the arrest was on the 22nd May, and an application on the 4th June for the defendant's discharge, on the ground of a defect in the affidavit to hold to bail, was held too late.

Addison, in support of his rule. If this were a mere irregularity, the application would probably be too late. The party having been arrested in Staffordshire and carried into Worcestershire, the detention and imprisonment in the latter county were altogether illegal; it was a voluntary escape, after which the officer could not again take the defendant—*Bro. Abr. Escape*, pl. 11; *Boyton's case*, 3 Rep. 43; *Boothman v. Surrey*, 2 T. R. 5; *Chace v. Joyce*, 4 M. & Sel. 412; *Hammond v. Taylor*, 2 B. & Ald. 408. [TINDAL, C. J. That may be very good ground for an action against the sheriff for false imprisonment: but is it a ground for discharging the defendant out of custody on a summary application?] *Barratt v. Price*, 2 M. & Scott, 634, 9 Bing. 566, 1 D. 725, is an authority to show that, the original caption being wrongful, the subsequent detention is equally illegal.

TINDAL, C. J. I think we ought not to interfere in this case. The only tangible ground for the motion is, that the defendant was arrested in one county and carried into and detained in custody for two days in another. This, it is said, is a voluntary escape. If so, the sheriff may be liable to an action: but I think it is not a ground for discharging the defendant out of custody on motion; particularly as there has been so unreasonable a delay in coming to the Court. In *Barratt v. Price*, the arrest was effected fraudulently and illegally; the com-

(a) See *Black v. Archer*, Cowp. 65, *Adams v. Osbaldeston*, 3 B. & Ad. 489. This objection was answered by the affidavits contra.

(b) See *Ryley v. Boissomas*, 1 D. 383, *Curwin v. Moseley*, 1 D. 432, *Tomkins v. Chelcote*, 2 D. 187, *Coppelo v. Brown*, 3 D. 166, *Sealy v. Hearne*, 3 D. 196.

(c) The affidavit stated that the defendant was indebted to the plaintiff in the sum of 211*l.* and upwards, upon and by virtue of a promissory note dated the 10th May, 1824, drawn by the defendant, payable to the plaintiff on demand, with lawful interest for the same; that the defendant had duly paid interest after the rate of 4*l.* per cent. per annum upon the said principal sum of 200*l.* up to and inclusive of the 10th November, 1833; and that the whole of the said principal sum of 200*l.*, with interest thereon after the rate aforesaid, from the said 10th November, 1833, had been demanded, and remained due and unpaid.—As to the sufficiency of this affidavit, see *Cameron v. Smith*, 2 B. & Ald. 307, *Brook v. Coleman*, 2 D. 7, *Westmacott v. Cook*, 2 D. 519.

plaint was not, as here, of an irregularity in the mode of conducting the defendant to gaol.

The rest of the court concurring—

Rule discharged, without costs.

THOMPSON v. THOMPSON.—p. 266.

The instalments of an annuity for the payment of which a surety expressly covenants in case of the default of the grantor, are not proveable under a fiat against the surety, where such instalments do not become due until after the bankruptcy of the surety.

THIS was an action brought against the defendant as surety for one G. Smallwood, a bricklayer, to recover 280*l.*, for two years' and a half arrears of an annuity of 112*l.* due the 30th of April, 1834, under an indenture of the 31st of October, 1831, made between G. Smallwood and the plaintiff, and 30*l.* for expenses occasioned by the principal's default of payment; and also to recover from the defendant, as such surety, the loss the plaintiff had sustained by Smallwood not completing the carcasses of certain houses, pursuant to the defendant's covenant in the said grant of annuity, on or before the 24th of June, 1832. The defendant pleaded—first, as to so much of the declaration as related to the non-payment of the 280*l.*, that, on the 8th of December, 1831, he became a bankrupt, and that the cause of action accrued to the plaintiff before he became bankrupt—a similar plea as to the 30*l.* expenses—and, as to the alleged non-completion of the houses, that they were completed. On these pleas issues were joined; and the jury found by a special verdict, that, before the commencement of the suit, to wit, on the 8th December, 1831, the defendant became a bankrupt, and that thereupon a certain commission of bankrupt, bearing date at Westminster the 8th December, 1831, was, after the making of the indenture in the declaration mentioned, duly awarded and issued against the defendant; that, by virtue of the said commission, the defendant was duly found and adjudged to be a bankrupt, and that the defendant afterwards and before the commencement of the suit, to wit, on the 3rd April, 1833, duly obtained his certificate; that 140*l.*, part of the said sum of 280*l.* of the said annuity, yearly rent-charge, or annual sum, became and was due and owing and in arrear to the plaintiff before the said 3rd of April, 1833, and the sum of 140*l.*, residue of the said sum of 280*l.* of the said annuity, yearly rent-charge, or annual sum, became and was due and owing and in arrear to the plaintiff since the said 3rd of April, 1833: and if upon the whole matter aforesaid it should seem to the court that the said certificate was not a bar to the action, then the jurors said that the causes of action in respect of the first breach in the declaration assigned did not, nor did any of them, or any part thereof, accrue to the plaintiff before the defendant became a bankrupt within the true intent and meaning of the statute then in force concerning bankrupts; and in that case they assessed the damages of the plaintiff by reason thereof, over and above the costs and charges by him about his suit in that behalf expended, to 280*l.*: that the cause of action in respect of the breach of covenant in the said declaration lastly assigned also accrued to the plaintiff before the said 3rd April, 1833: and if upon the whole matter aforesaid it should seem to the court that the said certificate was not such bar as last aforesaid, then the jurors said that the said cause of action in respect of the said breach of covenant in the declaration lastly assigned, did not, nor did any part thereof, accrue to the plaintiff before the defendant became a bankrupt as aforesaid; and in that case they assessed the damages of the plaintiff by reason thereof, over and above his costs and charges by him about his suit in that behalf expended, to 1220*l.*, and for those costs and charges, to 40*l.*

Adams, Serjeant, for the plaintiff.—The breaches of covenant assigned in

this declaration are none of them debts or demands capable of proof under the fiat against the defendant, and consequently the certificate is no bar to the action. The 54th section (a) of the 6 Geo. 4, c. 16, relates to proof by the annuity creditor where the grantor becomes bankrupt; and the 55th (b) relates to the rights of the surety on the bankruptcy of the principal annuity debtor: neither of these clauses therefore can apply to the present case, for, it is the surety who has become bankrupt, and not Smallwood, the grantor of the annuity. The demand arising out of the first breach of covenant, if proveable at all, can only be so under the 56th section, which enacts, "that, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends: provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed." To bring it within that enactment there must be a *debt*. An undertaking to pay a sum on the default of a third person is not a debt. If Smallwood had been bankrupt, the annuity must have been valued: but the contingency of Smallwood's default is not susceptible of valuation. In *St. Martin (Overseers) v. Warren*, 1 B. & A. 491, 2 Stark. 188, it was held that a defendant's liability as surety in a bastardy bond is not discharged by his bankruptcy and certificate. And in *Taylor v. Young*, 3 B. & A. 521, (*Young v. Taylor*, 8 Taunt. 314, 2 Moore, 236,) where one of two assignees of a lease gave a bond to the lessee, by whom the assignment was made, conditioned for the payment of the rent to the lessor, and the performance of the other covenants in the lease, and for indemnifying the lessee against the non-performance of the covenants, both the assignees of the lease having become bankrupt, and the bond having been forfeited before the bankruptcy; it was held that the lessee could not prove for the damages which had accrued previously to the bankruptcy, not having paid them to the lessor. So, in *Atwood v. Partridge*, 12 Mo. 431, 4 Bing. 209, where the defendant covenanted with the plaintiffs for the due payment by R. of the

(a) Which enacts "That any annuity creditor of any bankrupt, by whatever assurance the same may be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by lapse of time since the grant thereof to the date of the commission."

(b) Which enacts that it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity, and for the payment thereof; and if such surety after such proof pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due) pay the sum so proved as aforesaid, he may be *sued* [sued] for the accruing payments of such annuity, until such annuitant shall [have] been paid or satisfied the amount so proved, with interest thereon at the rate of 4l. per cent. per annum from the time of notice of such proof, and of the amount thereof, being given to such surety; and after such payment or satisfaction, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid to the amount so paid or satisfied as aforesaid by such surety; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety in respect of such annuity: provided that such surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid."

annual premium on a policy effected on the life of R., and given by R. to the plaintiffs by way of security for a debt due from him to them; and the defendant became bankrupt *before* and obtained his certificate *after* a default by R.: it was held that the defendant was not discharged from liability for the premium which the plaintiffs had been obliged to pay to keep the policy on foot. Best, C. J., there says: "The question is, whether there was any debt which the defendant undertook to pay. I am of opinion that there was none, either contingent or otherwise. The defendant merely undertook that R. should do certain acts. Upon the failure of R. in the due payment of the annual premium, the plaintiffs would have a claim on the defendant, as surety, for unliquidated damages, varying in amount according to circumstances. If R. was still living, the amount of damages would be the sum paid by the plaintiffs to keep the policy on foot; but, if he had died leaving the annual premium in arrear, the defendant would have been called upon to make compensation to the plaintiffs for the loss of their whole debt; or, if R. had left behind him the means of satisfying part of the debt, the plaintiff's claim on the defendant would be reduced pro tanto. Thus, there might be a multiplicity of causes tending to vary the amount of damages to which the defendant would become liable in consequence of his suretyship." And Gaselee, J., says: "It was but a liability for unliquidated damages, and therefore not a debt from which the defendant would be discharged under the 126th section." With respect to the claim for expenses occasioned by the principal's default, and for the loss sustained by the plaintiff in consequence of the non-completion of the houses pursuant to the covenant—these clearly are claims for unliquidated damages, which have ever been held not to form the subject of proof under a commission.(a)

Alexander, contra. Although the plaintiff might not, as the Court of Review seem to have thought (*Ex parte Thompson*, 2 Deac. & Ch. 126, 1 Mont. & B. 219,) have an absolute right to prove under the former part of the 56th section, yet he might lodge his claim under the latter part. This and similar clauses in former bankrupt acts have always received a liberal construction—*Patterson v. Banks*, Cowp. 543; *Brookes v. Lloyd*, 1 T. R. 17; *Baxter v. Nichols*, 4 Taunt. 90, 2 Rose, 111; *Ex parte Grundy*, 1 Mont. & M'A. 293; *Ex parte Tindal*, 1 Mont. & M'A. 415, 8 Bing. 402, 1 M. & Scott, 607; *Ex parte Lewis*, 1 Mont. & M'A. 246; *Ex parte Myers*, 1 Mont. & B. 229; 2 Deac. & Ch. 251: in the latter of these cases, a debt on a guarantee which did not become absolute before the bankruptcy, was held to be proveable as a contingent debt. The cases of *Taylor v. Young*, St. Martin (Overseers) v. Warren, and *Hoffham v. Foudrinier*, 5 M. & Sel. 31, were decided upon the stat. 49 Geo. 3, c. 121, ss. 9, 17, which afforded a very inadequate relief—see Mr. Justice Chambers' observations thereon in *Baxter v. Nichols*, 4 Taunt. 92. *Biré v. Moreau*, 12 Moore, 226, 4 Bing. 57, was a case of costs, which were held not to constitute a *debt contracted* within the meaning of the 56th section of the 6 Geo. 4, c. 16.

Adams, Serjeant, in reply. In *Ex parte Myers*, the acceptance became due after the bankruptcy and before certificate; the case therefore fell within the latter part of the 56th section. In all the other cases that have been cited, where the proof has been allowed, there has been a debt payable on a contingency. Here, however, there is no contingency within the meaning of the statute, and originally no debt. *Nen constat*, that, because there has been one default by the principal debtor, there will be further defaults. There is therefore no principle upon which the value can be ascertained. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the Court:—The question arising upon this special verdict is, whether the several breaches of covenant

(a) See *Utterson v. Vernon*, 3 T. R. 539; *Parker v. Norton*, 6 T. R. 695; *Pulteney v. Warren*, 6 Ves. 94; *Ex parte Mumford*, 15 Ves. 289; *Parker v. Crole*, 2 M. & P. 160, 5 Bing. 63; *Yallop v. Ebers*, 1 B. & Adol. 698.

stated in the declaration are either debts or are claims and demands which are by the statute made proveable under the commission : for unless they fall within that description, the certificate will be no bar within the 6 Geo. 4, c. 16, s. 127, and consequently the plaintiff will be entitled to the verdict. Now as to the breach of covenant which is lastly assigned in the declaration, viz., that Smallwood did not complete and finish the messuages therein described so as to make them fit for habitation on or before the 24th June, 1882—that is a demand for general and unliquidated damages, such as cannot be ascertained without the intervention of a jury, and is altogether incapable of forming the subject of a proof by the affidavit or deposition of the party himself. Such damages therefore can never be considered as a debt or demand proveable under commission. Again, as to the second breach of covenant, which is for 80*l.* alleged to be the expenses, costs, and damages sustained by the defendant by reason of the non-payment of the annuity—that breach almost appears to be open to the same objection as the last ; besides which, it is clear, that, if the plaintiff has no right to prove under the commission the annuity itself, which is the principal debt, he cannot be allowed to prove these damages, which are only incidental or accessory to the annuity itself. The question therefore upon this record is reduced to the single point, whether the instalments of an annuity for the payment of which the bankrupt is surety only, and which he expressly covenants to pay in case of the default of the grantor, are proveable under a fiat against the surety, where such instalments do not become due until after the bankruptcy of the surety. And we are of opinion that they are not. If such a demand is proveable at all, it must fall within the provisions of the 56th section of the statute, and no other : for, as to the 54th section, its object was to enable the annuity creditor of any bankrupt to prove for the value of an annuity under a commission against the grantor. But the plaintiff in this case is not the annuity creditor of the defendant, the bankrupt. The defendant neither granted the annuity nor covenanted absolutely for its payment : he only covenanted to pay in case the grantor should make default. It is clear, therefore, that the case is not within the 54th section. The 55th section was passed to enable the collateral surety for payment of an annuity to come in under a commission issued against the principal debtor. It is unnecessary to say that this section cannot apply to the present case, where the commission has been issued, not against the grantor of the annuity, but against the surety himself. No section, therefore, can possibly apply to this case except it be the 56th. That section provides for two cases—first, where there is “a debt payable upon a contingency which has not happened before the issuing of the commission;” in which case the commissioners are directed to ascertain the value thereof, and to admit the creditor to prove the amount so ascertained. The second case is, “where the value shall not be ascertained before the contingency shall have happened ;” and in that event the creditor may, after such contingency shall have happened, prove in respect of the debt, and receive dividend with the other creditors, not disturbing any former dividends.

The question is, whether the instalments mentioned in the first breach of the declaration fall within either the one or the other of these provisions. We think it clear that the quarterly payments of the annuity not falling due until after the issuing of the commission, are not comprised within the *first part* of the section. Before the days of payment arrive, these instalments are not only no debt, but can never become a debt from the surety, except in the event that Smallwood, the grantor of the annuity, shall make default in such payments. But the value of such a contingency it is impossible to calculate. The liability of the surety would depend upon the power and the will of the principal to pay the first quarter and also the subsequent instalments when they fell due : and it is needless to say that such a contingency cannot be subjected to any known law of calculation. And, accordingly, when the present plaintiff, before any quarterly payment became due, applied to the commissioner to ascertain the

value of the annuity, and to allow him to prove such value, the commissioner rejected the proof: and we agree in the judgment given by the Court of Review, who held such rejection to be right—see *Ex parte Thompson*, 1 Mont. & Bligh, 219. If the instalments of an annuity are proveable at all, it must either be by proving the present value of the whole annuity, or by proving the separate value of each instalment as it falls due. But it is obvious that the act has made no provision for the proof of the present value of the annuity against the estate of the surety. If the whole annuity is allowed to be proved against the estate of the surety, there is no provision in the statute for reimbursing the estate of the surety by enabling the assignees to look to the principal debtor for indemnity: whereas, in the case of the bankruptcy of the grantor of the annuity, and the annuity being valued and proved against his estate, a provision is made for the indemnity of the surety, by the 55th section, namely, that the surety, by paying to the creditor the ascertained value of the annuity, may have the benefit of the proof of the annuity creditor against the bankrupt's estate. By this course the whole of the annuity transaction is closed to all the parties, the grantor, the surety, and the annuitant. The absence, therefore, of any similar provision in the case of the surety becoming bankrupt, leads to the inference that it was not intended to provide for such case by the statute, but that it should be left as it stood at common law. And we think, that, as the whole value of the annuity is not proveable at once under the 56th section, so neither is each particular instalment proveable after the contingency happens; for, the 54th section of the act deals with an annuity as a debt of a peculiar nature, and proveable in one way only; directing the present value of the whole annuity to be ascertained, and such whole value to be the subject of proof: not that each successive instalment shall be proved as it becomes due. And if the annuity is so dealt with under the 54th section, where the proof takes place against the grantor's estate, there is no reason to suppose the legislature would have treated it differently under the 56th section, as against the estate of the surety, if such annuity was intended to be proved under that section. And, indeed, it would be a great hardship on the annuity creditor to compel him to prove each separate instalment as it became due, that is, as the contingency of the default of the principal debtor happened, through a long series of years; for, that would in effect be to take away from him the whole benefit of his security, without giving to him a real share under the estate. This decision does not in any manner overrule the case of the proof against the estate of the guarantee or surety for a debt after the default of the principal, which proof was allowed in *Ex parte Myers*, 1 Mont. & Bligh, 229, 2 Deac. & Ch. 251; but is limited to the case before us, the proof of the instalments of an annuity. As therefore we consider that no part of the demand in this declaration was proveable under the commission against the defendant, we think there must be judgment for the plaintiff. Judgment for the plaintiff.

LESLIE and Others, Assignees of CUMBERLEGE, the Younger, a Bankrupt, v. GUTHRIE.—p. 331.

Where there were several pleas, on some of which issue was joined, and as to one a demurrer upon which judgment was given for the defendant four days before the end of Easter term.—The Court refused to allow the defendant to sign judgment as in case of a nonsuit in Trinity term, on the ground of the want of a notice of trial for the adjournment of the day of sittings after Easter term.

The defendant, on the 8th May, in Easter term last, obtained a judgment on demurrer to one of the pleas—vide 1 Scott, 683. On the 6th day of the present term—

Atcherley, Serjeant, for the defendant, obtained a rule calling upon the plaintiffs to show cause why judgment as in case of a nonsuit should not be signed, the plaintiffs not having given notice of trial, and why the money paid into court in the cause should not be paid out to Messrs. Inglis & Co., the real defendants.

Bompas, Serjeant, showed cause. There has been no default: the plaintiffs could not take any step pending the demurrer. One step in a term is sufficient. To entitle the defendant to move for judgment as in case of a nonsuit, no notice of trial having been given, there must be a term's default—*Butcher v. Kiernan*, 2 Marsh. 364. The plaintiffs have the whole of the present term to give notice.

Atcherley, Serjeant, in support of his rule. When the trial is to be had in London, and notice is given for the sittings in term or for the first day of the sittings after term, it must be an eight or fourteen days' notice: but, if the notice be given for the adjournment day, it is sufficient to give such notice four days before the first day of the sittings after term, if the defendant reside within forty miles from London—R. E. 51 Geo. 3. The step to be taken in order to prevent a judgment as in case of a nonsuit, must be a step touching the issue in fact. Here, the demurrer was disposed of on the 8th May: there was therefore ample time in the last term for the plaintiffs to give notice, the term not ending until the 13th.

TINDAL, C. J. I do not think there has been such a default here as to warrant us in interfering, though *Paxton v. Popham*, 11 East, 366, is an authority to show, that, after judgment for the defendant on demurrers to certain special pleas, there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues have been joined.

The rest of the court concurring—

Rule discharged, without costs.

COLLINS and Another v. GWYNNE.—p. 332.

Where a special case on which judgment had been given for the plaintiff in this Court, was at the instance of the defendant turned into a special verdict, that he might have an opportunity of obtaining the judgment of a court of error thereon, this Court, after the lapse of two years, and after the costs of the trial and special case had been taxed and paid, refused to allow the plaintiffs the costs thereby occasioned.

JUDGMENT having, in Hilary term, 1833, been signed for the plaintiffs on a special case, and the costs taxed and paid, the defendant obtained leave to turn the special case into a special verdict. The record was then removed by writ of error to the Exchequer Chamber, where the judgment of this court was affirmed, with costs.

Taddy, Serjeant, for the plaintiffs, obtained a rule calling upon the defendant to show cause why the prothonotary should not tax the plaintiffs the costs of and occasioned by the turning the special case into a special verdict, entering on the roll the special verdict, and carrying the transcript into the court of error.

Bompas, Serjeant, showed cause. He contended, that, as to the costs occasioned by turning the special case into a special verdict, the application being made at so late a period (two years having elapsed since those costs were incurred) the court ought not to entertain it; and that, with respect to the costs arising after the allocatur and before the record reached the court of error, they were never allowed in the court below.

Taddy, Serjeant, in support of his rule. The defendant having brought a writ of error returnable in parliament, the plaintiffs are compelled to complete the roll in this Court: consequently, the costs prior to the transcript reaching the Exchequer Chamber are clearly costs occasioned by the writ of error, but

such as could not be allowed on taxation there. Then, with respect to the costs occasioned by turning the special case into a special verdict, inasmuch as that was matter of favour accorded to the defendant, he ought to pay those costs.

TINDAL, C. J. The costs which the plaintiffs claim by this motion may be divided into two classes—first, those occasioned by the application of the defendant to turn the special case into a special verdict—secondly, the costs of entering the special verdict upon the roll, which costs had not been incurred when the costs of the trial and of the special case had been incurred. With respect to the first set of costs, it was certainly a matter of favour to the defendant to allow the special case to be turned into a special verdict; and I do not say that we should not have compelled him to pay the costs occasioned thereby, had the plaintiffs asked for them at the time. But, after the lapse of two years, I think it would be a little hard to inflict those costs upon the defendant. As therefore this is an application to our discretion, I am not, under the circumstances, disposed to accede to it. With regard to the costs of entering the special verdict on the roll, and carrying the transcript into the Exchequer Chamber, they properly belong to the plaintiff below on the affirmance of the judgment, unless (and I am not quite clear that it is not so) they are included in the costs usually awarded on affirmance in parliament. The matter must therefore go back to the prothonotary, to reconsider as to the last-mentioned costs.

The rest of the Court concurring—

Rule accordingly.

MEMORANDA.

The Judges who sat in the Court of Common Pleas during the foregoing term were—

Lord Chief Justice TINDAL,
Mr. Justice PARK,
Mr. Justice GASELER,
and
Mr. Justice VAUGHAN.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.—1835.

HORNIDGE *v.* EYLAND.—p. 357.

Although the money first received under a fiat is by the statute required to be appropriated in discharge of the expenses incurred by the petitioning creditor, yet, where he assents to a different appropriation, he is estopped from afterwards contending that the directions of the act have not been complied with.

ASSUMPSIT for work and labour done by the plaintiff as the attorney and solicitor of and for the defendant, and at his request, in and about the striking of divers dockets, in and about the issuing and working of divers fiats and proceedings in bankruptcy for the defendant, and in and about the prosecuting and defending and soliciting divers actions and suits at law and in equity for the said defendant at his like request, and for certain fees due and of right payable to the plaintiff in respect thereof; and also for other work and labour, care, diligence, and attendance of the plaintiff by him before that time done, performed, and bestowed in and about the procuring of the release of one W. Mills from imprisonment, and in and about the drawing copying, and engrossing of divers writings and proceedings of and for the defendant, at his like request, and also in and about other affairs, matters, and business of and for the defendant, and for divers journeys and other attendances by the plaintiff before that time made, performed, and given in and about the said business of the defendant, and at his like request. Money counts. The amount of the plaintiff's demand was 38*l.* 19*s.* 5*d.* The defendant paid into Court 15*l.*

The cause was tried before Tindal, C. J., at the sittings at Westminster after the last term. The facts were as follows:—The plaintiff as solicitor of one Mills, on the 18th of July, 1884, prepared a deed of assignment of his effects for the benefit of his creditors, one of whom was the present defendant. On the 18th August, Mills's effects were sold, and the proceeds paid over to the plaintiff. Before the sale, Mills committed an act of bankruptcy by laying in prison; whereupon a fiat was issued on the 15th September, upon the petition of the defendant. The defendant was appointed one of the assignees. The contention arose upon a sum of 25*l.*, the costs of preparing and incident to the deed of assignment, which the plaintiff claimed to retain out of the proceeds of the sale of Mills's effects, the defendant (who was the principal and almost

the only creditor) having at a meeting before the commissioner (Fane) assented to the allowance of those costs out of the estate. On the part of the defendant, it was submitted that the petitioning creditor was entitled, under the 6 Geo. 4, c. 16, s. 14, to have the first money received under the fiat appropriated to the discharge of the costs incurred by him in the prosecution of the fiat. A verdict having been found for the plaintiff, damages 23*l.* 19*s.* 5*d.*, with leave to the defendant to move to enter a nonsuit—

Bompas, Serjeant, now moved accordingly. He contended that the money arising from the sale of the bankrupt's effects after an act of bankruptcy, being the money of the assignees, it was not competent to the defendant to give any assent to its appropriation other than in due course of law.

TINDAL, C. J. That the moneys first received under the fiat must be appropriated in discharge of the expenses necessarily incurred by the petitioning creditor, is not disputed. But the question here is, whether the defendant has not, by his own voluntary act, estopped himself from taking the objection. The sum in dispute, it appears, was with his assent, appropriated to the costs of preparing the deed of assignment. This assent might have proceeded from a consciousness on his part that he was personally responsible for those costs.

The rest of the Court concurring—

Rule refused.

ATKINSON and Another, Assignees of POTTER, a Bankrupt, v. BRINDALL.—p. 369.

In order to constitute a fraudulent preference, so as to avoid a payment made by a trader, it must be a voluntary preference and made in actual contemplation of *bankruptcy*: it is not enough to show that the party was in such a state of insolvency and embarrassment as to render bankruptcy a *probable* event.

THIS was an action brought by the plaintiffs as assignees of one Potter, a bankrupt, to recover the amount of certain cash and bills alleged to have been paid by the bankrupt to the defendant by way of fraudulent preference. The cause was tried before Williams, J., at the last Assizes at Worcester. Potter and Walford were carpet manufacturers at Kidderminster. Their circumstances becoming embarrassed, Walford, in the beginning of 1834, left this country and went to America. On the 14th February in that year, a fiat in bankruptcy was taken out against Potter, but was subsequently abandoned. On the 15th March, 1834, Potter executed an assignment of all his effects for the benefit of his creditors, under which they stipulated to receive 12*s.* in the pound in satisfaction of the debts due to them respectively. Between the date of this assignment and the 15th January, 1835, the defendant lent money to Potter at various times, amounting in the whole to 205*l.* Towards the close of the year 1834, Potter became further embarrassed. On the 15th January, 1835, he, having dishonoured two bills on the 13th, and without any pressure or solicitation on the part of the defendant, sent him 121*l.* 3*s.* in cash, and two bills, the one for 56*l.* 9*s.*, the other for 27*l.* 8*s.* 3*d.*: and on the 28th of the same month a second fiat issued against him, under which he was duly declared a bankrupt. Upon this state of facts, the learned judge left it to the jury to say whether Potter contemplated bankruptcy at the time he made the payment in question to the defendant: telling them that a contemplation of insolvency was not sufficient to invalidate the payment. The jury found for the defendant.

Ludlow Serjeant, now moved for a new trial, on the ground of misdirection. He submitted, that, from the desperate circumstances in which Potter appeared to have been for more than a year, and the fact of the payment in question having been made voluntarily and after the dishonour of two bills only two days

before, and the fiat following so speedily, he must have contemplated bankruptcy to be extremely probable, if not inevitable; which was sufficient to render the payment a fraudulent preference. And he relied on the case of *Poland v. Glyn*, 2 D. R. 310, 4 Bing. 22, 12 Moore, 109 n., where it was held, that, if a person in trade pay a sum of money to one of his creditors, and his affairs are in such a state that he may reasonably anticipate bankruptcy at the time he makes such payment, it is fraudulent: and Bayley, J., says: "I take the general rule of law upon this subject to be, that a voluntary payment to one creditor under circumstances which must reasonably lead the debtor to believe bankruptcy *probable* (not *inevitable*, for I do not think it necessary the rule should go that length), is a fraud upon the other creditors, within the meaning of the bankrupt laws; and that money so paid may be recovered by the assignees when a bankruptcy has taken place."

TINDAL, C. J. It seems to me that the direction of the learned judge in this case was substantially correct. Down to the time of his actual bankruptcy, a trader has the unrestrained dominion over his own property. The only exception to the rule is, that, if he disposes of any part of it, contemplating bankruptcy at the time, and intending to prevent the equal and just distribution provided by the law, he thereby commits a fraud. The mere contemplation of insolvency, however, does not necessarily involve a contemplation of bankruptcy. This matter has lately undergone the consideration of the Court of King's Bench in the case of *Morgan v. Brundrett*, 5 B. & Ad. 296, 2 N. & M. 280, where the whole Court agree that the question for the jury is, whether bankruptcy and not mere insolvency is contemplated. Littleale, J., says: "The late cases with reference to the question, whether a payment or delivery of goods has been made in contemplation of bankruptcy, have gone much further than they ought." Parke, J., adds "In order to render the deposit void, it was incumbent on the plaintiffs to show, first, that it was made in contemplation of bankruptcy, and, secondly, that it was voluntary. There was very slight evidence that it was made in contemplation of bankruptcy. The meaning of those words I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankrupt. It is not sufficient that it should be made (as may be inferred from some of the late cases) in contemplation of insolvency. These cases I think have gone too far." And Patteson, J.—The recent cases have gone too great a length. They seem to have proceeded on the principle, that, if a party be insolvent at the time when he makes a payment or delivery, and afterwards become bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment: but I think that is not correct; for, a man may be insolvent, but yet not contemplate bankruptcy." In the present case there certainly was very little evidence before the jury: but I am not prepared to say that I am so far dissatisfied with the verdict as to feel inclined to interfere in a question that is peculiarly and almost exclusively within their proper province.

PARK, J. I think the case of *Morgan v. Brundett* puts this question upon the true ground. The direction of the learned judge was in conformity with that authority, and in my opinion perfectly correct.

GASELKE, J., concurred.

BOSANQUET, J. I also am of opinion that the direction in this case was right. The principle upon which voluntary payments to favoured creditors made before the commission of an act of bankruptcy are avoided, is, that such payments are a fraud upon the bankrupt laws. A voluntary payment or delivery can only be a fraud upon the bankrupt laws, where the party making it contemplates at the time the issuing of the fiat against him.

Rule refused.

JOHNSTON v. WOOLF.—p. 372.

Upon an issue directed to try whether one P. had committed an act of bankruptcy on a given day, it appeared that, on the preceding day, he sent a letter from his dwelling-house at Greenwich, to his place of business, addressed to his son, stating that he was unable to meet his engagements, and desiring that he might be denied to any creditor who might call; that immediately after dispatching this letter, he left home, and remained absent during the whole of that and the following day. A witness proved that P. called on the day in question at her brother's house in London; that he expressed to her an apprehension of being sent to the Fleet, and stated that he was in no hurry to get home, and would not go very early, as he had creditors who would lay hold of him; and that he did not leave till after dark. The jury were told, that, if they believed the statements made by the witness, P. on that occasion committed an act of bankruptcy: they said they did believe the witness, but they did not think P. spoke with bona fides:—Held, that P. had committed an act of bankruptcy: and that evidence of his conduct and conversations on the day subsequent to the date mentioned in the issue, was not admissible to explain his conduct on that day.

UPON an issue to try whether or not one C. Pearson had committed an act of bankruptcy, on the 18th June, 1835, before five o'clock in the afternoon, the following facts appeared in evidence before Park, J., at the last assizes at Croydon.

Pearson was a manufacturing chemist residing at Greenwich. Prior to the day in question he was in embarrassed circumstances; two of his acceptances, one for 150*l.*, and another for 350*l.*, being then overdue and dishonoured. Three acts of bankruptcy were set up; first, a beginning to keep house; secondly, an absenting for the purpose of delaying creditors; thirdly, the fraudulent disposal of goods. As to the latter, there was no evidence. As to the keeping house, the only evidence consisted of a letter written by Pearson to his son, and sent by him from his dwelling house to the manufactory on the morning of the 17th June, to the following effect: "As I find myself, from some demands now pressing urgently on me, unable to meet my engagements with my creditors, I request, if any of them call, that you will deny me to them; and inform Mr. C. (a clerk) to the same effect." His intention to keep house, however, was not carried into effect; for he immediately left home. Upon this there was no finding; but the letter was used as evidence in support of the second act of bankruptcy, viz. an absenting for the purpose of delaying creditors. Pearson did not return home on the 17th until 12 o'clock at night. On the 18th, he again left home at an early hour in the morning, and did not return until evening. To account for these absences, it was proved, that, on the 17th, Pearson attended the hearing of a cause in Chancery to which he was a party; that he was one of the directors of the Steam Navigation Company; and that the 18th was a day on which one of the weekly meetings of the directors was held; though it did not appear that he had actually attended that meeting. A witness named Marsh proved, that, on the 18th, between four and five o'clock, Pearson called at the house of her brother, in Calthorpe Street, and stated that he wished to know whether he was personally acquainted with the warden of the Fleet Prison, to which place he was afraid he should be sent; that, upon her saying she would hasten tea, he observed that she need not trouble herself, for that he was in no hurry to get home, that he had creditors who would lay hold of him, and that he wished to get home if he could with safety, but would not go very early; and that he left Calthorpe Street after dark. Pearson's clerk was also called, and it was proposed to question him as to what was said or done by Pearson on the 19th. The learned judge, however, refused to receive his examination, observing that it would not be evidence in support of the issue. The jury having retired for some time, returned into Court and asked the judge two questions, one of which was, whether the conduct of Pearson in staying in Calthorpe Street amounted to an act of bankruptcy. The learned judge told them, that, if they believed the statement made by Miss Marsh, Pearson did on

that occasion commit an act of bankruptcy. The jury said they did believe Miss Marsh; but they did not think Pearson spoke on that occasion with bona fides. A verdict having been returned for the plaintiff—

S. B. Harrison now moved for a new trial, on the grounds that the verdict was against the evidence, and that the testimony of the clerk had been improperly rejected. The act of absenting is in itself equivocal, and susceptible of explanation. Taking the evidence of Miss Marsh with the observation of the jury thereon as to the absence of bona fides in the communication made to her by Pearson, there is nothing to warrant the inference that he on that occasion absented himself from his home and business with intent to defeat or delay his creditors. Then, as the absenting is an equivocal act, and the motive of the party must be shown, his subsequent conduct is surely evidence to explain such act. That which the supposed bankrupt did on the 19th June, being a part of the same course of acting, ought to have been submitted to the jury. In *Rawson v. Haigh*, 2 Bing. 99, 9 Moore, 217, 1 C. & P. 77, a letter written by a bankrupt shortly after his absenting himself from his home, was held to be admissible to show his motive in going. And in *Ridley v. Gyde*, 9 Bing. 349, 2 M. & Scott, 448, a trader, being pressed for payment of a debt by the attorney of a creditor, promised to give him a security on the following day; instead of which he left his place of residence, and immediately afterwards gave securities to another creditor, a relation. On his return home, at the expiration of nearly a month, the attorney of the former creditor, in the course of conversation, asked him what security he had given his relation; to which he replied, "he did not know:" it was held that the declarations of the debtor in that conversation were admissible in evidence to support an alleged act of bankruptcy in giving securities to his relation by way of fraudulent preference, and to show the conduct of the party giving them; although it was objected that the conversation took place in the absence of the person to whom the securities were given, and at too great a distance of time (a month) from the completion of the transaction.

TINDAL, C. J. It appears to me that the question in this case was properly left to the jury, and that the conclusion they have drawn from the evidence laid before them was the correct one. The act of bankruptcy was completed by the absenting of the party on the 18th June. It is said that the act of absenting is in itself ambiguous, and may be innocent. It certainly is so. But, let us look at all the circumstances. On the morning of the 17th, Pearson sends a letter to his son at the manufactory, telling him that he finds himself unable to meet his engagements with his creditors, and requesting that he may be denied if any of them call. This looks very like a beginning to keep house: but it seems that after he had dispatched this letter, he thought better of it, and ran away. Then we find him absent from his home and place of business during the whole of that and the next day; and this absence almost entirely unaccounted for: there was no proof that he attended the board of directors of the Steam Navigation Company. If the case had rested there, I should have thought that there was abundant evidence for the jury. But, in addition to this, we have the testimony of Miss Marsh as to the conversation that took place at her brother's house, clearly explaining the bankrupt's motive for delaying his return to Greenwich. The jury said they gave credit to the witness, but added that they did not think the bankrupt spoke with bona fides. But he is not the less a bankrupt because he told a falsehood to Miss Marsh: and we are not on that account to overlook all the rest of the evidence. I am clearly of opinion that the verdict is correct. I also think the learned Judge properly rejected the evidence tendered as to the conduct of Pearson on the 19th June: that was expressly excluded by the terms of the issue. In the cases cited, the letters and declarations were properly admitted to shew the motive of the bankrupt's absence; the act of bankruptcy being in course of commission, they formed part of the transaction.

PARK. I am of the same opinion. There was a clear act of bankruptcy completed on the 18th. From the whole course of the evidence it appeared that the party's absence was occasioned by the fear of arrest; and, being absent, his return was for the same reason delayed until an hour when he could return in safety. An act of bankruptcy being once committed, it could not be purged by any thing that took place afterwards.

GASELEE, J., concurred.

BOSANQUET, J. I am also of opinion that the verdict was right. There was a clear act of bankruptcy committed by Pearson by absenting himself on the 17th, and remaining away during the whole of that and the next day. The 19th is expressly excluded by the terms of the issue. The act of bankruptcy being complete on the 18th, the issue was satisfied. Rule refused.

DUMSDAY, Demandant, HUGHES, Tenant.—p. 377.

The tenant in a writ of right, not being able to discover who the demandant was, obtained a Judge's order directing the demandant's attorney to deliver to the tenant's attorney within four days, the true name and address of his client. The Court refused to allow the tenant to sign judgment of nonpros for disobedience of this order.

Semble, that the proper course would be to make the order a rule of court, and apply for an attachment against the attorney.

THIS was a writ of right. The count had been delivered, and the tenant had obtained a rule for a view. The tenant being unable to discover who the demandant was, in June last obtained a Judge's order for the disclosure of his place of abode. That order not having been complied with, an application was in the beginning of October made to the Lord Chief Justice, and on the 13th, his lordship made an order upon the demandant's attorney to deliver to the tenant's attorney within four days the true name and address of his client. No notice having been taken of this order—

Wilde, Serjeant, moved for leave to sign judgment of nonpros. He submitted that the Court, having the general power to interpose to prevent the abuse of its process, and having a right to be informed who the suitors are, were under the circumstances warranted in granting relief to the tenant in the form prayed; which, if any real demandant did exist, could not operate to his prejudice.

TINDAL, C. J. The proceedings being regular, I do not see how we can accede to this application. It is not like the case of a common motion for judgment as in case of a nonsuit: the nonpros would be a final bar to the demandant's claim.

The rest of the court concurring—

Rule refused.(a)

(a) *Wilde*, Serjeant, afterwards suggested that the proper course probably would be, to make the judge's order a rule of court, and then move for an attachment against the attorney. To this the court assented.

In a writ of right the judgment, whether upon default, demurrer, confession, or verdict, is final, because the thing demanded is certain. The judgment for the demandant is, that he recover against the tenant his seisin of the tenements with the appurtenances, to hold to him and his heirs, quit of the tenant and his heirs for ever—*Tyssen v. Clarke*, 3 Wills. 563; for the tenant, that the demandant take nothing by his writ, but be in mercy for his false claim, and that the tenant go thereof without day; and also that the tenant hold the tenements with the appurtenances to him and his heirs, quit of the demandant and his heirs—*Co. Litt.* 295, b.

In some cases the judgment in a writ of right will be a final bar to the party against whom it is given, so as to preclude him from recovering the lands in another writ of right, or in any other action. On this account, such judgment is called a final judgment. The rule laid down by Fitzherbert, J., is, that judgment final shall not be given in a writ of right, but after the mise joined—26 H. 8, 8. However, if the mise be joined upon the mere right, although the verdict of the grand assize be given upon another point, yet the judgment shall be final, as it shall also be if the tenant, after the mise joined, make default,

; DOE d. POTTER v. ROE.—p. 378.

Service of a declaration in ejectment upon the wife of the son of the tenant in possession on the premises, who at the time of such service informed the party who made the service that the tenant was in America, and that her husband (the son) was transacting the business of the house :—Held, sufficient for a rule nisi.

Mr. Serjeant *Wilde* moved for judgment against the casual ejector, upon an affidavit which stated that the deponent called at the premises, a public house at Mitcham, in Surrey, for the purpose of serving William Leach, the tenant in possession, with a copy of the declaration, when the deponent was informed by Mary Leach, the wife of Henry Leach, the son of the said William Leach, that the said William Leach was then in America, and that her husband, the said Henry Leach, was transacting the business of the said public house; whereupon the deponent delivered a copy of the declaration and notice to and left the same with the said Mary Leach, on the premises, and explained to her the intent and meaning of such service. He cited *Impey's Practice*, 6th ed. 591. *Fenn v. Denn*, Barnes, 192.

TINDAL, C. J. The fact of the tenant being in America, and that his son carried on his business and represented him in his absence, resting solely upon the information given to the deponent by the son's wife, we can only grant a rule nisi, which may be served upon the son upon the premises.

Rule nisi accordingly. (a)

JOLISTON v. KENNEDY.—p. 410.

Where a defendant is held to bail or detained by virtue of a judge's order, he is not bound to apply either to the same or to another judge at chambers, to rescind the order or to discharge him from custody on the ground of defects in the affidavit of debt; the application is properly delayed till the court is sitting.

HURLSTONE, on a former *ex*, obtained a rule nisi to set aside an order made by Patteson J., on the 22d October last, for holding the defendant to bail, and that the defendant might be charged out of custody as to this action, on entering a common appearance, the ground that the affidavit of debt was defective.

Busby showed cause. It appeared that, on the 30th October, the day on which the time for putting in bail expired, a summons was taken out, returnable the next day, for the discharge of the defendant on the ground that the date of the order was not indorsed on the back of the writ of detainer, as required by the 2 Will. 4, c. 89, s. 8, s. d. Nos. 4 and 5. Williams, J., before whom the summons came on for hearing, declined to interfere, on the ground that the application was a day too late. *Tyler v. Green*, 3 Dowl. 439. The objections to the affidavit not having been mentioned when the parties were before Williams, J., at chambers, it was contended that it was now too late to take advantage of them. The affidavit was admitted to be irregular.

Hurlstone, in support of his rule, submitted that, to have taken these objec-

or confess the action; or if the demandant be nonsuited. *Co. Litt.* 295, b.; *Herne v. Lilburn*, 1 Bulst. 161; admitted in *Chetman v. Sleigh*, *Carth.* but see *Penryn's case*, 5 Reg. 85, p. When a petit cape must issue before judgment, see 1 Bulst. 161; *Roscoe on Real Actions*, 282.

The tenant in a writ of right may have judgment in a case of a nonsuit, but cannot have costs—*Newman v. Goodman*, 2 W. Blac. 1093, 1 *Almeggill v. Pierson*, 1 Bos. & Pul. 103.

(a) The rule was afterwards made absolute, no cause being shown.

tions before Williams, J., would have been virtually asking him to rescind the order of Patteson, J., which would have been equally indecorous and contrary to the usual course of practice at chambers.

TINDAL, C. J. I think the defendant has pursued the proper course. It would have been appealing to one judge against the decision of another, to have asked Mr. Justice Williams to entertain objections to an affidavit upon which Mr. Justice Patteson had granted an order.

PARK, J. It is not proper to ask one judge to interfere with the order of another, unless at his express desire. Whenever such an application is made to me, I invariably send the parties to the court. If it be near the term, I adopt the same course even if the order is my own.

The rest of the Court concurring—

Rule absolute.

BALLS v. STAFFORD.—p. 426.

There cannot be a partial appropriation to a plea either of tender or of payment, of money paid into Court in lieu of bail.

BAYLEY moved for leave to plead (amongst others) a plea of payment into court of the sum of 81*l.* 14*s.*, the plaintiff to be at liberty to appropriate to that plea the sum of 81*l.* 14*s.* out of a sum of 220*l.* already paid into court in this action. The affidavit upon which the motion was founded stated that the defendant was arrested under and by virtue of a writ of *ceas* issued out of this court on the 28th August last, indorsed for bail for the sum of 200*l.*, and that the said sum of 200*l.* together with 20*l.* for costs, was paid about the 23d September last paid into court instead of putting in and perfecting bail, pursuant to the statute 7 & 8 Geo. 4, c. 71, s. 2; and that the said sum of 220*l.* remained in court in the cause.

THE COURT, referring to *Stultz v. Heneage*, 4 Mo & Scott, 472, where it was held that the court cannot allow part of a sum paid into court in lieu of special bail to be appropriated to the purposes of a plea of tender, the third section of the 7 & 8 Geo. 4, c. 71, expressly pointing out the only mode in which money so deposited can during the progress of the cause be released, viz. by putting in and perfecting special bail—for reasons there given, refused the rule.

Rule refused.

CORRY v. WHARTON.—p. 436.

SAME v. SAME.

Where a rule is obtained in two causes, the affidavits must be intitled in both of them, though the plaintiff and defendant be the same in both.

A RULE having been obtained in these two causes, upon affidavits intitled in one of them only—

Arnold objected to their being read.

PER CURIAM. The affidavits must be re-sworn. They are not affidavits made upon the subject-matter which we are to adjudicate: consequently perjury could not be assigned against them.

The affidavits were accordingly re-sworn.

LEMON v. LEMON.—p. 506.

A *distringas* to compel appearance cannot issue after the expiration of the writ of summons.

F. B. LEE moved for a *distringas* to compel the appearance of the defendant in this case. It appeared from the affidavit that the writ of summons issued on the 29th January last, and consequently had expired on the 29th May, and had not been continued.

TINDAL, C. J. By the 10th section of the 2 Will. 4, c. 89, it is enacted "that no writ issued by authority of that act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and *capias* may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith." There having been no actual service of the writ within the four months, it appears to me that an application to the court after the expiration of that period for a *distringas* to compel appearance to the writ which has come to its natural end, is too late. The writ of summons having been allowed to become extinct, it cannot be made the foundation of any subsequent proceeding. If the *distringas* could issue after the four months have elapsed, the writ of summons not having been continued as provided for by that act, I see no reason why it might not equally be sued out at any period however remote.

The rest of the court concurring—

Rule refused.

CLARK and Another, Assignees of SCRIVENER, a Bankrupt, v. GILBERT.—p. 520.

The defendant having in his possession a lease belonging to one S., which had been deposited with him as a security for moneys advanced by him to S., and upon which he claimed a lien for costs as against S. and also as against the assignee appointed under a commission of bankruptcy issued against S. in 1830, concurred with the assignee in the sale of the lease, and received from him in satisfaction of his demand, the amount of the purchase-money, and also received with the assent of the assignee, certain sums due for rent of the premises, &c. The sale took place after the defendant, as solicitor to the assignee, had notice that a petition to supersede the commission, on the ground of the insufficiency of the petitioning creditor's debt, was pending. In January, 1832, the commission against S. was superseded, and in March a second fiat issued against him:—Held, that the assignees under the last mentioned fiat were entitled to recover from the defendant the several sums so received by him from or with the assent or under the authority of the assignee under the superseded commission.

ASSUMPSIT for money alleged to have been received by the defendant to the use of Scrivener before his bankruptcy, and to the use of the plaintiffs as his assignees since the bankruptcy. At the trial a general verdict was found for the plaintiffs for 882*l.* 2*s.*, subject to the opinion of the court upon the following case:—

By indenture of lease bearing date the 17th November, 1828, certain premises in Ratcliffe Highway, in the county of Middlesex, were demised by Abraham Gale and Thomas Gale to Scrivener, the bankrupt, for the term of eighty-one years, at the rent of 100*l.* At the time of issuing the commission against Scrivener, the bankrupt, he was indebted to the defendant, an attorney, in 234*l.* or thereabouts, for moneys advanced to him by the defendant, and for professional business done; and the defendant had possession of the lease as Scrivener's attorney. Whilst the defendant was in possession of the lease, viz. on the 5th December, 1829, Scrivener, by indenture bearing date on that day,

mortgaged by way of demise part of the said premises to his father Abraham Scrivener, to secure 600*l.* and interest. On the 30th December, 1829, a commission of bankrupt issued against the mortgagor, the said Scrivener upon the petition of one William Stevens, who was afterwards appointed sole assignee of the estate and effects of the bankrupt; and an assignment thereof was made to him accordingly. The defendant was Stevens's attorney, both as petitioning creditor and assignee under that commission; which commission was afterwards superseded as hereinafter-mentioned. On the 26th March 1830, a petition to the Great Seal was presented by Augustus White, a creditor to supersede the commission of bankrupt, on the ground of the insufficiency of the petitioning creditors debt; upon which petition the defendant appeared as solicitor for the petitioning creditor and assignee, W. Stevens; and after some time an order was made upon that petition to supercede the commission. After notice of the petition, and whilst the same was pending, Stevens, as assignee, with the concurrence of the defendant, caused the interest of the bankrupt in the premises comprised in the said lease, subject to the mortgage, to be sold by auction; and one George Pound became the purchaser at the price of 350*l.* At the time of the purchase, Pound paid by way of deposit, 50*l.* into the hands of the auctioneer, who, after retaining 48*l.* 6*s.* for the expenses of the sale, paid over the balance, amounting to 3*l.* 14*s.*, by his cheque to Stevens, which cheque Stevens immediately paid to the defendant on account of his costs and the lien which he claimed on the deeds.

By indenture bearing date the 8th June, 1830, made between Stevens as assignee of the first part, the bankrupt of the second part, and the said G. Pound of the third part, reciting (*inter alia*) the mortgage to Abraham Scrivener, and also that, in consideration thereof, it had been agreed between Stevens and Pound, that Pound should take the premises subject thereto, and should pay Stevens 350*l.* and no more, Stevens and the bankrupt assigned the lease before mentioned, and the premises thereby demised, to Pound for that sum, subject to the before-mentioned mortgage, and also subject to certain underleases which had been granted. The deed of assignment to Pound was prepared by his attorney, and was approved of on Stevens's behalf by the defendant, and executed in his office. At the time of the execution of the said indenture of assignment, viz. June, 1830, the residue of the consideration money, after allowing the 50*l.* paid by way of deposit to the auctioneer, being 300*l.*, was paid by the attorney of Pound to Stevens the assignee, and by him to the defendant, by whom it was received generally, the defendant having a claim for such lien as aforesaid, and Stevens being indebted to him for costs.

In the course of the year 1830, the defendant, by the authority of Stevens, as assignee, received three further sums of money, viz. 10*l.*, a debt due to the bankrupt from the owner of a house adjoining the said premises of the bankrupt in Ratcliff Highway, for contribution towards the expense of erecting a party-wall between the house of such owner and the said premises of the bankrupt, such sum of 10*l.* being the share of the expense of erecting such party-wall to be borne by the said owner, according to an agreement to that effect made between such owner and the bankrupt before his bankruptcy; and 6*l.* 10*s.* and 11*l.* 18*s.* for rent in respect of the demised premises. At the time of the receipt by the defendant of the said sums of 3*l.* 14*s.*, 300*l.*, 10*l.*, 6*l.* 10*s.*, and 11*l.* 18*s.*, he had also a claim against Stevens for his professional bill for business in suing out and prosecuting the said commission of bankrupt, which claim, together with the said sum due from Scrivener at the time of his bankruptcy, considerably exceeded the amount of the sums so received. The said lease remained in the possession of the defendant after the execution of the mortgage, and from thence until after the receipt by the defendant of the said sums of 3*l.* 14*s.*, 300*l.*, 10*l.*, 6*l.* 10*s.*, and 11*l.* 18*s.*

By indenture bearing date the 5th August, 1831, between Abraham Scrivener, the bankrupt's father and mortgagee, of the one part, and Pound of the other part, the draft of which indenture was settled and approved of by the de-

defendant on behalf of Pound—reciting the said lease, mortgage, and assignment; and also reciting that the bankrupt had built upon the said piece or parcel of land several messuages or tenement and dwelling-houses, and carcasses, and other erections; that the said Abraham Scrivener had in the month of April, 1830, undertaken, on account of the bankrupt, to pay out of his said mortgage-money unto the defendant several sums of money, amounting to 234*l.*; that the said Abraham Scrivener had, on the 8th June, 1830, become liable to pay out of his said mortgage-money unto the defendant, on account of the bankrupt, the further sum of 50*l.*; that, for the purpose of paying unto the said Abraham Scrivener his said mortgage-money or sum of 600*l.*, G. Pound had then lately offered for sale by public auction the said leasehold premises in divers lots, but that the greater part thereof had been bought in for want of adequate prices for the same; that Abraham Scrivener being then far advanced in life, and much debilitated in his constitution, and very desirous of having his mortgage-money paid, and of adjusting his several liabilities on account of the bankrupt, and of satisfying a further debt due from the bankrupt to the defendant, had applied to G. Pound to pay to him his mortgage-money or sum of 600*l.*, but that G. Pound, not being provided with money to pay the same, had prevailed upon the defendant to release the said A. Scrivener and the bankrupt from all claims and demands whatsoever, and to take his security for the due performance of all such liabilities and payments as aforesaid; that such arrangement had been approved of by the said A. Scrivener; that as some loss might be sustained by G. Pound on account of the reduced value of the leasehold premises, the said A. Scrivener had consented to receive the further sum of 240*l.* in full and complete satisfaction of his said mortgage debt or sum of 600*l.*; that G. Pound had secured, to the satisfaction of the defendant, the money so due and owing to him from A. Scrivener and the bankrupt; that, in consequence thereof the defendant had, by deed poll under his hand and seal, bearing even date with the indenture now in recital, released A. Scrivener from all liabilities in respect of the bankrupt, and from all other claims and demands whatsoever; and that the defendant had, in like manner released the bankrupt from the said debt.—It was witnessed that, in pursuance of the said agreement, and for the considerations therein mentioned, and in consideration of the sum of 240*l.* in hand paid by Pound to A. Scrivener (and which A. Scrivener did thereby admit and acknowledge to be in full payment and satisfaction of his said mortgage debt or sum of 600*l.*, and thereof and from the same did by the said indenture forever acquit, release, and discharge Pound, his executors, administrators, and assigns, and every of them), the said A. Scrivener, did thereby grant, bargain, sell, assign, surrender, and yield up unto Pound the premises comprised in the indenture of mortgage, and also the indenture of lease and mortgage, and all other deeds and documents whatsoever, of or relating to the mortgaged premises; to have and to hold the same unto Pound for all the remainder of the said mortgage term, so that the said term might merge and fall into the reversionary and other estates and term of Pound in the said premises, and form part thereof.

The deed of 5th August, 1811, was approved of by the defendant on behalf of Pound, and was executed in the defendant's office, and in his presence. On the 16th January, 1832, the commission of bankrupt was superseded, in pursuance of an order made by the Vice-Chancellor, upon the petition of the said Augustus White. On the 14th March, 1832, a fiat in bankruptcy was awarded against Scrivener, upon the petition of T. F. Sibley, under which he was duly declared a bankrupt upon an act of bankruptcy committed on the 21st December, 1829. The plaintiffs were afterwards duly appointed assignees under such fiat, and the estate and effects of the bankrupt became and were thereby vested in the plaintiffs pursuant to the statutes of bankruptcy. At the trial the plaintiffs put in evidence the following documents, viz. the first commission, bearing date the 30th December, 1829; the petition to supersede the same, dated 26th

March, 1830; the supersedeas dated the 16th January, 1832; the fiat dated 14th March, 1832, and inrolled the 6th March, 1833; the appointment of the plaintiff Clark as official assignee, dated the 24th March, 1832; and the appointment of the plaintiff White as assignee, dated the 10th April, 1832. Stevens was called, who stated (among other things) that he was indebted to the defendant between 300*l.* and 400*l.* in respect of the first commission and subsequent proceedings: that the bankrupt, prior to his bankruptcy, told him that the lease and title deeds were deposited with the defendant, to whom he owed between 200*l.* and 300*l.*; that the defendant had a lien thereon; and that he, Stevens had paid the 3*l.* 14*s.* and 300*l.* to the defendant, and allowed him to receive the other sums. Stevens also identified an account which had been signed, sworn to, and exhibited by him as assignee, in November, 1830, before the commissioners under the first commission.

The defendant, after the plaintiffs' case was closed, put in that account, which however, the plaintiffs objected to as not admissible in evidence against them; but the learned judge received the account, subject to the question of admissibility, which was reserved for the opinion of the court. The plaintiffs then put in and read copies of two examinations of the defendant before the commissioners under the second fiat, dated respectively the 28th April and the 17th May, 1832.

The questions for the opinion of the court were—First, whether the above mentioned account was admissible in evidence on behalf of the defendant—and Secondly, whether, upon the state of facts as they would stand after the decision of the first question, the plaintiffs were entitled to recover any, and if any, which of the said sums of 3*l.* 14*s.*, 300*l.*, 10*l.*, 6*l.* 10*s.* and 11*l.* 18*s.* If the court should be of opinion that the plaintiffs were entitled to recover, a verdict was to be entered for such amount as the court should direct. If the court should be of a contrary opinion, a nonsuit was to be entered.

James Manning, for the plaintiffs. At the time of the receipt of the several sums of money sought to be recovered in this action, the defendant was aware that the title of Stevens, from whom or under whose authority he received those sums, was impeached; the commission issued against Scrivener upon the petition of Stevens being invalid, for want of a good petitioning creditor's debt: and, that commission being superseded, and a new and valid one issued, the assignees appointed under this second commission are clearly entitled to recover in an action for money had and received. *Stead v. Thornton*, 3 B. & Ad. 357, is an authority to shew that there is sufficient privity between these parties to enable the plaintiffs to maintain this action. There, the assignee of a bankrupt, being insane, was removed, and a new one appointed; and it was held that the new assignee was entitled to maintain an action for money had and received against one who had received money in the character of agent to the late assignee. Lord Tenterden there said: "We are not called upon to decide how the case would be if the defendant had received this money as the duly constituted agent of the former assignee. He could not be so, that assignee having been incompetent to appoint any agent. He is, therefore, in the situation of any other person who has received and has in his hands a part of the bankrupt's estate, and is undoubtedly liable to those who represent that estate." Probably the plaintiffs would not have been entitled to sue either the defendant or Stevens in trover for deeds deposited with the latter: but, the moment they were disposed of, the proceeds became money had and received to the use of the assignees of the depositor—*Walker v. Laing*, 7 Taunt. 568, 1 Moore, 281. No lien therefore can be set up as against the 300*l.* and the 3*l.* 14*s.*; and it is perfectly clear, that, if any lien ever existed, it could not extend to the 10*l.* received by the defendant in respect of the party-wall, or to the 6*l.* 10*s.* or 11*l.* 18*s.* received for rent.

Busby, for the defendant. No fraud can be presumed in this case; none is alleged: but the mere question is, whether there is such a privity between the

parties as will enable the plaintiff to maintain this action. The defendant was Stevens's agent: and the action, therefore, if maintainable at all, should have been brought against Stevens. "If the receipt of this money," says Parke, J., in *Stead v. Thornton*, "had taken place under such circumstances that the former assignee could be charged with it, as he might if he had received it by his agent or clerk, I should have thought this action not maintainable. But here the receipt was that of the defendant alone, who stood in the situation of a mere stranger, and held the money subject to the claim of the assignees who might be afterwards appointed." In *Stephens v. Badcock*, 8 B. & Ad. 354, J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues for the client (which he was authorised to do), and gave a receipt signed "B., for Mr. J." When he left home, J. was in bad circumstances, and he never returned; but it did not appear that his intention so to act was known at the time of the payment to B. B. afterwards refused to pay over the money to the client: and on a *sumpsit* brought against him for money had and received—the Court held that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it; the master on the other hand, being answerable to the client for the sum received by his clerk; and there was no privity of contract between the plaintiff and defendant. And in *Baron v. Husband*, 4 B. & Ad. 611, 1 N. & M. 728, the solicitor of the assignees of a bankrupt received from them a sum of money, to be applied in payment of the costs of the petitioning creditor up to the time of the choice of assignees: the solicitor offered to pay the money on condition that the bill should undergo a subsequent taxation, but to that the petitioning creditor declined to assent: it was held that no promise arose upon this offer, the terms not being acceded to; and that, without the promise, there was no privity of contract to support an action for money had and received. Lord Denman, in delivering the judgment of the Court, says: "The defendant received the money as the agent of the assignees, and not of the plaintiff; he held it subject to their control and directions, and would continue to be accountable to them until he entered into some binding engagement with the plaintiff to hold it for his use. As soon as that engagement was entered into, and not until then, he would hold the money for the plaintiff's use. This is the doctrine laid down in *Williams v. Everett*, 14 East, 582, *Wharton v. Walker*, 8 Mer. 652, *Scott v. Porcher*, 4 B. & C. 168, 6 D. & R. 288, *Wedlake v. Hurley*, 1 C. & J. 88, and has been acted upon in many other cases. In this case there has been no such engagement. The defendant never promised to pay the plaintiff, except upon a condition to which he would not assent, viz. that his bill should undergo a subsequent taxation. Supposing the money here to have been received by the defendant as the agent of Stevens, it is clear from these authorities, that the present action is not maintainable. On the other hand, the action is equally incapable of being sustained if the defendant be taken to have received the money as a creditor of the estate; Stevens being, at the several times of the payment and receipt of the money, assignee. [TINDAL, C. J. Stevens, though assignee *de facto*, was not legally assignee; there was no valid commission—no petitioning creditor's debt.] In *Gould v. Shoyer*, 6 Bing. 738, 4 M. & P. 635, it was held that the assignees of a bankrupt are not bound by a sale under a former superseded commission; but may recover back the property, although the purchase were strictly *bona fide*. But that was an action of *trover* for a lease; and there is a wide distinction between a thing subsisting in *specie*, and capable of being followed and identified, and money which cannot be ear-marked^(a)—*Miller v. Race*, 1 Burr. 452. In

(a) "'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said 'that the reason why money cannot be followed is, because it has no ear-mark.' But this

Rogers v. Kelly, 2 Camp. 123, where the plaintiff paid a sum of money into a banker's for a specific purpose, and the banker's clerk by mistake paid it to the defendant, who had no right to it: it was held that the plaintiff could not maintain an action against the defendant to recover it back. Lord Ellenborough said: "There is no privity between the parties to this suit. The plaintiff's claim is on the bankers, and they must seek their remedy against the defendant the best way they can. The plaintiff's money must still be considered as in the hands of the bankers. His account with them is the same as if this mistake had not been committed." The inconvenience of holding that money received under circumstances like the present may be recovered back, will be very great; it would extend to this, that, where a dividend has been paid under a commission that is afterwards superseded, each creditor who has received a payment in respect of his debt will be liable to an action at the suit of the assignees appointed under a second commission to recover back the amount. Here, the defendant clearly had a lien upon the deeds deposited with him—*Stevenson v. Blakelock*, 1 M. & S. 535: and as equitable mortgagee he was entitled to receive the 10*l.* for the party-wall, and 6*l.* 10*s.* and 11*l.* 18*s.* for rent—*Sumpter v. Cooper*, 2 B. & Ad. 223. There, a debtor deposited the title deeds of houses with his creditor as a security, and afterwards executed an assignment of his interest in the houses to the same party; but this instrument was never registered, pursuant to the statute 7 Ann. c. 20. The debtor afterwards became bankrupt, and the assignment of his effects under the commission was duly registered. The assignees brought an action against the creditor for the rents of the houses which he had received from the time of the assignment made to him by the bankrupt: it was held, that, although this instrument was void, the rents which the defendant, being equitable mortgagee, had received, could not be taken out of his hands by virtue of the registered assignment under the commission.

Manning, in reply. Admitting, for the sake of argument, that the defendant had a lien upon the deeds, by his concurrence in the sale that lien was destroyed, and consequently the plaintiffs are entitled to recover. The sale was tortious; but the plaintiffs may waive the tort, and sue for the proceeds; *Marsh v. Keating*, 1 New Cases, 198, 1 Scott, 5. There, one F., a partner in the plaintiffs' house, transferred certain stock out of the defendant's name in the books of the Bank of England, under a forged power of attorney, and without any authority from her, and caused the produce to be mixed with the money of the firm. F. having been convicted of another forgery committed under similar circumstances, and executed, it was held that the defendant might recover the amount in an action against the surviving partners for money had and received to her use. In that case the party might have had a remedy against the bank. Where creditors receive dividends under a commission that is afterwards superseded, bona fide, and without notice of its invalidity, they cannot be called upon to refund; but they may where they have received the money (as the defendant in this case did) with full knowledge of all the circumstances.

Our. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—"In this case, the plaintiffs, who are assignees of the bankrupt Scrivener, sue for money had and received by the defendant since the bankruptcy to their use as assignees. All the money which has come to the hands of the defendant consisted of payments made to him in the course of the year 1830, and, consequently, subsequent to the act of bankruptcy, which took place on the 21st December, 1829: such payments, however, were made to the defendant under circumstances which fall under two distinct heads of consideration.

is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency." Per Lord Mansfield, in *Miller v. Race*, 1 Burr. 457.

No question can arise in this case on the ground that the fiat of bankruptcy under which the present plaintiffs are assignees was not awarded until the 14th March, 1832; because the former commission, which was superseded, was in force before and at the time when the several payments in question were made; and such payments must consequently be taken to have been made after notice of an act of bankruptcy, according to the provision of the 83d section of the late bankrupt act, and to be protected by the provisions of that statute. The facts, indeed, of the present case can leave no doubt that there was not only constructive, but actual notice of the act of bankruptcy on which the present fiat was awarded; the former commission having been taken out by the defendant himself as solicitor to Stevens the petitioning creditor, and the defendant having been afterwards appointed and having acted as solicitor to the first commission, when Stevens had been chosen assignee.

Now, the ground upon which the defendant disputes the plaintiffs' right to recover in the present action is shortly this, that all the payments were made to the defendant by Stevens, the assignee under the first commission, or with his concurrence, while such first commission was in full force; and that they were made by him in satisfaction of a debt due from the bankrupt to the defendant, for which the defendant held a lease and title deeds of the bankrupt, as a pledge or security: and it is argued that there can be no privity of contract between the present plaintiffs, the assignees under the second fiat, and the defendant, a creditor under the first commission, but that the only action maintainable by the present assignees for the recovery of money of the bankrupt which came to Stevens's hands, must be an action against Stevens himself, not against the separate creditors among whom he divided it. And the case of *Stead v. Thornton*, 3 B. & Ad. 357, n., is relied upon as affording an inference that such was the opinion of the Court of King's Bench. It was also further objected, that, as the money was first received by Stevens, and then handed over by him to the defendant, this money cannot be followed into the hands of the defendant by any mark or trace, but must be considered for the purpose of being recovered as still remaining in the hands of Stevens. We think, however, the facts stated in this case will enable us to come to a decision upon it without giving any opinion upon the abstract question which has been argued before us. For, as to two of the sums in dispute, namely, the sum of 300*l.*, and the sum of 3*l.* 14*s.*, it appears that they were part of the proceeds arising from the sale of a lease belonging to the bankrupt. Now, that lease, at the time of such sale, was in the possession of the defendant as a pledge or security for the payment of his demand against the bankrupt; being either in his possession as solicitor, under a claim upon it for his lien which the law has given him, or having been expressly deposited with him as a security for his demand, according to the evidence of Stevens. In either case, the right and power of the defendant over the lease was precisely the same; he had the right to retain the lease in his possession until his demand was paid, and so far, by means of the possession of the lease, to enforce payment of his demand: but he had that right only; he had no right to sell the lease and to pay himself his demand out of the proceeds. So long as the lease remained in his possession, neither the bankrupt nor his assignee could retake it, without either payment of his demand, or a tender and refusal, which is equivalent to payment. But, if, instead of keeping the thing pledged, he sells it, or enables any other person to sell it, by concurring in the sale, he is guilty of a direct conversion, and makes himself liable for the value of the lease in an action of trover. Such a case is the same in principle as that put by Littleton, s. 71—"If I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending." On which Lord Coke adds this commentary: "The reason is, that, when the bailee, having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may bring an action of trespass on the case

for the conversion, at his election." Or again, the case becomes that of the working of a distress, or the sale of a distress before the statute of William and Mary gave a power of sale, which was always held a conversion; *Bagshaw v. Goward*, Cro. Jac. 148; *Gomersall v. Medgate*, Yelv. 194.

In the present case, therefore, upon the sale of the lease by the defendant, the plaintiffs might have brought an action of trover against the defendant: and it makes no difference, as it appears to us, that Stevens concurred in or directed the sale; for, upon the events that have since happened, Stevens must be considered to have been a perfect stranger, acting without any authority in law, and liable to have been joined in the action with the present defendant. If, then, the assignees might have maintained an action of trover, they may, according to a well known class of cases, waive the tort and bring an action for money had and received, such waiver being a benefit to the defendant, as it limits the damages to the amount of the proceeds of the tortious sale. This disposes of the two first sums mentioned in the case, which were received as part of the proceeds of the sale of the lease.

As to the remaining sums, two of which appear to be rent for the bankrupt's houses, which were received by the hands of the defendant; and the third, a sum of money due to the bankrupt upon an agreement relating to a party-wall, which was also received by the defendant from the party who owed it to the bankrupt: those sums appear to be strictly and liberally money received by the defendant to the use of the assignees after the act of bankruptcy committed and notice of such act. And we can see no alteration in the law of the case because Stevens assented to such payments being made; for, Stevens was not assignee de jure, but a mere stranger in interest, without any authority whatever to give his consent. Upon the whole, therefore, we think judgment must be given for the plaintiffs for the several sums mentioned in the case.

Judgment for the plaintiffs.

PONTET v. The BASINGSTOKE CANAL COMPANY.—p. 543.

By a canal act, it was provided that the directors should keep books, and that the proprietors, land-owners, and others interested in the navigation, should be at liberty to inspect the company's books:—Held, that a bond creditor was entitled to such inspection, to enable him to meet the defence intended to be set up by the company in an action upon the bond.

THIS was an action brought to recover arrears (since 1824) of interest due upon certain bonds or deeds-poll given by the company in the year 1793, 1795, and 1797, to the plaintiff's testator, conditioned for the payment of money borrowed by them under the authority of the 18 Geo. 3, c. lxxv. The defendants pleaded that the deeds-poll declared on were made at a meeting of proprietors not duly convened; that the assets of the company were insufficient to pay the plaintiff without giving him a priority not warranted by the act of parliament by which they were incorporated; and also, as to a portion of the arrears, the statute of limitations.

Barstow, for the plaintiff, obtained a rule calling upon the defendants to show cause why they should not permit the plaintiff to inspect the books of the company, upon an affidavit that such inspection was necessary to enable him to proceed safely to trial. He referred to a clause of the act which requires the company to keep books, and provides that proprietors, land-owners, and others interested in the said navigation, should be at liberty to have recourse to and inspect the same, and take copies thereof, at their own expense.

Wilde, Serjeant, and *Erle*, showed cause.—The plaintiff has no right to the inspection prayed. He is not a shareholder or proprietor, and therefore not a party interested in the navigation. *Ratcliffe v. Bleasby*, 10 Moore, 523, 3 Bing.

148, may be taken to be a leading case upon this subject: it underwent very great consideration, and the court held "that they would not, at the instance of a plaintiff, compel a defendant to produce an instrument which was in his hands, and to which the plaintiff was neither an instrumentary party nor a party in interest." In *Rowe v. Howden*, 1 M. & P. 834, 4 Bing. 539, in an action by the owners of a ship against a broker employed by them to procure a cargo, the court refused to order the latter to allow the former to inspect or take a copy of a letter received by him from a correspondent abroad, as far as it related to the plaintiffs's ships, although he acted as such broker at the time. So, in *Rundle v. Beaumont*, 1 M. & P. 896, 4 Bing. 587, in an action for freight and demurrage, by ship-owners against the charter, the court refused to grant the latter an inspection of the log-book kept during the voyage. In the *Imperial Gas Company v. Clarke*, 4 M. & P. 727, 7 Bing. 95, the defendants were sued as directors of an incorporated company, for mismanagement of the company's affairs: and the court refused to allow them to inspect the books kept by the company during the period of their directorship—Tindal, C. J., saying: "The general rule is, that one side shall not be permitted to get at the evidence of the other side. There are, however, exceptions to that rule. In the case of corporations, parties have been allowed to inspect the *corporate books* and by-laws, *on the ground that they have an interest in them.*" In *Stevens v. The Mayor of Berwick-upon-Tweed*, 4 Dowl. 277, it was held that the circumstance of an attorney being a burgess does not entitle him, in an action against the corporation for costs, to inspect the corporate books in order to prove his retainer, his claim having nothing to do with the affairs of the corporation. Littledale, J., says: "Such applications as the present are granted only in those cases where the opposite party stands in the situation of a trustee for both parties. That is not the case here. It is true that the plaintiff has a right to inspect the books where his rights as a burgess are affected: but here his rights as a burgess do not come in question; and the mere accidental circumstance of his being a burgess cannot give him a right to inspect the corporation books for the purpose of sustaining his private claims." Upon these authorities it is clear that this case does not fall within the general rule by which the practice on applications of this sort is regulated: and the provision in the act of parliament does not extend to creditors.

Bartow, in support of his rule, insisted that the books kept by the company in obedience to the directions of the act, were held by the company as trustees for their bond-creditors, as well as proprietors, the former being as much "interested in the navigation" as the latter.

TINDAL, C. J. The only question here is, as it seems to me, whether the inspection prayed is to be granted by us, or whether the plaintiff is to be driven to a court of equity. The rule seems to be, that, where the court of equity would interfere as matter of course, it is usual for the court of law to grant an inspection. It appears to me, however, that this case falls within the equitable construction of the act of parliament. The creditors of the navigation are clearly to a great extent interested in it. Without, therefore, in any degree extending the practice on this subject, I think we may on that ground make the rule absolute.

The rest of the Court concurring—

Rule absolute.

TURNER and Others v. W. IZON and E. KETLAND.—p. 596.

A cause was referred, and the arbitrator stated the facts specially on his award for the opinion of the Court. On the matter coming on for argument, the plaintiffs being advised that one of the defendants was improperly joined in the action—The Court permitted them to discontinue, on payment of the costs of the cause (no provision being made for the costs of the reference and award) and of the motion, and undertaking not

to bring any joint action against the two defendants, nor any separate action against the defendant so improperly joined.

THIS was an action for goods sold and delivered. The cause was referred, and the matters specially stated by the arbitrator on his award, in order to take the opinion of the Court thereon. On the case coming on for argument, the plaintiffs were advised that the defendant Ketland had been improperly joined in the action; and—

Wille, Serjeant, on a former day, obtained a rule calling upon the defendants to show cause why the plaintiffs should not be at liberty to discontinue the action upon payment to the defendants of their costs of the action and of and occasioned by the application—the plaintiffs undertaking not to bring any joint action against the defendants in this cause. He referred to *Roberts v. Marriett*, 2 Wm^s Saund. 73, where the Court after demurrer joined gave the plaintiff leave to discontinue on payment of costs, and to the authorities collected in note (1) to that case; (a) and also to *Tidd's Practice*, 9th edit. p. 679, where it is said: "The rule to discontinue may be had as a matter of course, from the clerk of the rules in the King's Bench, at any time before trial or inquiry (*Price v. Parker*, 1 Salk. 178:) and leave has been given to discontinue after argument and before judgment on demurrer (*Stephens v. Cooper*, 3 Lev. 440; *Butler v. Malissy*, 1 Stra. 76, 116.) And, even after a *special verdict*, the plaintiff may discontinue, by leave of the Court, because that is not complete and final; but in this case it is a great favour (*Price v. Parker*;) and it is never granted after a *general verdict*, or writ of inquiry executed and returned (*Stephens v. Etherick*, Carth. 86, 1 Show. 63,) nor after a peremptory rule for judgment on demurrer (*Turner v. Turner*, 1 Salk. 179.) A discontinuance is not allowed in the Common Pleas after a *special verdict*, in order to adduce fresh proof in contradiction to the verdict (*Roe v. Gray*, 2 W. Bl. 815.) And where the plaintiff moved to discontinue, upon payment of costs, after judgment given for him on demurrer, but not entered of record, and a writ of error brought, and bail put in thereupon, the Court refused to make a rule to discontinue without payment of costs on the writ of error.—*Pym v. Warren*, Barnes, 169."

Goulburn, Serjeant, showed cause. The Court have no power to interfere: or, if they have, the circumstances of this case are not such as to warrant them in so doing. [TINDAL, C. J. After a special verdict we clearly have authority to grant leave to discontinue: why have we not, therefore, after an award made setting out the facts specially?] Here, the verdict is final: the plaintiffs electing to retire from the argument, the defendants were entitled to judgment. This case, therefore, goes much further than that of a special verdict: and it is perfectly well understood, that a discontinuance is never permitted after a general verdict—*Price v. Parker*, *Stephens v. Etherick*; and the reason assigned is that it would enable the plaintiff to have as many new trials as he

(a) "After demurrer argued and allowed, the Court has permitted a discontinuance, on payment of costs, where there was a mistake in the plaintiff in pleading—2 Lev. 124, *Rex v. Burnis*; *Ibid.* 209, *But v. Withers*; 1 Lev. 191, *Jones v. Pope*, S. C. 1 Saund. 39, 1 Sid. 306; 1 Lev. 192, *Bennet v. Filkins*, S. C. 1 Saund. 23; 1 Lev. 298, *Martin v. Delboe*; 3 Lev. 440, *Stephens v. Cooper*; 1 Stra. 76, *Butler v. Malissy*; *Ibid.* 116, *Henderson v. Williamson*: but now the Court usually gives the party leave to amend upon payment of costs. And, after *special verdict*, the plaintiff may discontinue by leave of the Court, because it is not complete and final: this, however, is a matter of great favour—1 Salk. 178, *Price v. Parker*. And the Court will not grant leave in a hard action—*Cases temp. Hardw.* 200, 201, *Boucher v. Lawson*. Nor will they do it to give the plaintiff an opportunity of adducing fresh proof to contradict the verdict—2 Bl. Rep. 815, *Roe v. Gray*. And leave to discontinue is never granted after a *general verdict*—1 Lev. 48, *Anon.*; 1 Salk. 178, *Price v. Parker*; or after a writ of inquiry executed and returned—*Carth.* 86, *Stephens v. Etherick*, S. C. 1 Show. 63. Or after a peremptory rule for judgment on demurrer, 1 Salk. 179, *Turner v. Turner*."

pleased. In *Roe d. Gray v. Gray*, the Court refused to allow the lessor of the plaintiff to discontinue after a *special verdict*.

Wilde, Serjeant, in support of his rule. The cases cited only tend to show that the permitting a discontinuance is matter of favour: and in every instance in which a plaintiff has been refused the indulgence, he wished to bring *the same action* again. Here, however, the plaintiffs only seek to be allowed to bring another action against one only of the defendants, to try a totally different question.

TINDAL, C. J. If by proceeding to judgment the defendants would be entitled to a different measure of costs, there might be good reason for our withholding the leave prayed by this motion. But, on looking to the reference and award, it will be found that the costs of the reference and award are not provided for. The simple question, therefore, is whether or not a second action may be brought. As at present advised, I see no reason why it should not. If any difficulty presents itself in the way of the plaintiffs, I cannot think we are doing wrong in removing it. The plaintiffs must, however, also undertake not to bring another action against the defendant Ketland alone.

The rest of the Court concurring—

Rule absolute accordingly.(a)

MEMORANDUM.

The Judges who sat in the Court of Common Pleas during the foregoing term were—

Lord Chief Justice TINDAL.

Mr. Justice PARK.

Mr. Justice GASELEE.

and

Mr. Justice BOSANQUET.

(a) See *Sweeting v. Halse*, 9 B. & C. 369, 4 M. & R. 544, where after a *general verdict* for the defendant, and a *rule absolute for a new trial*, the plaintiff had a rule to discontinue. There, although the question whether upon such discontinuance the defendant was entitled to the costs of the trial (which it was held he was) was argued at length, the objection to a discontinuance after a *general verdict* was not mooted.

And see *Ames v. Ragg*, 2 Dowl. 35—*Goodenough v. Beetles*, 2 C. M. & R. 240.

"To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall obtain an undertaking on the part of the plaintiff to pay the costs, and a consent that, if they are not paid within four days after taxation, defendant shall be at liberty to sign a nonpros." Reg. 108, Hilary term, 4 Will. 4.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Hilary Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.—1836.

ABBOTT and Another, Assignees of FLUDE, a Bankrupt, v. BURBAGE and Others.—656.

F. & S., traders in partnership, being in insolvent circumstances, entered into a deed of composition with their joint creditors whereby they engaged to pay them 4s. 6d. in the pound upon the amount of their respective debts, by three instalments, F. & S. retaining possession of the stock in trade, and the creditors engaging to release them on payment of the last instalment. By the same deed F. assigned to the trustees a policy of assurance upon his life (which constituted his entire separate property), in trust to pay out of the proceeds the balance of the debts due to the joint creditors, and the surplus if any to his, F.'s, personal representatives. Two years after the date of the assignment a fiat issued against F. In an action brought by the assignees under the fiat against the trustees named in the deed, to recover the policy, S. who was called as a witness, stated that at the time of the execution of the deed his partner and himself entertained hopes of retrieving themselves:—Held, that the assignment of the policy under these circumstances did not constitute an act of bankruptcy:—Held, also, that it was properly left to the jury to say whether the deed was honestly and bona fide entered into for the purpose of enabling F. & S. to continue to carry on their trade, or with intent to defeat or delay any particular class of creditors; or whether the deed was voluntary and a fraudulent preference given by F. to the joint creditors of the firm.

THIS was an action of trover brought by the plaintiffs as assignees of one Flude, a bankrupt, to recover from the defendants the value of a policy of insurance effected on the life of Flude for 3000*l.* with the Atlas Insurance Company. The cause was tried before Tindal, C. J., at the sittings in London after the last term. The facts were as follows:—In the year 1831, and for some years prior to that date, Messrs. Flude and Simpson carried on in partnership the trade of wine merchants in Mincing Lane, London. In December in that year, finding themselves to be in insolvent circumstances, they called a meeting of their joint creditors, and, communicating to them their embarrassed state, proposed that the separate property of Flude should be assigned to trustees in trust for the creditors of the firm. A deed of assignment was accordingly entered into, under which it was stipulated that Flude and Simpson should be permitted to carry on the business, retain the stock in trade, and pay 4s. 6d. in the pound to the creditors (meaning the joint creditors of the firm,) by three instalments, at three, six, and nine months' date; the creditors

agreeing to release them on payment of the composition. By this deed Flude assigned to the trustees (the defendants) the policy in question, which constituted the whole of his separate estate, in trust for the joint creditors, that they might receive out of the produce thereof upon the death of Flude the residue of their respective debts, the surplus (if any) to be handed over to his personal representatives. Flude at this time owed separate debts to a considerable amount.

Flude and Simpson continued to carry on their business for some time, and paid the first and second instalments, but failed in payment of the third. A commission of bankrupt issued against Flude towards the close of 1883. At the trial the question was, whether or not the execution of the above deed constituted an act of bankruptcy by Flude, as being an assignment of all his separate property for the benefit of the joint creditors of the firm, in fraud and delay of Flude's separate creditors. Simpson, who was called as a witness, stated, that, at the time the deed was executed, his partner and himself had hopes of retrieving themselves.

His lordship left it to the jury to say whether the deed was honestly and bona fide entered into for the purpose of enabling Flude and Simpson to continue to carry on their trade, or with intent to defeat or delay any particular class of creditors; or whether the deed was voluntary and a fraudulent preference given by Flude to the joint creditors of the firm. The jury returned a verdict for the defendant.

F. Kelly now moved for a new trial, on the ground of misdirection. It was not enough in a case like this to leave it dryly to the jury to say whether the deed was honest or fraudulent, which they would understand to mean merely honest or fraudulent in point of fact: there attention should have been called to the circumstances of the parties at the time of execution. If the facts had appeared upon a special case, they would clearly be sufficient to establish an act of bankruptcy. This was within the meaning of the 6 Geo. 4, c. 16, s. 8, an assignment with intent to defraud certain creditors. [TINDAL, C. J. Is not the intent a question for the jury?] Undoubtedly it is: but the jury ought in such a case to be informed that the effect of the transaction was such that the law would infer the intent to be fraudulent. When a man in a state of declared insolvency assigns for the exclusive benefit of one class of his creditors the only property of any value that he possesses, his intent necessarily must be to defraud or defeat and delay the claims of his other creditors. Here the effect of the instrument was to sweep away the whole of Flude's separate property for the sole and exclusive benefit of the creditors of the firm. In *Morgan v. Horseman*, 3 Taunt. 241, 1 Rose, 884, it was held that a deed whereby a debtor, being pressed, conveyed estates in trust to sell and to pay the pressing creditor, with a further trust to pay his debts to certain relatives in order to give them an undue preference, in contemplation of bankruptcy, is an act of bankruptcy. *Linton v. Bartlett*, 1 Wils. 47, is to the same effect. [BOSANQUET, J. In both those cases the assignor contemplated bankruptcy.] This assignment being made whilst the parties are in a state of such absolute insolvency as appeared in this case, it must be taken to have been made in contemplation of bankruptcy. It was admitted that bankruptcy was inevitable unless the creditors assented to the proposed arrangement. At all events the state of the parties should have been submitted to the jury as one ingredient to aid them in coming to a conclusion. Where in contemplation of law an assignment is fraudulent and voluntary, in order to its constituting an act of bankruptcy, it is not requisite that bankruptcy should be certain; it is enough if it be imminently probable.

TINDAL, C. J. The grounds of objection taken to the mode in which this case was summoned up to the jury are two—first that the attention of the jury was not sufficiently called to the fact that Flude & Simpson were in a state of insolvency at the time of the execution of the deed in question—secondly, that

they were not told, that, to constitute the transaction a fraudulent preference in contemplation of bankruptcy, it was enough that bankruptcy was in a high degree probable: that is, that I did not sufficiently place before the jury the fact of the probability of the bankruptcy of Flude & Simpson at the time they executed the deed. The supposed act of bankruptcy by Flude was the execution of that deed in December, 1831. It is said, in the first place, that that assignment was a fraudulent grant made with a view to defeat or delay creditors; and, secondly, that it constituted a fraudulent and voluntary preference given by Flude to the joint creditors, with intent to defeat the claims of his separate creditors. The first description of act of bankruptcy is taken from the statute itself (s. 3), which enacts "that, if any trader shall make or cause to be made any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, with intent to defeat or delay his creditors, such trader shall be deemed thereby to have committed an act of bankruptcy." To constitute the execution of a grant or conveyance an act of bankruptcy within that clause, two circumstances must concur—the conveyance must be fraudulent, and it must be with intent to defeat or delay creditors. Looking at this instrument, it appears to me to be very unlike any grant or conveyance to which the attention of the courts has ever been called with reference to this question. So far from being a grant or conveyance made with intent to defeat or delay creditors, it is an agreement between two traders and their creditors, under which the former are to retain possession of the stock in trade for the purpose of enabling them to carry on the concern, and to be allowed a given time for the payment of a composition of 4s. 6d. in the pound on the debts of their joint creditors: and at the end of the deed is a clause whereby a policy of insurance upon the life of one of the partners is assigned to the trustees in trust to pay each creditor the balance of his demand, the surplus, if any, to go to the personal representatives of the life. The policy was at this time in the hands of Messrs. Hankey, the bankers of Flude and Simpson. What was the effect of this assignment at the time of its execution? The joint creditors, who were parties to it, could take no proceedings either against the person or the property of Flude until the expiration of the nine months given for payment of the last instalment: but the separate creditors of Flude were not prevented from suing immediately. The deed passed no property of which the creditors (whether joint or separate) could at the time avail themselves; for, the policy of assurance would not be beneficial until after Flude's death; and therefore it cannot be held to be a grant whereby any class of creditors could be defeated or delayed. (See *Grogan v. Cook*, 2 B. & P. 230.) The fair import of the deed was to improve the condition of the separate creditors by delaying the remedy of the joint creditors. Simpson, who was called as a witness, stated that his partner and himself thought that when they got possession of their stock in trade under the provisions of the deed, and were thus relieved from pressure, they might go on and eventually retrieve themselves. It was therefore purely a question for the jury; and there could be little doubt that at the time the deed was executed the parties had no intent to defeat or delay their creditors. With respect to the other question whether this deed constituted a fraudulent preference in contemplation of bankruptcy—it is to be observed that the fiat did not issue until two years after the execution of the deed. The question was whether the parties at the time *contemplated bankruptcy* as a probable event. The fact of insolvency is not enough to warrant the inference that bankruptcy was contemplated; for, these questions never can arise except in cases of insolvency, and insolvency does not necessarily terminate in bankruptcy. The evidence of Simpson as to this fact would naturally weigh very much with the jury. Upon the whole I am not dissatisfied with the verdict, and am not disposed to assent to its being disturbed.

PARK, J. The main question was whether or not the assignment was fraudulent and made with intent to defeat or delay creditors. It was a question for

the jury to decide upon the whole facts before them. Whether the deed was fraudulent or not was a question for the judge: but the question of intention must be submitted to the jury. It is objected that the fact of Flude and Simpson's insolvency was not placed with sufficient prominence before the jury. If it had been put to them in the way suggested, and the jury had found for the plaintiffs, doubtless we should have been entertained with a motion on the part of the defendants. Simpson stated that his partner and himself had hopes of continuing their trade; and the fact of the stock being left in their hands shows that this was the opinion of all the parties. The real question in cases of this sort is, whether bankruptcy is in the contemplation of the party. In all cases of insolvency, bankruptcy may be apprehended: but that is not enough to avoid the transfer or conveyance. It seems to me that there is no pretence for questioning the summing up in this case.

GASLEE, J. I see no ground for disturbing this verdict. The questions were very properly left to the jury; and the lord chief justice has expressed himself satisfied with the conclusion they have drawn from the facts.

BOSANQUET, J. I am of the same opinion. The argument we have heard to-day proceeds upon the supposition that a grant or conveyance by one who is in insolvent circumstances of a part of his property, is necessarily fraudulent, because it tends to delay other creditors, notwithstanding bankruptcy does not ensue until two years afterwards. It appears here, that, so far from contemplating bankruptcy as either inevitable or even very probable, the parties were, with the assistance of their joint creditors, struggling to avoid it.

Rule refused.(a)

CORRY v. WHARTON.—p. 664.

Upon a reference to the prothonotary to inquire into the circumstances attending the settlement of an action, the prothonotary reported that the settlement was fraudulent as against the plaintiff, stating some of the facts that led him to that conclusion. On motion to confirm the report:—Held, that it was not competent to the counsel on the other side to impeach the facts found by the prothonotary, though they were at liberty to dispute his deductions therefrom.

Semble, that such a report should be in writing.

THIS was an action brought to recover a sum of 1300*l.* for arrears of an annuity. The action was commenced on the part of the plaintiff by one A. an attorney of respectability, and proceeded to judgment. B. was afterwards substituted for A. as the plaintiff's attorney. B., with the assistance of a pretended friend of the plaintiff, and without consulting the plaintiff, or communicating with his former attorney, A., entered into a compromise with the defendant, the result of which was that the judgment was set aside, B. receiving from the defendant 120*l.* and the friend 60*l.* Upon the application of the plaintiff, it was ultimately (with the consent of all parties) referred to one of the prothonotaries to inquire into the circumstances under which this compromise was effected, and to report to the Court.

The prothonotary having *verbally* (b) reported that the compromise was fraudulent and made without the knowledge of the plaintiff, discharging the defendant from all knowledge of or participation in the fraud, and stating three several facts as having materially influenced his judgment—

Adams, Serjeant, moved that the prothonotary's report might be confirmed.

(a) See *Morgan v. Brundett*, 5 B. & Ad. 296, 2 N. & M. 280; *Atkinson v. Brindall*, ante, 642, and *Gibson v. Boutts*, 3 Scott, Easter term, 6 Will. 4.

(b) The Court seemed to think that in cases of this description the report ought to be in writing.

Spankie, Serjeant, *Talbot* and *Arnold*, contra, were proceeding to argue upon the facts, when the Court interposed, observing that, the question of fraud or no fraud having been referred to the prothonotary, it could not now be gone into. *Spankie*. If this were a motion for a new trial, it would be competent to the defendant to show that the verdict was against the evidence. [PARK, J. This is rather like the case of an award: the facts found by the arbitrator cannot be disputed.] The prothonotary has found that the transaction was fraudulent, giving certain reasons for his opinion. Has not the defendant a right to go into the matter in order to show that the prothonotary's deduction from the facts is fallacious? The finding of the arbitrator, with reasons, is in the nature of a special verdict. Suppose an arbitrator volunteers the statement upon his award of facts that were not in evidence before him? [TINDAL, C. J. You cannot dispute the prothonotary's conclusions of fact; but you may dispute his deductions therefrom. In the case of arbitrators, the parties are at liberty to except to the reasons as stated on the face of the award, not disputing the facts on which those reasons are founded.] They then proceeded in the course pointed out.

Adams, Serjeant, was stopped by the Court.

TINDAL, C. J. I have always imagined it to be generally understood in Westminster Hall, that, when a question of fact is referred to an officer of the Court, his report is conclusive, unless, upon a substantive motion, it is thought to be necessary to send the matter back to him. I agree, that, if the grounds stated upon the report are insufficient to support the conclusion, counsel are at liberty to that extent to reason upon it. Notwithstanding the observations I have heard, I see nothing to invalidate the conclusion at which the prothonotary has arrived. He assigns *certain* reasons for his opinion, not, as I understand, *all* the grounds upon which that opinion was founded: but still the reasons he has assigned appear to me to be amply sufficient. I therefore think that the report must be confirmed.

PARK, J. I am of the same opinion. I think it would be establishing a very dangerous precedent if we permitted all the facts to be gone through again after the matter has by consent been referred either to an arbitrator or to an officer of the Court. The ground of this attempt is that the reasons assigned by the prothonotary for the conclusion he has come to are not per se sufficient to justify it. To this I do not agree: but, assuming the reasons stated to be insufficient—it by no means follows that they constituted the only grounds of the decision. Had the parties desired it, the Court would have directed an issue at first; and then, if the jury had found as the prothonotary has now found, their decision would have been held final.

GASELEE, J., and BOSANQUET, J., concurring, the prothonotary's report was confirmed and the rule made absolute on terms. Rule absolute.

SIMPSON v. Sir W. CLAYTON, Bart., Administrator of Sir W. CLAYTON, Bart., deceased.—p. 691.

Where the plaintiff's counsel steps the judge in the course of his summing up, because his opinion appears to be strongly adverse, and elects to be nonsuited, he cannot afterwards move for a new trial.

THE declaration stated, that before the making of the indenture of lease thereafter set forth, W. Clayton was lawfully possessed of the tenements and premises thereafter mentioned to have been demised, for the residue and remainder of a certain term of years, to wit, the residue of the term of ninety-nine years commencing from the 5th March, 1777, theretofore granted of the said premises (inter alia) under and by virtue of certain letters patent under the

great seal of the Duchy of Cornwall, if three persons, viz. the said W. Clayton, G. Clayton, and J. Medwin, the lives nominated in the said letters-patent, should so long live; that the said W. Clayton being so possessed of the tenements and premises aforesaid for the residue of the said term of years so granted, afterwards, to wit, on the 1st August, 1789, by an indenture of lease then made between the said W. Clayton of the one part and John Ismay and John Harrison of the other part [profert,] the said W. Clayton, for the considerations therein mentioned, did demise, lease, and to farm let unto Ismay and Harrison all those two pieces or parcels of land situate &c. [describing them]—habendum to Ismay and Harrison, their heirs, executors, administrators, and assigns from the 24th June then last past for the term of sixty-four years and a quarter thence next ensuing and fully to be complete and ended, if the said W. Clayton, George Clayton, and James Medwin, the lives nominated in the letters-patent from the Duchy of Cornwall of the said demised premises (inter alia) to the said W. Clayton, or if any other person or persons whose lives or life the said W. Clayton, his executors, administrators, or assigns, or the person or persons who at the time during the said term of sixty-five years and a quarter should be entitled to the beneficial interest of the then present or any future letters-patent should procure to be nominated in any future letters-patent of the thereby demised premises, should so long live, yielding and paying therefore the yearly rents in the said indenture mentioned: And the said W. Clayton, for himself, his heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree to and with Ismay and Harrison, their executors, administrators, and assigns, that he the said W. Clayton, his executors, administrators, and assigns, and all other person or persons who for the time being should be entitled to the said recited letters-patent and the premises thereby demised, in order to confirm the said term thereby or intended to be thereby granted in the said premises to Ismay and Harrison, their executors, administrators, and assigns, absolutely, should and would from time to time when either of them the said W. Clayton, G. Clayton, and James Medwin, or any other person or persons whose life or lives should be nominated and appointed in any future letters-patent in his or their place or stead, should happen to die or depart this life during the term of 65½ years, *apply for, and do his and their utmost endeavours to procure such renewal or renewals of such letters-patent for another life or lives*, so as the said Ismay and Harrison, their executors, administrators, and assigns, might hold and enjoy all and singular the premises thereby demised to them or intended so to be for the whole of the said term of 65½ years thereby demised; subject only to the rents and covenants in the said indenture mentioned; and that without Ismay and Harrison, their executors, administrators, and assigns being compelled or compellable or liable to pay any part of the fine or fines that should be paid on such renewal; and also that, they the said Ismay and Harrison, their executors, administrators, or assigns paying the said yearly rent, and performing, fulfilling, and keeping all and singular the covenants, clauses, and agreements thereinbefore reserved and contained on the parts and behalfs of them the said Ismay and Harrison, their executors, administrators, or assigns, to be paid, observed, performed, and kept, should and might peaceably and quietly have, hold, use, occupy, possess, and enjoy all and singular the premises thereby demised, or intended so to be, with their and every of their appurtenances, for and during the term thereby granted, without any let, suit, trouble, denial, interruption) ejection, eviction, or molestation of, from, or by the said W. Clayton, his executors, administrators, or assigns, or the persons or person who for the time being should be entitled to the said letters-patent, or any other person or persons whomsoever lawfully claiming or to claim by, from, or under, or in trust for him, them, or any or either of them, or by or through his, their, or any or either of their consent; assent, neglect, default, privy, or procurement; as by the said indenture, on reference thereto, will appear: by virtue of which demise the said Ismay and

Harrison, to wit, on the 1st August, 1789, entered into and upon all and singular the said demised premises with the appurtenances, and became and were possessed thereof for the said term so to them thereof granted as aforesaid. The declaration then proceeded to set forth various meane assignments and demises, by virtue whereof the plaintiff ultimately became assignee of three fourths and one third of another fourth of and in the demised premises for the rest and and residue of the said term of 65½ years by the said first-mentioned indenture granted; and that during that term, to wit, on the 11th October, 1828, G. Clayton, one of the persons so named in the said letters-patent from the Duchy of Cornwall, and in the said first-mentioned indenture mentioned, died; and afterwards and during the said term by the said first-mentioned indenture granted, to wit, on the 30th November, 1833, J. Medwin, another of the persons so named in the letters-patent and in the said first-mentioned indenture, died and afterwards and during the said term by the first-mentioned indenture granted, to wit, on the 28th January, 1834, Sir W. Clayton, in the said first-mentioned indenture mentioned, and being the said party thereto, died; that no other person or persons were during any part of the time aforesaid, either before or after the making of the said first-mentioned indenture until the death of the said Sir W. Clayton, nominated and appointed in any letters-patent from the Duchy of Cornwall of the said demised premises in the place or places or stead of the said G. Clayton, J. Medwin or either of them, according to the meaning and intent of the said first-mentioned indenture: and, although the plaintiff had performed all things in the said first-mentioned indenture mentioned on his part and behalf as such assignee as aforesaid to be performed and fulfilled; yet the said Sir W. Clayton in his lifetime, not regarding his said covenant in that behalf so made as aforesaid, did not nor would either on the death of the said G. Clayton, on the said J. Medwin, in order to confirm the said term by the said first-mentioned indenture granted in the said premises to the said Ismay and Harrison absolutely, apply for and to do his utmost endeavours to procure a renewal of the said letters-patent in the said first-mentioned indenture mentioned for another life or lives, so as *the plaintiff(a)* might hold and enjoy the said demised premises in and by the said first-mentioned indenture demised to him for the whole of the said term of 65½ years, subject only to the rents and covenants in the said indenture contained, but wholly neglected and refused so to do; that thereupon, and by reason thereof, and on the death of the said Sir W. Clayton, the said term by the said first-mentioned indenture granted, ceased and became and was ended and determined: By means of which said several premises the plaintiff had lost and been deprived of all the rents, profits, benefits, and advantages which would have arisen and accrued to him from the performance of the said covenant of the said Sir W. Clayton in that behalf so made and so broken as aforesaid, and from the existence and continuance of the said term by the said first mentioned indenture granted, and which rents, &c. would have amounted to a large sum of money, to wit, 10,000*l.*; and also by means of the premises the plaintiff had lost and been deprived of the use and benefit of divers sums amounting, to wit, to 2000*l.* in and about the improving, repairing, and benefiting the said premises during the said term; and the plaintiff had been and was by means of the premises otherwise much injured and damnified; so the plaintiff in fact said that the said Sir W. Clayton had broken the covenant so by him made as aforesaid.

The defendant pleaded that the said Sir W. Clayton, did, on the death of G. Clayton and J. Medwin respectively, in order to confirm the said term by the said first-mentioned indenture granted in the said premises to Ismay and Harrison absolutely, *apply for and do his utmost endeavours to procure a renewal of the said letters patent in the said first-mentioned indenture mentioned for another life and lives*, so that the plaintiff might hold accordingly the said demised

(a) Quære.

premises in and by the said first-mentioned indenture demised as aforesaid for the whole of the said term of 65 $\frac{1}{4}$ years, subject only to the rents and covenants in the said indenture contained, according to the tenor and effect, true intent, and meaning of the said first-mentioned indenture, and of the said covenant of the said Sir W. Clayton by him in that behalf made as aforesaid. Upon this plea the plaintiff joined issue.

The cause was tried before Park, J., at the last Summer Assizes for the county of Surry. The facts were as follows:—Sir W. Clayton held under letters-patent from the Duchy of Cornwall about eighty-seven acres of land in the parish of Lambeth for a term of ninety-nine years from Michaelmas, 1777, provided three persons therein named (G. Clayton, J. Medwin, and W. Clayton) should so long live. Sir W. Clayton granted an under-lease of a portion of the land in question to Ismay and Harrison for a term of sixty-five years and a quarter, if the *cestui que vie* should so long live, covenanting with Ismay and Harrison and their assigns, that, when any of the *cestuis que vie* should die within the term, he, his heirs, &c., would apply for and use his utmost endeavours to procure a renewal of the letters-patent, and that without the under-leases paying any portion of the fine for such renewal. The term and interest granted to Ismay and Harrison, by various mesne assignments, became vested in the plaintiff.

On the 11th October, 1828, G. Clayton, one of the lives died; in November, 1833, J. Medwin died; and in January, 1834, Sir W. Clayton died; whereupon the whole interest of the Clayton family in the property ceased.

On the death of G. Clayton, it became the duty of the lessor, in pursuance of his covenant, to use his best endeavours to obtain the substitution for another life; and the question in the cause was whether or not he had so done; it being agreed that he was bound to apply for a renewal, and pay such fine thereon as the renewal was reasonably worth. The only evidence offered on the part of the defendant to shew that the lessor had used his utmost endeavours to procure a renewal of the letters patent, consisted of a memorial for the insertion of another life, presented to the Duchy on the 17th October, 1828, and a bill in equity; which, after three years' negotiation terminated in an offer to renew upon payment of a fine of 64,200*l*. This fine was the result of surveys and calculations made by several surveyors and actuaries of eminence, and was assessed at three years purchase upon houses producing a rent of 20*l*. per annum, at two and a half years' purchase upon houses of a less value. The defendant offered to pay 30,000*l*; but his offer was rejected. Various letters patent under which the Clayton family had held the property from the time of Charles the Second, were put in by the defendant with a view to contrast the amount of the fines paid upon the successive renewals, with that demanded upon the present occasion. These were objected to on the part of the plaintiff as inadmissible: but the learned judge received them. On the part of the defendant it was contended that the fine he was bound to pay on the renewal should be calculated upon an estimate of his own beneficial interest in the premises, and not that of the under-tenants. The plaintiff's counsel proposed to prove, by the evidence of the surveyors and actuaries, that the fine demanded by the Duchy was reasonable; and that the property had since been taken by other parties at a much higher amount of fine. The learned judge refused to admit this evidence, observing that the only issue to be tried was whether or not the defendant had used reasonable exertions to procure a renewal of the letters-patent.

The learned judge in his summing up told the jury that the only question for their consideration was whether or not the defendant had used due exertions to obtain a renewal of the letters-patent, regard being had to the amount of the fine demanded for such renewal; and that he was not bound to pay an unreasonable sum: and he was proceeding to comment upon the evidence, expressing himself somewhat freely as to the irrelevancy of the evidence of the value of

the property offered on the part of the plaintiff; when the plaintiff's counsel, after an ineffectual attempt to persuade the judge that the principle upon which the defendant estimated the reasonableness of the fine was incorrect, elected to be nonsuited.

Shee, in Michaelmas Term last, moved for a new trial. Notwithstanding his having elected to be nonsuited, the plaintiff is still under certain circumstances entitled to move for a new trial. [TINDAL, C. J. It must be a very strong case.] The cases of *Butler v. Dorant*, 3 Taunt. 229, *Robinson v. Cook*, 6 Taunt. 336, and *Elsworth v. Bird*, M'Clel. 69, decided, that, where the plaintiff's counsel acquiesces in or elects to be nonsuited, he cannot afterwards have a new trial. But these cases have since been overruled. In *Alexander v. Barker*, 2 C. & J. 133, it was held that submitting to a nonsuit in deference to the opinion of the judge (which opinion was incorrect) did not estop the plaintiff from moving to set aside such nonsuit. Bayley, B., there says: "I have heard Lord Tenterden say, over and over again, that, if he nonsuited upon an opinion intimated at the trial, in which the counsel acquiesced, and was wrong, the court ought to set aside that nonsuit. It would be very hard if it were otherwise, because counsel must in that case at their peril decide whether the judge was right or wrong." In *Vacher v. Cocks*, 1 B. & Ad. 145, the plaintiff's counsel insisted upon being nonsuited. Lord Tenterden said: "A judge ought not to nonsuit if there is any evidence for the consideration of the jury on behalf of the plaintiff; because, if the facts went to the jury, they might possibly in their discretion find a verdict for him. Here, the plaintiffs insisted on a nonsuit: they were entitled to do so; but, if there was any evidence on which the jury might in their discretion have found a verdict for the defendants, the nonsuit by which that evidence was withdrawn from the jury's consideration ought not now to be set aside at the instance of the plaintiffs." In the present case there was no evidence to warrant a verdict for the defendant; and the evidence offered for the plaintiff was either rejected or so materially weakened in its effect by the strong observations of the learned judge, that the plaintiff's counsel were fully justified in the course they adopted. [GASELLE, J., referred to *Palmer v. Marshall*, 1 M. & Scott, 454, where the plaintiff elected to be nonsuited, and afterwards applied to the court for a new trial on the ground of misdirection, and no objection was taken to his right to move.]

Thesiger and *Platt* showed cause. Where the nonsuit is the act of the judge, no doubt the court will in a proper case interfere. But here the trial was rendered abortive by the plaintiff's own act: he improperly withdrew the case from the consideration of the jury; and therefore he has no right now to come and ask the Court to set aside the nonsuit. *Butler v. Dorant* is precisely in point, and has never been overruled. There, on a special agreement made on the sale of a share in the secret of making Barkley's antibilious pills, whereon the defendant agreed annually to expend 1000*l.* in advertisements, the breach assigned was the not having expended that sum. Upon the trial, after the case was closed on both sides, the judge was proceeding in his summing up to direct the jury that the plaintiff, not having distinctly proved any special damage arising from the breach, was entitled to nominal damages only; whereupon Best, Serjeant, for the plaintiff, elected to be nonsuited. He afterwards moved for a new trial on the ground of misdirection. Lawrence, J., said: "His lordship did not say you should be nonsuited; he directed the jury that you should have nominal damages only; but you did not choose to trust your case with the jury. If there were a misdirection, you should have abided the verdict, and have reserved the objection for a motion for a new trial. I believe this has never been done, that a counsel shall lie by until he hears the opinion of the judge at Nisi Prius, and that if he thereupon chooses to be nonsuited, he shall come to the Court to set aside his own act." Mr. Baron Wood, in *Ward v. Mason*, 9, Price, 295, lays down the rule very distinctly in these terms: "If the plaintiff chooses to submit to the opinion of the judge, without letting the case go

to the jury, he certainly may do so, and that will be binding on him; but no man is obliged to submit to be nonsuited on the opinion of the judge upon the weight or sufficiency of the evidence which he brings forward to support his case. The judge may direct the jury on it, according to the opinion which he may have formed; and, if the jury adopt it, the party is concluded by their verdict; or, in order to avoid that, the party may submit to be nonsuited. In that case, most assuredly he would not be permitted to move to set the nonsuit aside." *Vacher v. Cocks* is an authority rather in favour of the defendant. There, the judge, in summing up the case, directed the jury, if they came to a certain conclusion, to give their verdict for the plaintiff; but, if they came to either of two other conclusions, which he pointed out, to find for the defendant and state on which ground their judgment was formed. The plaintiff then chose to be nonsuited: and it was held that he was not entitled to a new trial on account of misdirection, if either of the two latter points was rightly put to the jury.

Shee, in support of his rule. A nonsuit can in no case be said to be the act of the judge; it is in every case the act of the party: and no distinction can be laid down between acquiescence, election, submission, and insisting. This case is not to be distinguished from *Alexander v. Barker*. All the cases show that there are circumstances that will warrant the setting aside a nonsuit in which the plaintiff's counsel has felt it to be his duty, in deference to the judge, to acquiesce at the trial. Treating the greater part of the plaintiff's evidence as either inadmissible or immaterial to the issue, was in effect the same as directing a nonsuit. The plaintiff is equally entitled to a new trial if there was no evidence on which the jury would be entitled to find for the defendant. [TINDAL, C. J. For misdirection in matter of law, a bill of exceptions only lies.] Although it is true the learned judge had not finished his summing up, enough had been said to show the strong bias of his opinion, in which the plaintiff's counsel could do no other than acquiesce.

TINDAL, C. J. I am of opinion that this rule ought to be discharged. The general rule of law is, that, where in the progress of the trial the plaintiff's counsel chooses to withdraw the case from the consideration of the jury, he cannot afterwards come to the court and ask for a new trial. There are, however, certain exceptions to this rule; as, where the judge who presides at the trial intimates a strong opinion that the plaintiff ought to be called, or refuses to receive evidence tendered, or misdirects the jury in point of law, and the plaintiff's counsel, deferring to the opinion of the judge, elects to be nonsuited—the court will deal out to the parties the same measure of justice as if the cause had proceeded uninterruptedly to its conclusion. Such was the case of *Alexander v. Barker*, where it was held that submitting to a nonsuit in deference to the opinion of the judge at the trial (which opinion was incorrect) did not estop the plaintiff from moving to set aside such nonsuit. There, the nonsuit proceeded upon a mistaken view of the case. But so far from that being so here, I can scarcely conceive a case more foreign in its circumstances from the authority just adverted to: it appears that the learned judge was proceeding to sum up the evidence to the jury, when the counsel for the plaintiff interposed, and desired that he might be nonsuited. It was a mere voluntary election. I have heard of no wrong direction; nor of any evidence having been improperly rejected: the utmost extent of the argument is, that the judge, from time to time as he proceeded, expressed an opinion on the weight of the evidence. This he had a perfect right to do. Even if the judge, in the expression of his opinion upon the effect of the evidence as one of the jury, were mistaken in point of fact, that would afford no ground for a motion. It cannot be necessary to cite any authority for so indubitable a position: if it were so, *The Attorney-General v. Good, McLele. & Y.* 286, is precisely in point. It was there held that the due degree of weight to be given by a judge in directing the jury to particular evidence which had been properly admitted, must be left to his own

discretion, and his discretion in this respect cannot be revised by the court. Hullock, B., there says: "I think that the evidence was admissible, and ought to have been left to the jury. If that be so, and the case were sent down again for trial, it would be again admitted. Therefore the only ground remaining is, that too great effect was given to the evidence in the learned judge's direction. I apprehend that that would be a new ground for granting another trial, and would open a door to applications for that purpose to an extent incalculable. I am at a loss to know by what rule the precise quantum of force which should be attached by a judge to a particular piece of evidence on a trial is to be measured." When the plaintiff's counsel saw the strong impression of the judge against them, and that the like feeling seemed to pervade the minds of the jury, I am far from saying they exercised an unwise discretion in withdrawing from the contest: but, if any one is to suffer from the exercise of that discretion, it clearly ought not to be the defendant.

PARK, J., declined to give any opinion.

GASELEE, J., was absent.

BOSANQUET, J. It does not appear to me that there is any ground for saying that the jury were misdirected; the very question about which the parties were contending was precisely put—whether the fine demanded was reasonable or not. The learned judge may have thought the evidence on the one side stronger than that on the other; and, seeing that he entertained that impression, and that the jury were also imbibing it, the plaintiff's counsel may have acted wisely in withdrawing. The judge's opinion as to the weight of evidence, even if it leads him to give utterance to expressions that are not strictly warranted by the facts, affords no ground for a motion for a new trial—*The Attorney-General v. Good*. The plaintiff is not estopped from trying the question again.

Rule discharged.

DOE d. MILBURN v. EDGAR.—p. 732.

One G. was let into possession of land allotted to one P. under an inclosure act in 1814 upon a contract of sale under which one-half of the purchase money was paid, and interest upon the remaining moiety regularly till the year 1828, when G. became bankrupt. No conveyance was ever executed, nor was the remainder of the purchase-money ever paid:—Held, that the possession by G. under this inchoate contract was not adverse to the title of P., the vendor; and that the assignee of P. might maintain ejectment notwithstanding the lapse of twenty years from the time possession was first given: Held also, that it was not competent to G., or to one claiming under him, to contest the title of P., by reason of the want of an award by the commissioners under the act.

THIS was an action of ejectment for the recovery of land in the parish of Uphill, in the county of Somerset. In addition to the facts stated in a former report of this case, 2 Scott, 581, it appeared at the trial that the lessor of the plaintiff, treating the purchase from Payne by Gegg as incomplete, had demanded possession of the premises in question, which the defendant refused to deliver up. On the part of the defendant it was contended that an adverse possession for more than twenty years having been shown on the part of Gegg, a legal conveyance of the land to him must now be presumed; (a) and also that there was no evidence of any award made by the commissioners under the inclosure act, upon which to found a title in Payne. Coleridge, J., told the jury that the possession of Gegg was not adverse, and left it to them to say whether or

(a) Objections were also taken to the validity of the assignment by Payne under the lords' act to the lessor of the plaintiff: these were disposed of on the former occasion; and the reference as to the other points not having been proceeded with, they were now argued.

not the sale to him had ever been completed. The jury found that it had not, and a verdict was thereupon entered for the lessor of the plaintiff.

Erle, in Michaelmas Term last, obtained a rule nisi for a nonsuit or a new trial, on the grounds above stated—

Crowder, and *Ball* showed cause. The case stands in the same position as if *Payne* had been the lessor of the plaintiff, and *Gegg* the defendant. As between them, it is perfectly clear there has been no adverse possession. *Gegg* was in under an agreement for a sale which was never completed; he was therefore a mere tenant at will, whose possession was liable at any time to be determined by a demand—*Right d. Lewis v. Beard*, 13 East, 210; *Doe d. Newby v. Jackson*, 2 D. & R. 514, 1 B. & C. 448; *Doe d. Hiatt v. Miller*, 5 C. & P. 595. In *Hall v. Doe d. Surtees*, 1 D. & R. 340, 5 B. & A. 687, where A. mortgaged premises in fee to B., with a proviso for redemption on payment of the mortgage-money on a given day, but A. continued in possession until his death, after which C., his son and heir, and his widow, continued in possession until the death of the latter, when C. conveyed the premises in fee to D., who levied a fine with proclamations, and entered into possession: on ejectment being brought by E., the heir at law of B., the original mortgagee, and a special verdict found as a fact the non-payment of the mortgage debt on the given day, without finding either an adverse possession by A. or his heir, or that interest had been paid upon the mortgage-money by the mortgagor: it was held, that, though there had been a lapse of thirty-seven years since default in payment of the principal, the statute of limitations was no bar to the ejectment, and consequently that the mortgagee was not precluded thereby. With respect to the objection as to the want of an award—when possession was given of the land in question by the commissioners, it was given in fact to *Payne*, the party to whom the allotments had been made.

Erle and *Barstow*, in support of the rule. A party who comes in under an agreement for a purchase, is not tenant to the vendor—*Sugd. V. and P.*, 7th edit., 231. Here, *Gegg* was let into possession as a vendee, and at all events after a lapse of twenty years his title became adverse to that of the vendor. In *Right d. Lewis v. Beard* and *Doe d. Newby v. Jackson* there had not been twenty years' adverse possession. This is like the case of a feoffment without livery of seisin: a party let into possession under a feoffment without livery remaining in possession twenty years, such possession becomes adverse so as to preclude the feoffor from maintaining an ejectment. *Payne* had no title in respect of which his assignee can maintain ejectment. Where property is claimed under an inclosure act, the party is bound to show an award duly made by the commissioners: here, no such evidence was given. By the general inclosure act, 41 Geo. 3, c. 109, the legal title to an allotment is not acquired until the execution and proclamation of the commissioners' award; and where a local act directed that the commissioners, by notice, might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors, and that the owners might fence their allotments after they had been marked, staked out, and confirmed, and *before the signing the award*, and might also, within three months *before the execution of the award*, sell and convey their interests in the allotments, the commissioners being thereby authorised to allot to the purchasers, and the latter, *after the execution of the award*, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that, where the allotments were copyhold, the deed should be inrolled in the court-rolls of the manor, and that the purchaser should be admitted tenant thereto at the same time as the other allottees of the copyhold lands, viz. *after the execution of the award*: it was held (*Farrer v. Billing*, 2 B. & A. 171), that this authority to inclose and so to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given) be enjoyed and exercised without the legal seisin of the land; and that, therefore, these provisions not sufficiently countervailing

those of the general inclosure act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award. In *Ellis v. Arnison*, 5 B. & A. 47, 2 D. & R. 161, where an inclosure act directed that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed to the impropriate rectors and curate in lieu of all great and vicarial tithes; and the commissioners were then required to distinguish by their award the several allotments to such rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes: it was held that the tithes were not extinguished until the commissioners made their award. *Carr v. Baldwin*, 1 Stark. 65, is an authority to the same effect. And even if Payne acquired a legal title under the local act in the absence of an award, Gegg being put into possession as vendee, under the 28rd section, had the same rights as the vendor, Payne; and therefore cannot at this distance of time be turned out of possession.

TINDAL, C. J. I am of opinion that no sufficient ground has been shewn either for entering a nonsuit or granting a new trial in this case. Two grounds have been urged for the motion—first, as to the rule of law as applicable to the land, supposing it to have been freehold—secondly, as to the peculiar character of the property as an allotment under an inclosure act. The questions may be considered, as was observed in argument, as if the parties to this record had been Payne and Gegg, the lessor of the plaintiff claiming under the former, and the defendant under the latter. On the part of the defendant it is contended that the lessor of the plaintiff cannot recover, because there has been an adverse possession by Gegg for more than twenty years. Let us see how the fact of adverse possession is made out. Gegg, it appears, was let into possession of the allotments in July, 1814, under a written authority addressed to the commissioners by Payne, stating that the allotments had been sold to Gregg. Half the purchase-money was paid in two sums of 200*l.* each, and interest on the remaining 400*l.* was paid by Gegg to Payne down to the time of the bankruptcy of the former in 1828. Upon this evidence, what other inference could the jury draw than they did, viz. that Gegg was let into possession under a contract for a purchase which was never completed? The possession clearly was not adverse: and it has not been contended that Gegg might not within twenty years have been turned out of possession by Payne. The case has been assimilated to that of a feoffment without livery of seisin; and it has been said that one who is let into possession by a feoffment without livery of seisin, and remains in possession for twenty years, thereby acquires a title by adverse possession. The 70th section of Littleton, with Lord Coke's Commentary thereon, is an authority the other way. Littleton says: "If a man make a deed of feoffment to another of certain lands, and delivereth to him the deed, but not livery of seisin; in this case, he to whom the deed is made may enter into the land and hold and occupy it at the will of him who made the deed, because it is proved by the words of the deed that it is his will that the other should have the land; but he who made the deed may put him out when it pleaseth him." And Coke adds: "It appeareth, that, if the feoffee doth enter, he is tenant at will, because he entereth by the consent of the feoffor." Here, Gegg was let into possession by consent of the owner of the land, and the fact of the payment of interest from that time until 1828, shows that he retained possession only with the permission of Payne. With regard to the second point—the authority given by Payne to the commissioners was as follows: "I direct you to put John Henry Gegg in possession of the two allotments made in respect of the premises belonging to me." This shews that the allotment had already been made. By the 28rd section of the inclosure act it is provided that a party who has agreed to purchase any allotment, shall, if let into possession, have the same rights as the vendor: and it is contended, that, Gegg having been let into possession, and no award having been proved to have been made by the commissioners, Payne had no legal title. The first answer to that argument is, that,

if well founded, it would have been equally applicable immediately after the transaction took place: and I apprehend it will scarcely be contended that it would not have been competent to Payne at the end of a fortnight to have ejected Gegg. Besides, if Gegg was let into possession under Payne, he cannot be permitted to dispute Payne's title: he must stand or fall by the title of the party under whom he obtained possession. The intention of the 28rd section of the act was not to raise questions between vendor and vendee, but to clothe the latter, as against third parties, with the same rights as the former could himself have enjoyed. I am clearly of opinion that there was no such adverse possession as between Payne and Gegg, as to warrant the jury in presuming a conveyance, and that the verdict ought not to be disturbed.

PARK, J., and GASELKE, J., concurred.

BOSANQUET, J. I think also that this rule must be discharged. The jury have found that Gegg's possession was not adverse, and their verdict appears to me to be well warranted by the evidence. The facts are these: Gegg in 1814 agreed with Payne to purchase the allotments in question; half the purchase-money was paid, and Payne received interest on the residue down to Gegg's bankruptcy in 1828. No conveyance was ever in fact executed. Gegg being let into possession under this agreement, until a demand and refusal to re-deliver it, he would not be a trespasser. With respect to the inclosure act, I am clearly of opinion that it is not competent to the defendant, nor would it have been to Gegg, to dispute Payne's title. Gegg's interest in the premises was merely permissive.

Rule discharged.

HOLLINGWORTH v. BRIGGS.—p. 794.

The Court allowed the defendant to amend his pleadings after one of the plaintiff's witnesses had been examined and cross-examined under a judge's order—it appearing that, prior to the examination, the plaintiff's attorney was apprised of the proposed amendments, and the witness was examined with reference thereto.

THIS was an action brought to recover a sum of 200*l.*, being the amount of the defendant's subscription to a policy of assurance on freight, dated the 14th October, 1834, effected upon the ship *Angerstein*, lost or not lost, at and from Valparaiso and her ports of loading on the west coast of South America to London. On the 18th November last, the defendant (under a judge's order) pleaded to the following effect—First, to the first count, and so much of the last count as related to all the sums of 20*l.* therein alleged to have been received by the defendant for the use of the plaintiff, except 6*l.* 6*s.* parcel thereof, and to the account therein alleged to have been stated between the plaintiff and defendant, that the defendant did not promise—Secondly, to the first count, that the vessel was unseaworthy, and not worth repairing—Thirdly, that the goods loaded on board the vessel (being copper and saltpetre) were an unfit and improper cargo for the vessel, and more than she could reasonably stow and carry; and that the loss was occasioned by the unfitness of the cargo, and overweighting, and not by the perils of the seas unconnected with and independent of such unfitness and overweight—Fourthly, that the plaintiff was not interested in the subject-matter of insurance—Fifthly, that the vessel insured sailed from Valparaiso on her intended voyage, and afterwards arrived at her ports of loading in the policy mentioned; that, at the said last-mentioned ports divers goods and merchandizes were loaded on board the vessel, to be carried and conveyed therein on the voyage mentioned in the policy; that the same were so improperly laden and stowed on board, that the vessel was rendered and remained and continued from thenceforth until and at the time of the loss unfit for the voyage and wholly unseaworthy—Sixthly, that the plaintiff was not deprived of

the freight by any bilging, breaking, or injury of or to the said vessel by or through the dangers or perils of the seas and the force and violence of the winds and waves, as in the declaration alleged—Seventhly, to the last count, as to 6*l.* 6*s.*, payment of that sum into court.

Issue was joined on the 17th December last; and, on the 22nd, a judge's order was obtained for the examination before one of the prothonotaries of John Bouch (the captain of the *Angerstein*), who was about to proceed to Calcutta. Bouch was accordingly, on the 30th, examined and cross-examined. After the order for the examination of Bouch was made, the defendant obtained a summons for leave to amend his pleas, which summons was served, and the proposed amendments handed over to the plaintiff's agent a few minutes prior to the commencement of the examination of Bouch, and after he had been sworn; and it was sworn on the part of the defendant, and not denied, that the witness was examined and cross-examined with reference to such amendments.

In addition to the pleas above set forth, the defendant had originally proposed to plead other three, which the judge refused to allow. One of the last-mentioned pleas was to the following effect—"That the vessel, before and at the time she sailed on the voyage, and from thenceforth until and at the time of the loss, was the property of the plaintiff, and he was the owner thereof: that, after she sailed on the voyage named, and during the same, and before the loss, she was damaged and injured; but that such damage and injury might have been repaired and made good with reasonable care and diligence, and at a small expense as compared with the value of the vessel; but that such repairs were neglected and omitted to be made; and that, if such repairs had been made and done, the loss would not have happened."

R. V. Richards, on the part of the defendant, obtained a rule nisi to amend the second plea by striking out the words "and not worth repairing;" and the third by some slight verbal alterations; and also to add a plea to the following effect:—"That, after the vessel was bilged, broken, damaged, and injured, as in the first count mentioned, she put in and arrived at Valparaiso; that the said injuries, &c. might and could have been repaired and made good so as to have enabled her to complete the voyage with her cargo so on board as aforesaid, had reasonable endeavours and diligence been used by the plaintiff or his agents." The affidavit in support of the motion (in addition to the facts above detailed) stated that the evidence of Bouch (taken before the prothonotary) was very materially at variance with the survey of the *Angerstein* alleged to have been made by the port surveyor and others at Valparaiso on the 26th September, 1834; that it was intended to apply on behalf of the defendant for a commission to examine witnesses at Valparaiso; that the *Angerstein* was sold by Bouch at Valparaiso in October, 1834, on the professed ground that she was not worth repairing, and it appeared by his examination, that, when he left Valparaiso in the early part of the November following, the vessel was taking in cargo, and was about to proceed on a voyage to San Carlos, in Chili.

Maule showed cause. Regard being had to the stage in which the proposed amendments are sought, it is manifest that great inconvenience to the plaintiff and great injustice must inevitably result from allowing them. A material portion of the plaintiff's case has already been gone into, as to which the evidence stands in an unchangeable form; and the defendant by his amendments seeks to introduce something arising out of that evidence. Suppose the testimony of Bouch were false, inasmuch as it was given in reference to a totally different record, it would be impossible to indict him for perjury.

Richards, in support of his rule. Before the new rules in pleading, any of the defences here set up might have been given in evidence under the general issue. But now, the defence being required to be put upon the record, the defendant will have no means of meeting the plaintiff's case unless the suggested amendments are allowed; and it would be most inconvenient and mischievous to lay it down as a general rule that no amendment can be under any circum-

stances allowed where a witness has been examined under an order of the Court or a judge.

TINDAL, C. J. The first amendment proposed will not in any degree alter the situation of the plaintiff, and therefore it may be allowed. With respect to the others, the question seems to me to turn on the degree of notice of the intended application to amend given to the plaintiff before the examination of the witness Bouch. From the affidavits it appears to me that such reasonable notice was given. The plaintiff knowing that amendments would be applied for, might either have cross-examined Bouch with reference to the amended issues, or he might have suspended the examination until those issues had been put in proper form. Without, therefore, laying down any general rule, I think under the circumstances the amendments may be allowed.

PARK, J. I am of the same opinion. A judge at chambers would have allowed these amendments before the examination of Bouch. And it appears that notice was given to the plaintiff's attorney before his examination was actually commenced that the amendments would be applied for; and it is sworn, and not denied, that the examination and cross-examination proceeded with reference to the contemplated amendments. Under these circumstances, I think justice requires that the rule should be made absolute.

GASELEE, J. I am of the same opinion: but at the same time I must observe that I think amendments of this sort ought to be watched with considerable care and caution.

BOSANQUET, J., concurred.

Rule absolute, on payment of costs.

IRVING and Another v. EATON.—p. 798.

In a *capias* into London, the direction to return the writ was addressed to "the said sheriff:"—Held, no ground for setting aside the writ.

An affidavit of debt in an action against the drawer of a bill of exchange stated that the bill was *undue* and unpaid, and *disclosed no default of the acceptor*:—Held, sufficient. *Sed quare.*(a)

THE defendant was held to bail upon an affirmation which stated that he was indebted to the plaintiffs in the sum of 50*l.*, as indorsees of a bill of exchange drawn by the defendant on and accepted by James Caldwell for the payment of 50*l.* to the order of the defendant at a day now past, and by the defendant indorsed to the plaintiffs, "and which said bill is wholly *undue* and unpaid." The writ of *capias* was addressed to the sheriffs of London; but the direction to return it ran thus—"And we do further command you *the said sheriff*," &c.

John Jervis moved that the bill-bond might be delivered up to be cancelled, on the ground that it did not appear from the above affirmation either that the bill was due or that the acceptor had made default. He also objected that the writ of *capias* was defective, the direction to return the writ being addressed to a non-existing officer; *Nicoll v. Boyne*, 8 M. & Scott, 812, 10 Bing. 339; *Barber v. Weedon*, 2 Dowl. 707.

PER CURIAM. The affirmation states the defendant to be *indebted* to the plaintiff, which he could not be unless the bill were overdue and the acceptor had made default. As to the writ, if the words "the said sheriff" are rejected, the objection is removed.

Rule refused.

(a) The decision in this case as to the allegation in the affidavit of the default of the acceptor, and the case of *Weedon v. Medley*, 2 Dowl. 689, to the same point were expressly overruled by the Court of Exchequer in *Crosby v. Clarke*, 1 M. & W. 296, where the Court (in affirmance of the rule laid down in *Buckworth v. Levi*, 5 M. & P. 23, 7 Bing. 251, 1 Dowl. 211, *Cross v. Morgan*, 1 Dowl. 122, and *Banting v. Jadis*, 1 Dowl. 445) held that an affidavit of debt in an action by the indorsee against the drawer or indorser of a bill of exchange, must show a default by the acceptor.

WILLIAMS v. PLUMRIDGE.—p. 799.

In trover for chalk dug by the defendant from the waste of the plaintiff's manor and converted by the defendant into lime, it appeared that the plaintiff's bailiff had demanded payment for the chalk, but whether as *rent* or not the evidence was conflicting. The judge not having left it to the jury to say whether or not the defendant held the land at a rent—The Court directed a new trial.

TROVER for chalk, lime, and soil. Pleas—1. not guilty—2. that the plaintiff was not lawfully possessed as of his own property of the said goods and chattels in the declaration mentioned. Issue thereon.

The cause was tried before Bolland, B., at the last Assizes for the county of Bucks. It appeared that the plaintiff was lessee of the manor of Fingest, in the county of Bucks; that the father of the defendant, about forty-eight years ago, opened a pit on part of the waste of the manor, and continued to the time of his death, which happened about sixteen years since, to dig chalk therefrom and convert the same into lime; that the defendant, from the death of his father down to a short time before the commencement of this action, did the like; that no acknowledgment had ever been paid to the former lords of the manor for chalk so dug; and that, in May, 1835, the bailiff of the manor applied on behalf of the plaintiff for payment for the chalk, when the defendant replied that he had no money, and must go to gaol to pay it: and that, on another occasion, when a similar demand was made, the defendant gave the same answer, but at the same time desired to be furnished with an account; and that, an account being handed to him, charging him for the chalk at the rate of 5s. per annum, he disputed the plaintiff's right to demand it, and refused to pay anything. There was conflicting evidence as to whether the above sum was demanded as a payment for the chalk, or as rent *eo nomine*. For the defendant, it was contended that the plaintiff could not, whether the demand was for rent, which would be an acknowledgment of a tenancy, or for payment of the chalk, which was treating the defendant as a contractor, afterwards charge him as a tortfeasor. The learned judge said that the claim of right set up by the defendant, not having been specially pleaded, could not be given in evidence; and that the only questions for the jury were, first, whether the defendant had been guilty of a conversion, which he observed was clearly proved, and secondly, whether the chalk was the plaintiff's property, which the lease proved. A verdict having been found for the plaintiff—

Storks, Serjeant, in Michaelmas term, obtained a rule nisi for a new trial, on the ground of misdirection.

Gunning and *Dasent* showed cause.—They submitted that, if there ever was a tenancy, there was sufficient evidence of a disclaimer, the defendant at the trial setting up a claim of right arising out of a long uninterrupted possession: and they relied on *Thompson v. Shirley*, 1 Esp. 31, where it was held that a demand of payment for goods for which an action of trover is brought is a good demand to support the action; and *Burr v. Morris*, 4 Tyr. 485, where it was held that the acceptance of part does not affirm the taking so as to waive the tort, but the amount received will go in mitigation of damages.

Storks, Serjeant, in support of his rule.—The money demanded was for rent *eo nomine*. There was nothing on the evidence to show that the defendant was a tortfeasor. [TINDAL, C. J. The question whether the money was demanded for rent or as a payment for the chalk, was never put to the jury.] The objection was overruled by the learned judge, on the ground that the defendant had not set up a claim of right by a plea properly framed for that purpose.

TINDAL, C. J. It certainly does appear that the true question in the cause has not been presented to the jury—whether the defendant held the land at a rent or not. A disclaimer of the plaintiff's title at the time of the demand,

would undoubtedly remit the plaintiff to his right to bring trespass or trover. But the evidence discloses nothing approaching to a disclaimer: it amounts to no more than a refusal to pay, on the score of poverty. The claim of right attempted to be set up at the trial seems a little more like a disclaimer: but that was made at a period too late to bind the rights of the parties. The cause must go down again; the costs of the first trial will abide the event of the second.

The rest of the Court concurring—

Rule absolute accordingly.

CLEMENTS *v.* WILLIAMS.—p. 814.

A defendant who keeps out of the way a witness material to the plaintiff, and thereby impedes the service of a subpoena, is liable to an attachment.

A RULE nisi was obtained by *Stammers* for an attachment against the defendant for impeding the service of a subpoena, upon affidavits stating that the witness, a young lady aged seventeen, was a material and necessary witness, that she resided with the defendant as a part of his family, and was entirely under his care and control, and that the plaintiff had been compelled to countermand the notice of trial in consequence of his inability to serve her with the subpoena, and showing various attempts so to do, which had been frustrated by the defendant.

Gurney, contra, submitted that a defendant was not bound to afford facilities to the production of evidence against himself.

Stammers, in support of his rule, was stopped by the court.

TINDAL, C. J. It appears that the defendant is fencing off the service of the process of the court, and keeping the witness out of the way. This is doubtless an offence against justice, and punishable by attachment. Upon the defendant's undertaking to produce the witness at the trial, and paying the costs of this motion, the rule may be discharged.

The rest of the court concurring, the rule was upon these terms.

Discharged.

TAYLOR *v.* SLATER.—p. 839.

Seemle that a defendant cannot be held to bail upon an affidavit made more than a year before the issuing of the writ.

Seemle that the 33rd rule of Hilary term, 2 Will. 4, as to the time for moving on the ground of irregularity, does not apply with equal force to the case of a prisoner as to that of a defendant at large.

THE affidavit of debt in this case was made on the 21st February, 1834; the process thereon was not sued out until the 18th January, 1836; and the defendant was arrested on the same day. On the 29th instant—

Wilde, Serjeant, obtained a rule nisi for his discharge from custody, on the ground that the affidavit was functus.

Andrews, Serjeant, showed cause. In Tidd's Practice, 9th edit. p. 190, it is said: "An affidavit to hold to bail continues in force for a year; during which period the defendant may be arrested on the first or any subsequent process sued out thereon. But an affidavit made more than a year before the suing out of the writ is not sufficient to authorize an arrest in the King's Bench; for, the act requires an oath of a subsisting debt at the time of suing out the process; and, after a year, it will be presumed that the debt has been paid, if nothing appear to the contrary—*Collier v. Hague*, 2 Str. 1270; *Pitches v. Davy*, MS.

Hilary, 44 Geo. 3; *Stewart v. Freeman*, MS. 47 Geo. 3, K. B.: but see *Crooks v. Holditch*, 1 B. & P. 176. It is therefore necessary that a new affidavit should be made before a writ is sued out, when more than a year has elapsed since the making of the former affidavit." The cases there cited are all King's Bench decisions: the rule suggested has never obtained in this Court. [TINDAL, C. J. The reason of the thing is applicable to the practice of all the courts.] The defendant should at least make an affidavit that the debt has been paid. [TINDAL, C. J. He has a right to rely upon the presumption of law.] Then, the application is too late. The arrest took place on the 18th January; consequently the time for putting in bail expired on the 27th; and the motion was not made until the 29th. In *Tucker v. Colegate*, 2 C. & J. 489, 2 Tyr. 496, 1 Dowl. 574, it was expressly held that objections to the affidavit to hold to bail cannot be taken after the time for putting in bail above has elapsed.

Wilde, Serjeant, in support of his rule, submitted that the rule as to the time for moving to set aside process or proceedings on the ground of irregularity, did not apply to the case of a prisoner; and that, at all events, the objection could not arise on the present occasion, there being in point of law no affidavit at all upon the files of the court.

PER CURIAM.—The rule certainly does not apply with the ordinary strictness in the case of a prisoner. (a) Rule absolute.

SIMPSON v. COOPER.—p. 840.

The declaration was delivered on the 12th January, with notice to plead in four days; on the 13th the defendant obtained a judge's order for "seven days' time to plead," upon an undertaking to accept short notice of trial for the last sitting in the term, the 26th:—Held, that the seven days commenced from the date of the order, and not from the expiration of the four days.

ANDREWS, Serjeant, on a former day, obtained a rule nisi to set aside the judgment signed in this case for want of a plea, for irregularity. The irregularity complained of was that judgment was signed before the time for pleading had expired. The declaration was delivered on the 12th January; on the 13th, a judge's order was obtained for "seven days' time to plead," the defendant undertaking to receive short notice of trial for the last sitting in the present term. The question was, whether the seven days were to be reckoned in addition to the four days which the defendant originally had by the practice of the court.

Wilde, Serjeant, showed cause. If the seven days' time to plead were to commence at the expiration of the four days, the whole time for pleading would not expire till the 24th; the last sitting was on the 26th; consequently, there would be no time to give notice for that day. The bargain between the parties furnishes evidence of what was the understanding of the judge when he made the order; and it is quite manifest that convenience requires, that when a defendant asks for a definite time to plead, the time granted should in all cases commence from the date of the order. In *Aspinal v. Smith*, 8 Taunt. 592, 2 Moore, 655, the order was *further* time to plead.

Andrews, Serjeant, in support of his rule. The defendant here had originally four days wherein to plead. The judge's order superadds seven days in addition to the four. There is nothing in *Aspinal v. Smith*, to differ that case from the present. It was there expressly held, that, where notice to plead is given, and before the expiration of the time named in the notice, a judge's order for further time to plead is obtained, such time is to be reckoned from the ex-

(a) But see *Fownes v. Stokes*, ante, p. 632.

piration of the time named in the notice to plead, and not from the date of the judge's order. The judgment therefore was clearly premature.

TINDAL, C. J. The declaration was delivered on the 12th January, and the judge's order for "seven days' time to plead" dated on the 13th. The defendant contends that he had the seven days in addition to the four days he was originally entitled to by the practice of the court, if so that would bring it to the 24th, which, being Sunday, we may call the 25th—one day before the last sitting. On the other hand, it is alleged on the part of the plaintiff, that according to the compact between the parties, the seven days were not intended to be given in addition to the four, for that would avoid the condition upon which the seven days' time was granted, viz. that short notice of trial should be given for the last sitting. I think the construction put upon the order by the plaintiff is the correct one, consequently this rule must be discharged.

PARK, J., and BOSANQUET, J., concurring—

Rule discharged.

STORR and Another v. WATSON.—p. 842.

After issue joined and a peremptory undertaking to try, the Court permitted the plaintiff to amend his declaration by substituting a count in trover for a count in case for negligence in the custody of the plaintiff's goods.

THIS was an action on the case. The declaration consisted of a single count charging that the defendant on the 18th April, 1835, had the care and custody of certain goods and chattels, to wit, &c., and thereupon it then became and was the duty of the defendant, whilst he so had the care and custody of the said goods and chattels, to take due and proper care thereof: yet the defendant, not regarding his duty in that behalf, did not nor would, whilst he so had the care and custody of the said goods and chattels, take due and proper care of the same, but wholly neglected so to do, and took such bad care thereof, that afterwards, to wit, on, &c., aforesaid, the said goods and chattels became and were purloined, stolen, and wholly lost to the plaintiffs, &c.

The defendant pleaded—first, not guilty—secondly, that the defendant did not have the care or custody of the said goods and chattels in the declaration mentioned, or of any of them, or any part thereof—thirdly, that it did not become nor was it the duty of the defendant to take due and proper care of the said goods and chattels, or any of them, or any part thereof.

Issue was joined in Trinity term last, and notice of trial given for the sittings after term. The plaintiffs not having proceeded to trial in pursuance of such notice, the defendant in Michaelmas term obtained a rule nisi for judgment as in case of a nonsuit, which rule was subsequently discharged upon the plaintiffs' giving a peremptory undertaking to try at the sittings after that term. The plaintiffs, under the advice of counsel, withdrew the record, with a view to obtain leave to amend the count or to add thereto a count in trover. On a former day in this term—

Wilde, Serjeant, obtained a rule nisi accordingly. The affidavit upon which the motion was founded negatived any intention to introduce into the declaration a new cause of action.

Channell showed cause. The only case to warrant such an amendment as that proposed here, is *Billing v. Flight*, 6 Taunt. 419, where, after a lapse of six terms, the court permitted the form of the action to be changed from *assumpsit* to *debt*, either of which might indifferently have been adopted in the first instance. But, in *Green v. Milton*, 4 B. & Ad. 869, after issue joined, and a peremptory undertaking given, the Court of King's Bench refused to allow the declaration to be amended by the substitution of a count in *detinue* for *trover*.

Wilde, Serjeant, in support of his rule, proposed to dispense with the existing count, and have only a count in trover.

PER CURIAM. To compel the plaintiffs to bring another action, would only be entailing upon them an useless expense, without at all benefiting the defendant. We therefore think they ought to be allowed to turn the present count into a count in trover, upon payment to the defendant of the costs occasioned by such amendment, and the costs of the application, including the costs of the day arising from the plaintiffs' not having proceeded to trial: the defendant to be at liberty to plead *de novo*.
Rule absolute accordingly. (a)

HOLMES v. EDWARDS.—p. 845.

Where an offer had been made to dispense with taxation, provided a certain sum were deducted from the bill, and on the taxation the bill was reduced by nearly the sum mentioned, though less than one-sixth of the bill—the party requiring the taxation was directed to pay the costs thereby occasioned.

WILDE, Serjeant, on the part of the defendant, obtained a rule calling on the executors of the plaintiff, deceased, to show cause why they should not pay the costs of taxation. It appeared that the defendant had offered to dispense with the taxation if the attorney would take off 100*l.* from the bill; and that the prothonotary, on the taxation, had taken off within 8*l.* or 4*l.* of that sum, being something less than one-sixth of the entire amount.

Talfourd, Serjeant, showed cause; and *Wilde*, Serjeant, was heard in support of his rule.

PER CURIAM. This is an application to our discretion. Under the circumstances, the costs of taxation having been rendered necessary by the non-acceptance of the offer of reduction, we think those costs should be paid by the party by whom they were occasioned.
Rule absolute.

(a) One of the earliest cases in which a declaration was allowed to be amended, is *Marlborough v. Widmore*, 2 *Str.* 890, where the Court permitted a declaration at the suit of executors on a promise to the testator, to be amended by inserting a promise to the plaintiffs. In *Brown v. Crump*, 6 *Taunt.* 300, new counts were added after a demurrer, and after the lapse of two terms. In *Freen v. Cooper*, 6 *Taunt.* 358, a declaration by assignees of a bankrupt for a rescue, alleging the wrong to have been done to them, was amended by the substitution of an allegation of wrong done to the provisional assignee: *Gibbs, C. J.*, there said that the rule prohibiting amendments after the lapse of two terms, applied only to the case of an amendment embracing a new cause of action. In *Minchin v. Cope*, 1 *Chit. Rep.* 45, the record was amended, after writ of error brought, by altering the memorandum of the time of filing the plaintiff's bill. In *Doe v. Armitage*, 1 *D. P. C.* 173, in a declaration in ejectment, a new count (upon another demise) was added after three terms. And in *Morris v. Evans*, 1 *D. P. C.* 657, in case for disturbance of a ferry, after the cause had been taken down for trial, and the record withdrawn, the Court allowed the declaration to be amended by varying the termini of the ferry: and the rule is thus stated by the Court: The rule adopted at chambers is, that you may at any time introduce a new count, if you do not thereby introduce a new cause of action, but only a variation in the mode of stating it." And in *Aylwin v. Todd*, 1 *New Cases*, 170, where the plaintiff had been misled by the defendant as to the nature of a charter-party, the Court permitted the plaintiff to amend by striking out a covenant on the charter-party, and declaring for freight, not upon the charter-party; and this after many years had elapsed since the commencement of the action, the defendant having been the cause of the delay.

See also *Billing v. Flight*, 6 *Taunt.* 419, *Billing v. Pooley*, 6 *Taunt.* 423, and the cases cited in *Tidd's Practice*, 9th edit., p. 697, and *Arch. Pr.* 3rd edit. p. 838.

As to amendments in penal actions, see *Matthews v. Swift*, 1 *Scott*, 706, and the cases there cited: and see *Levett v. Kibblewhite*, 6 *Taunt.* 483, as to amendments affecting bail.

MEMORANDUM.

In the course of Hilary Term, the Lords Commissioners resigned the Great Seal.

The Right Honourable Sir C. C. Pepys (Master of the Rolls) was thereupon appointed Lord High Chancellor of England, and raised to the peerage by the title of Baron Cottenham, of Cottenham, in the county of Cambridge.

Henry Bickersteth, Esq., was appointed Master of the Rolls, and was raised to the peerage by the title of Baron Langdale, of Langdale, in the county of Westmoreland.

Their lordships took their seats in their respective courts on Tuesday the 19th January.

THE Judges who sat in the Court of Common Pleas during the foregoing term were—

Lord Chief Justice TINDAL,
Mr. Justice PARK,
Mr. Justice GASELEE,
and
Mr. Justice BOSANQUET.

...

AN

INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME

Williamson

AGENT.

A., the wife of B., orders goods of C. to be sent to the house of D., a relation of A.'s. C. on the following day sees B., and B. accepts a bill for the price, which he pays at maturity. At the time of paying the bill B. orders goods of C. to a small amount for himself. A. subsequently orders other goods of C. to be sent as before to the house of D. Held, that there was evidence to go to a jury of B.'s having so conducted himself as to lead C. to believe that A. had B.'s authority to order the last-mentioned goods. *Filmer v. Lynn.* 597

APPROPRIATION OF PAYMENTS.

See PARTNERSHIP.

ARBITRATION.

A case being referred, the arbitrator in 1825 received from the plaintiff's attorney 87l. for his fees and expenses. In 1827, the parties went before the prothonotary, when he allowed only 35l. The defendant now, after a lapse of eight years from the time the payment was made (the attorney who paid the money having died in the interim), applied to the Court to order the arbitrator to refund the difference:—*Held*, that the application was too late. *Brasier v. Bryant.* 534

ASSUMPSIT.

Upon the abandonment of an unwritten contract for the sale of land, on defect of title, the deposit money and money paid by the purchaser to the auctioneer for the purchaser's moiety of the auction duty, may be recovered.

But expenses of investigating the title cannot be recovered without proof of a written contract binding on the vendor; nor interest upon the deposit. *Gosbell v. Archer.* 591

ATTORNEY.

1. Where a rule for striking an attorney off the roll for misconduct is referred to the prothonotary, he is not to be confined to the affidavits already before the court, but may receive any evidence tending to the elucidation of the matter. *Dicas, Gent, one &c. v. Warne.* 561

2. The court will not entertain a motion touching the conduct of an attorney, unless it appears upon affidavit that he is an attorney of the court, or that the transaction arises, in part at least, out of a cause before the court: nor will the court exercise its summary jurisdiction over an officer, unless in a case of palpable fraud. *In the Matter of Lord.* 625

AWARD.

1. A cause was referred to an arbitrator, with liberty to him to state upon his award any point of law raised by either party in reference to the matters thereby referred. Certain points of law were accordingly submitted to the arbitrator, which he set out upon his award, (but without reference to any particular state of facts,) and certified that he had over-ruled them. The arbitrator's decision upon these points, as abstract propositions, being correct, the court refused either to refer it back to him to amend his award by setting forth the facts upon which the questions of law arose, or to set aside the award. *Jay v. Byles.* 489

2. Where all matters in difference are referred to an arbitrator, an award directing the execution of general releases closes all accounts between the parties up to the time of submission. *Trimingham v. Trimingham.* 604

BAIL.

Semble that a defendant cannot be held to bail upon an affidavit made more than a year before the issuing of the writ.

Semble that the 33d rule of Hilary term, 2 Will. 4, as to the time for moving on the ground of irregularity, does not apply with equal force to the case of a prisoner as to that of a defendant at large. *Taylor v. Slater.* 677

BANKRUPTCY.

1. Where a trader whose goods are under seizure quits his home, it is for the jury to say whether he departs with the bona fide intention to endeavour to procure the means of removing the execution, or whether, hav-

ing gone for that purpose, he stays away for the purpose of avoiding his creditors. *Batchelor v. Vyes*. 565

2. The assignees of a bankrupt do not take under the assignment, property, the equitable title to which had been transferred before the bankruptcy.

But such equitable transfer must have been complete before the bankruptcy: it must have been a transfer of the whole or an ascertained part of specific property, and absolute, not contingent.

A. at Liverpool, having consigned goods to B., at Bahia, for sale on his (A.'s) account, draws bills on B. to be paid out of the produce of the consignment. A. negotiates the bills with C. in London. Upon B.'s refusing to pay the first of the bills, C. writes to A. as follows: "I request you to write to B. by the first vessel, with orders that, in case he does not pay your drafts, he shall immediately hand over such property as he may have of yours of an equivalent value to the bills not paid by him, to my agent at Bahia." A. answered, "Agreeably to your instructions, I will write to B. by brig W., directing him to hand over to D. property of mine in his hands to cover the amount of the bills that may eventually not be paid." A. accordingly wrote to B. this letter, which was not communicated to C., "I have engaged to C. that you shall pass into the hands of D., his agents, all the property which may exist in your hands for my account; you will arrange with D. the mode," &c. Before this letter reached Bahia A. became bankrupt; D. afterwards receiving goods from B. to an amount somewhat less than the bills unpaid, sold them, and remitted the produce to C.:—Held, that C. had not, at the time of the bankruptcy, such an equitable interest in the goods as would prevent A.'s assignees from recovering in trover.

Dubitatur, whether the last of the above letters was admissible in evidence; but held, that, whether admitted or not, the assignees might recover. *Burn v. Carvalho*. 622

3. The instalments of an annuity for the payment of which a surety expressly covenants in case of the default of the grantor, are not proveable under a fiat against the surety, where such instalments do not become due until after the bankruptcy of the surety. *Thompson v. Thompson*. 634

4. Although the money first received under a fiat is by the statute required to be appropriated in discharge of the expenses incurred by the petitioning creditor, yet, where he assents to a different appropriation, he is stopped from afterwards contending that the directions of the act have not been complied with. *Hornidge v. Eyland*. 641

5. In order to constitute a fraudulent preference, so as to avoid a payment made by a trader, it must be a voluntary preference and made in actual contemplation of bankruptcy: it is not enough to show that the party was in such a state of insolvency and embarrassment as to render bankruptcy a probable event. *Atkinson v. Brindall*. 642

6. Upon an issue directed to try whether one P. had committed an act of bankruptcy on a given day, it appeared that, on the preceding day, he sent a letter from his dwelling-house at Greenwich, to his place of business,

addressed to his son, stating that he was unable to meet his engagements, and desiring that he might be denied to any creditor who might call; that immediately after dispatching this letter, he left home, and remained absent during the whole of that and the following day. A witness proved that P. called on the day in question at her brother's house in London; that he expressed to her an apprehension of being sent to the Fleet, and stated that he was in no hurry to get home, and would not go very early, as he had creditors who would lay hold of him; and that he did not leave till after dark. The jury were told, that, if they believed the statements made by the witness, P. on that occasion committed an act of bankruptcy: they said they did believe the witness, but they did not think P. spoke with bona fides.—Held, that P. had committed an act of bankruptcy: and that evidence of his conduct and conversations on the day subsequent to the date mentioned in the issue, was not admissible to explain his conduct on that day. *Johnston v. Woolf*. 644

7. The defendant having in his possession a lease belonging to one S., which had been deposited with him as a security for moneys advanced by him to S., and upon which he claimed a lien for costs as against S. and also as against the assignee appointed under a commission of bankruptcy issued against S. in 1830, concurred with the assignee in the sale of the lease, and received from him in satisfaction of his demand, the amount of the purchase-money, and also received with the assent of the assignee certain sums due for rent of the premises, &c. The sale took place after the defendant, as solicitor to the assignee, had notice that a petition to supersede the commission, on the ground of the insufficiency of the petitioning creditor's debt, was pending. In January, 1832, the commission against S. was superseded, and in March a second fiat issued against him:—Held, that the assignees under the last-mentioned fiat were entitled to recover from the defendant the several sums so received by him from or with the assent or under the authority of the assignee under the superseded commission. *Clark v. Gilbert*. 649

8. F. & S., traders in partnership, being in insolvent circumstances, entered into a deed of composition with their joint creditors whereby they engaged to pay them 4s. 6d. in the pound upon the amount of their respective debts, by three instalments, F. & S. retaining possession of the stock in trade, and the creditors engaging to release them on payment of the last instalment. By the same deed F. assigned to the trustees a policy of assurance upon his life (which constituted his entire separate property), in trust to pay out of the proceeds the balance of the debts due to the joint creditors, and the surplus if any to his, F.'s, personal representatives. Two years after the date of the assignment a fiat issued against F. Is an action brought by the assignees under the fiat against the trustees named in the deed, to recover the policy, S. who was called as a witness, stated that at the time of the execution of the deed his partner and himself entertained hopes of retrieving themselves:

—Held, that the assignment of the policy under these circumstances did not constitute an act of bankruptcy:—Held, also, that it was properly left to the jury to say whether the deed was honestly and bona fide entered into for the purposes of enabling F. & S. to continue to carry on their trade, or with intent to defeat or delay any particular class of creditors; or whether the deed was voluntary and a fraudulent preference given by F. to the joint creditors of the firm. *Abbott and Another, Assignees of Flude, a Bankrupt, v. Burbage and Others.* 660

BILL OF EXCHANGE.

1. In an action on a bill of exchange, by indorsee against drawer, evidence was given of a conversation between the defendant and J. S., in which the defendant had said, in allusion to the action, that he had several defences—that the plaintiff had not sent the letter to him *in time*. This having been left to the jury, after objection, as evidence of due notice of dishonour, and the jury having found a verdict for the plaintiff,—it was held, by Littledale, J., Patteson, J., and Coleridge, J., (Lord Denman, C. J., dissentiente,) that the jury were not warranted in presuming that the plaintiff had given due notice.

A defendant can set off those debts only which were due to him from the plaintiff at the time of action brought, as well as at the time of plea pleaded.

A plea of a set-off on a bill of exchange, payable to the order of the defendant and accepted by the plaintiff, is not supported by evidence of a bill answering to the description in the plea, which at the time of action brought was in the hands of a third party, although before plea pleaded the bill had got back to the hands of the defendant. *Brathwaite v. Coleman.* 602

2. An affidavit of debt in an action against the drawer of a bill of exchange stated that the bill was *undue and unpaid, and disclosed no default of the acceptor*:—Held, sufficient. *Irving v. Eaton.* 488

COMPUTATION OF TIME.

1. Where a certain number of days' notice of an intention to do an act is required, the day of the service of the notice is *excluded* from the computation, and that on which the act is to be done is *included*,—unless there be some special provision requiring a different mode of computation.

Therefore notice to magistrates of an intention to apply on the 25th day of the month, for a certiorari to remove an order made by them for the allowance of accounts of surveyors of highways, served upon the 20th of the same month, is not a sufficient notice within 13 Geo. 2, c. 18, s. 5, requiring six days' notice to be given. *The King v. Justices of Cumberland.* 582

2. The declaration was delivered on the 12th January, with notice to plead in four days; on the 13th the defendant obtained a judge's order for "seven days' time to plead," upon an undertaking to accept short notice of trial for the last sitting in the term, the 26th:—Held, that the seven days commenced from the date of the order, and not from the expiration of the four days. *Simpson v. Cooper.* 678

COSTS.

1. On motion for a nonsuit on the ground of a variance between the declaration and the contract of guarantee therein set forth, or for a new trial on the ground that the guarantee was not continuing, the court, being of opinion that the defendant was liable upon the contract, but that it was improperly declared on, made a rule that the verdict which had been found for the plaintiffs for the sum secured, should stand, but that the defendant should be allowed to deduct therefrom his costs of the trial and of the motion. On taxation, the officer allowed to the plaintiff his costs up to the notice of trial, and to the defendant all the subsequent costs. *Held*, that he had done right. *Allan v. Kenning.* 489

2. The costs of the applicant under the interpleader act, where he has acted bona fide, will in the first instance be directed to be paid out of the fund or the produce of the thing in dispute, to be repaid by the party ultimately unsuccessful. *Ducar v. Mackintosh.* 496

3. Where there have been mutual dealings between a plaintiff and defendant, and each has a demand against the other, and the former arrests the latter for the whole amount of one side of the account, with full knowledge of at least a part of the defendant's demand against him, although the defendant has neglected or refused to deliver his account, the plaintiff is liable to costs under the 43 Geo. 3, c. 46, s. 3. *Astton v. Nawell.* 501

4. Where a writ of summons which had originally been issued into one county was afterwards (without being re-sealed) altered by the substitution of another—The court set aside the proceedings, on payment of the debt *without costs*, although the defendant had, before taking the objection, obtained a judge's order for staying the proceedings on his undertaking to pay the debt *and costs*, which order had afterwards been made a rule of court. *Siggers v. Sansom.* 504

5. A cause had been tried and a verdict found for the plaintiff, which was afterwards set aside by the court on the ground that the contract upon which the plaintiff sued was illegal and void. After the rule for a new trial was made absolute, it appearing that the defence had been conducted by an attorney of the Court of King's Bench, acting in the name of the one who had for some years ceased to be an attorney of this court—the court permitted the plaintiff to discontinue without payment of costs, except as to so much money as might be found to have been paid by the defendant to his attorney on account of the suit. *Patterson v. Powell.* 505

6. The plaintiff arrested the defendant for 800*l.*, having previously obtained acceptances for 820*l.*, for part of the debt, from the defendant's agents, to meet which remittances were made to the latter by the defendant. *Held*, that the arrest for 400*l.* was made without reasonable or probable cause, and therefore that the defendant was entitled to costs under the 43 Geo. 3, c. 46, s. 3. *Reynolds v. Flower.* 530
7. Where money has been paid into court in

Hen of bail, the plaintiff on moving to have it paid out to him is entitled to the costs of the application. *Freeman v. Paganini*. 550

8. On a distress for arrears of a poor rate under the 50 Geo. 3, c. xlv. s. 3:—Held, that, although the warrant made no mention of the costs of the previous summons, the reasonable costs of such summons might be levied under it; and that one shilling is a reasonable sum in that behalf. *Clarke v. Pedley*. 553
9. In an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant in an examination before the commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. *Eicke v. Nokes*. 567
10. Where a plaintiff recovers a sum less than the amount for which he arrested and held the defendant to bail, and it appears that his only probable cause of action was not bailable, (being for unliquidated damages,) the defendant is entitled to costs under 43 Geo. 3, c. 46, s. 3. *Beare v. Pinkus*. 617
11. On a plea of plene administravit præter, the plaintiff is entitled to judgment of assets in futuro for debt and costs. *Cox v. Peacock*. 625
12. The only fee allowed by law to be taken by the officer from a party arrested, is 4d., the fee prescribed by the statute 23 Hen. 6, c. 9: if he take more, he is liable to be sued for the penalty imposed for extortion by the 32 Geo. 2, c. 28. *Jones v. Levi*. 630
13. Where a special case, on which judgment had been given for the plaintiff in this court, was at the instance of the defendant turned into a special verdict, that he might have an opportunity of obtaining the judgment of a court of error thereon, this court, after the lapse of two years, and after the costs of the trial and special case had been taxed and paid, refused to allow the plaintiff the costs thereby occasioned. *Collins v. Gwynne*. 639
14. Where an offer had been made to dispense with taxation, provided a certain sum were deducted from the bill, and on the taxation the bill was reduced by nearly the sum mentioned, though less than one-sixth of the bill—the party requiring the taxation was directed to pay the costs thereby occasioned. *Holmes v. Edwards*. 680

COVENANT.

In an action for breach of a covenant, in a lease of coal mines, to get the whole of the veins of coal lying under certain closes, "not deeper than or below the level of the bottom of the mine" at a certain point, evidence is receivable to show that by the miners in the neighbourhood, the word "level" is used in a certain peculiar sense. *Clayton v. Gregson*. 600

CRIMINAL INFORMATION.

Upon a motion for a criminal information against A. for challenging B., an affidavit, stating that in a correspondence between them A. had intimated an intention, after

the settlement of accounts between himself and B., to require an apology for offensive expressions contained in a letter received by him from B., or "such satisfaction as is usual on such occasions between gentlemen;" and that afterwards C., a relation of A., came with a letter of B. in his hands,—settled the account by paying a balance due from A. to B.,—and, after saying that he had come in consequence of the letter in his hand, delivered a hostile message as from A.:—was held insufficient to connect A. with the challenge; and therefore the court refused the rule.

But the court granted a rule nisi against C. *Ree v. Youngusband*. 618

DEED.

By a deed of settlement made in 1754, lands were settled by T. H. in tail male to the use of such person as at the time of the decease of T. H. should be the second son then living of T. H. and A. H.; and, for default of such issue, to the use of the third, fourth, fifth, sixth, and all and every other son and sons, other than and except the eldest son, for the time being, of T. H. and A. H., who should by the death of such second, third, fourth, or other son, without issue, become a second son; and, for default of such issue as aforesaid, and in case there should be two or more daughters of T. H. and A. H., then to the use of such daughters and their heirs as tenants in common; but, in case there should be only one son of T. H. and A. H., then to the use of the eldest or only son: and for default of all such issue, to the use of T. H. in fee. T. H., the settlor, died in 1766, leaving four sons—P., who died in 1770, an infant, and without issue—C., who died in 1829, without issue—T., who died in 1783, without issue—and John who survived:—Held, that, under the circumstances, John, the fourth son of the settlor, took an estate in tail general in the settled estates. *Hawkins v. Hawkins*. 519

DISCONTINUANCE.

A cause was referred, and the arbitrator stated the facts specially on his award for the opinion of the court. On the matter coming on for argument, the plaintiffs being advised that one of the defendants was improperly joined in the action—The court permitted them to discontinue, on payment of the costs of the cause (no provision being made for the costs of the reference and award) and of the motion, and undertaking not to bring any joint action against the two defendants, nor any separate action against the defendant so improperly joined. *Turner and Others v. W. Ison and E. Ketland*. 657

DONATIO MORTIS CAUSA.

Declarations by an intestate, that he meant that a person with whom he resided should have his furniture and effects for what he owed her:—Held, sufficient to entitle such person to take, and retain possession of the property. *Royston v. Henkey*. 513

EJECTMENT.

1. In ejectment on a vacant possession, the

affidavit that six months' rent are in arrear may be made by a receiver. *Anonymous.* 526

2. A declaration and notice in ejectment were served upon a servant of the tenant, whose wife subsequently admitted that she had received it and had given it to her husband:—Held, insufficient. *Doe d. Tucker v. Roe.* 550

3. Service of a declaration in ejectment on the daughter of the tenant in possession is not good service, unless it be shown to have come to the hands of the tenant. *Doe d. Brittlebank v. Roe.* 566

4. Service of a declaration in ejectment upon the wife of the son of the tenant in possession on the premises, who at the time of such service informed the party who made the service that the tenant was in America, and that her husband (the son) was transacting the business of the house:—Held, sufficient for a rule nisi. *Doe d. Potter v. Roe.* 647

5. One G. was let into possession of land allotted to one P. under an inclosure act in 1814 upon a contract of sale under which one-half of the purchase-money was paid, and interest upon the remaining moiety regularly till the year 1828, when G. became bankrupt. No conveyance was ever executed, nor was the remainder of the purchase-money ever paid:—Held, that the possession of G. under this inchoate contract was not adverse to the title of P., the vendor; and that the assignee of P. might maintain ejectment notwithstanding the lapse of twenty years from the time possession was first given: Held also, that it was not competent to G., or to one claiming under him, to contest the title of P., by reason of the want of an award by the commissioners under the act. *Dod d. Milburn v. Edgar.* 670

FINES AND RECOVERIES.

1. Where in levying two fines between the same parties, the one surconcessit, the other sur cognisance de droit, the parcels had by mistake been transposed, the court allowed the fines to be amended, so as to make them conformable with the deed to lead the uses. *Banbury, Plaintiff, Harper and Wife, Deforciantes.* 494

2. The court allowed a recovery to be amended by inserting "Holy Trinity" before "Kingston-upon-Hull" on an affidavit that the property intended to pass was situated in the parish of the Holy Trinity, at Kingston-upon-Hull. *Dansey, Demandant; Lee, Tenant; Crowther, Vouches.* 518

3. Where the acknowledgment of a party to a fine was taken before commissioners who were aware of the fact of her being a married woman, and of the non-concurrence of her husband, but the parties were living separate under a deed by which the husband covenanted not to interfere with his wife's property—The court refused to reverse the fine, at the instance of the husband, but left him to his common law remedy. *Cheek, Plaintiff, Bootle and Others, Deforciantes.* 559

HABEAS CORPUS.

Since the statute 2 Will. 4, c. 39, s. 8, it is not necessary to remove by habeas corpus a pri-

soner in the custody of the Marshal of the King's Bench, to the custody of the Warden of the Fleet, in order to declare against him in this court where the action is commenced by writ of summons or capias under the authority of that act. *Millard v. Millman.* 489

HIGHWAY.

A notice of appeal against an order for stopping up a highway, is sufficient if it state that the appellants are aggrieved by being compelled to go a greater distance to the next market town from their respective residences than they would have gone if the road intended to be stopped up were put and kept in a proper state of repair.

It need not expressly state that they are aggrieved by the order. *The King v. Adey.* 582

INSOLVENT DEBTOR.

A. being in insolvent circumstances, and having sold his goods by public auction (the proceeds remaining in the hands of the auctioneer), the defendant, under pretence of having issued a fiat of bankruptcy against A., prevailed upon the auctioneer to pay over to him the amount of his debt, and subsequently procured the assent of A. to such payment. A., more than three months afterwards, petitioned the insolvent debtors' court for his discharge under the act. In an action by his assignee to recover back the sum so paid:—Held, that it ought to have been left to the jury to say whether the transaction did not amount to a voluntary charging of his estate by the insolvent, and whether he did not at the time contemplate taking the benefit of the act. *Wainright v. Miles.* 506

INSPECTION OF LETTERS & BOOKS.

1. In an action of slander imputing to the plaintiff that he was the writer of a scandalous letter reflecting upon the defendant, the latter in one of his pleas set forth the letter and justified the words spoken. The court permitted the plaintiff to inspect the letter with witnesses, in order that he might be prepared at the trial to show that it was not in his handwriting. *Curtis v. Curtis.* 533

2. The plaintiff, assignee of A., who had become bankrupt, sued B. in respect of certain contracts alleged to have been entered into by A. with the plaintiff on the joint account of A. & B.—The Court allowed B. to inspect the books of A. in the hands of the plaintiff as his assignee, in order that he might discover what the alleged contracts were. *Whitbourne v. Pettifer.* 551

3. By a canal act, it was provided that the directors should keep books, and that the proprietors, land-owners, and others interested in the navigation, should be at liberty to inspect the company's books:—Held, that a bond-creditor was entitled to such inspection, to enable him to meet the defence intended to be set up by the company in an action upon the bond. *Pontet v. The Passington Canal Company.* 556

LANDLORD AND TENANT.

1. The plaintiff took of the defendant a house, at a yearly rent, under an agreement, by the terms of which the latter undertook, that,

up to the date of the agreement, he had paid or would pay or discharge "all arrears of rent, rates, taxes, or assessments;" and the former agreed, that, "from and after that day, the same should be kept paid by him for the period he might occupy the premises." At the expiration of the first quarter, the superior landlord distrained for rent. Held, that there was no implied duty in the defendant to indemnify the plaintiff against this claim although the agreement between them stipulated for a yearly rent; the defendant having, by the subsequent clause, expressly undertaken to keep the reserved rent paid. *Upton v. Ferguson*. 490

2. A., by indenture executed by himself and B., assigned to B. certain premises, "subject to the payment of the rent and to the performance of the covenants and agreements reserved and contained in the original lease." B. entered under this assignment, and afterwards assigned over to a third person:—Held, that B. was not liable in covenant to A., for rent which the latter had been called upon to pay in consequence of the default of B.'s assignee—the words "subject to the payment of the rent, &c." being words of qualification, and not of contract. *Wolceridge v. Steward*. 521

3. The plaintiff was employed by the Highgate archway company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent. The company having ceased to collect toll at the particular spot, the plaintiff was dismissed from their employ, and received a notice to leave the house, which he promised to do:—Held, that these circumstances did not constitute the plaintiff a tenant of the company; and therefore that he could not maintain trespass against their agent for pulling down the toll-house. *Hunt v. Colson*. 527

4. In replevin, the defendant avowed for rent in arrear from one J. M., and also claimed the goods as being the property of himself and another as assignees of J. M., against whom a commission of bankrupt had issued. A verdict having been taken for the defendant on the whole record.—The court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees.

Seemle, that, pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant founded on his demand for rent. *Emery v. Mucklow*. 552

5. The statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, for expediting the remedy of the landlord where his right of entry accrues during or immediately after an issuable term, does not apply to the case of a tenancy under an agreement expiring the day before the first day of the term. *Doe d. Summerville v. Roe*. 568

6. In the absence of any suggestion of collusion between the lessor of the plaintiff and the tenant, the court will not set aside a regular judgment in ejectment, in order that the landlord may be let in to defend. *Doe d. Thompson v. Roe*. 626

LIMITATION OF ACTIONS.

See STATUTE.

MANDAMUS.

The Court refused to award a mandamus, commanding justices to enforce, by issuing a warrant of distress, a highway rate assessed upon land which had never been rated before, and the liability of which to be rated was denied.

And the prosecutor having, previously to the motion for a rule for a mandamus, merely proposed to call a meeting for the purpose of obtaining an indemnity for the magistrates, without actually offering a sufficient indemnity, the rule was discharged with costs. *The King v. Justice of Somersetshire*. 584

NEW TRIAL.

1. The court will not grant a new trial upon an affidavit by the defendant, stating that he was kept in ignorance by his late attorney of the state of the action, that he had a good defence upon the merits, and that the verdict passed against him by reason of the negligence of such late attorney.

Seemle, that the defendant's remedy is by action against the attorney for negligence. *Moody v. Dick*. 581

2. Upon a motion for a rule nisi for a new trial of a cause tried before an under-sheriff, the party making the application should produce a copy of the under-sheriff's notes verified by affidavit,—or an affidavit stating a refusal by the under-sheriff to give a copy of his notes, and bring before the Court the facts proved at the trial. *Hall v. Middleton*. 583

3. Where the plaintiff's counsel stops the judge in the course of his summoning up, because his opinion appears to be strongly adverse, and elects to be nonsuited, he cannot afterwards move for a new trial. *Simpson v. Clayton*. 664

4. In trover for chalk dug by the defendant from the waste of the plaintiff's manor and converted by the defendant into lime, it appeared that the plaintiff's bailiff had demanded payment for the chalk, but whether as rent or not the evidence was conflicting. The judge not having left it to the jury to say whether or not the defendant held the land at a rent.—The Court directed a new trial. *Williams v. Plumridge*. 676

PARISH.

1. Where a vicar, after summons to the parish clerk to attend and answer a charge of intoxication, moves him upon insufficient evidence of the intoxication, the court will issue a mandamus requiring the vicar to restore the clerk.

Quære, whether it would be sufficient ground to remove a clerk, that amongst his neighbours he was notorious as a drunkard, without proof of particular acts of intoxication and indecorum?

If one act of intoxication be relied on, the intoxication and consequent incapacity of the clerk to perform the duties of his office, when required to do so, should, at all events, be distinctly proved. *The King v. Neak*. 618

2. Under an inclosure act, lands are fenced in

and allotted to the vicar and his successors, in lieu of tithes. The vicar dies, leaving the fences out of repair:—Held, that his executors were liable to be sued by the succeeding vicar, for dilapidations. *Bird v. Relph.* 619

PARTNERSHIP.

1. W. & T., partners, were indebted to the plaintiff, and, after the dissolution of the partnership, T. also became indebted on his separate account to the plaintiff:—Held, that in the absence of any specific appropriation by either party, payments made by T. after the dissolution must go in reduction of the entire account, and consequently must discharge the earlier items. *Smith v. Wigley and Twancliffe.* 496
2. A contract made between two or more persons to enter into a partnership in contravention of the law, is void, and confers no rights upon either party.

A. and B. carried on the business of a pawnbroker in partnership under a deed. The business was conducted solely by A., and his name alone appeared over the shop door, and upon the printed tickets and duplicates used by persons in that trade, and the license contained the name of A. only. Semble, that, although the parties might by this contract have rendered themselves liable to penalties imposed by the statute 39 & 40 Geo. 3, c. 99, yet, that, there being no actual agreement for an infraction of the law, the contract was not void.

Where exceptions are not properly taken, as, where they appear upon the record before the finding of the jury—the court of error cannot give judgment thereon. *Armstrong v. Lewis.* 539

PAYMENT INTO COURT.

There cannot be a partial appropriation to a plea either of tender or of payment, of money paid into court in lieu of bail. *Balls v. Stafford.* 648

PLEADING.

1. It is no ground of special demurrer that the plaintiff omits to describe the nature of the action at the commencement of the declaration, pursuant to the rule of Michaelmas term, 1654.

By the terms of the charter-party, it was stipulated that the freight should be paid "one third in cash on arrival, and the remainder on delivery, by good and approved bills on or payable in London, at four months' date. In the declaration thereon, the breach was stated generally, that the defendant had not paid the freight "according to the terms of the charter-party;"—Held sufficient, on special demurrer. *Marshall v. Thomas.* 493
2. The xvth rule of Michaelmas term, 3 Will. 4, does not apply to declarations in ejectment. *Doe dem. Fry v. Roe.* 528
3. The plaintiff, in an action against his lessee for breaches of covenant, claimed by his particulars of demand a specific sum for dilapidations. Held, that the defendant might have that part of the demand struck out of

- the declaration, on payment of the sum claimed, and costs. *Smith v. King.* 529
4. Declaration in trespass commencing—"A. B. and C. D. complains," &c., and stating that the defendant was summoned to answer the plaintiff—not demurable. *Lyng v. Sutton.* 558
 5. To trespass for an assault and false imprisonment, the defendant pleaded that he was in lawful possession of a house, and that the plaintiff was unlawfully therein, and had been requested to depart, but had refused, whereupon the defendant gently laid his hands on him to remove him: that thereupon the plaintiff assaulted him in the presence of a policeman, wherefore he caused him to be taken to a police office. Replication, de injuria. The defendant proved all the matters of the plea except the assault by the plaintiff:—Held that the plaintiff was entitled to recover damages for the imprisonment. *Reece v. Taylor.* 590
 6. The court allowed the defendant to amend his pleadings after one of the plaintiff's witnesses had been examined and cross-examined under a judge's order—it appearing that, prior to the examination, the plaintiff's attorney was apprised of the proposed amendments, and the witness was examined with reference thereto. *Hollingsworth v. Briggs.* 673
 7. After issue joined and a peremptory undertaking to try, the court permitted the plaintiff to amend his declaration by substituting a count in trover for a count in case for negligence in the custody of the plaintiff's goods. *Storr v. Watson.* 679

POWER.

- A., tenant for life is empowered to make leases, provided "the ancient and accustomed reservations be hereby reserved," and provided "they be granted in the same manner and form, and with and under such and the like reservations, covenants, conditions, and agreements as are usually and customarily contained in leases of the same kind in the respective parishes and places in which the premises are situate."
- Upon the question as to the validity of a lease granted by A., other leases of land in the same parish are admissible in evidence for the purpose of shewing whether the lease in question satisfies the second proviso.
- Semble, that the true criterion of a reservation of the ancient and accustomed rent under the first proviso is,—the reservations contained in the lease made of the premises next preceding the creation of the power.
- Dubitatur*, whether a quarterly reservation of rent which had been previously reserved half-yearly, will vitiate the lease.
- It is no objection to such a lease, that in former leases a right of re-rent was reserved, in the event of there being no overt distress on the premises, and that in the lease under the power the word "overt" is omitted.
- The omission to reserve a heriot, where a heriot has been accustomedly reserved, would vitiate the lease.
- But a reservation of a heriot of "the best good of the person or persons who for the time being shall be tenant or tenants in pos-

session of the demised premises," is sufficient, though the reservation in former leases was "of the best good of A. B. (the cestui que vie and lessee) or, such person as shall be in possession of the premises as tenant, by virtue of the lease."

A clause, purporting to reserve and except to the lessor the power of hunting, &c. over the demised premises, enures as a grant from the lessee to the lessor of a right or privilege, and not as a reservation or exception.

A clause in a lease, purporting to reserve underwoods and underground produce, enures, not as a reservation but as an exception.

Where former leases contained an exception of "all and all manner of timber trees, and all trees likely to prove timber," a lease under such power, containing an exception of "all timber trees, bodies of pollard and other trees whatsoever," granted at the same rent, was held to be void,—on the ground that the subject-matter of the demise is increased by the alteration in the exception, and that no further rent is reserved in respect of such addition to the subject-matter of the demise. *See dem. Douglass v. Look.* 526

POST OFFICE.

Seemle, that the delivery of a letter to the bellman is a delivery to the post-office. *Pack v. Alexander.* 629

PRACTICE.

See PLEADING.

1. A motion to set aside the service of a writ of summons on the ground of an irregularity in the indorsements thereon, and that it is directed to a different county from that into which the *distringas* is issued, must be made within a reasonable time after the service thereof.

Seemle, that eighteen days is an unreasonable delay in this respect, provided the defendant might have come earlier. *Wright v. Warren.* 495

2. A lien attaching upon the goods in dispute does not prevent the party who holds them from applying to the court for relief under the interpleader act.

A party fairly applying for relief under the interpleader act is entitled to his costs out of the fund, or out of the proceeds of the goods in dispute. *Cotter v. Bank of England.* 499

3. By the 54th rule of Hilary term, 2 Will. 4, service of a rule to reply or plead any subsequent pleading is necessary. *Pound v. Lewis.* 505

4. Appearing to oppose a rule, does not waive an objection to the form of the affidavit upon which the rule was obtained—such as, the omission of the Christian name of one of the parties in the title of the cause.

No taxation of costs is necessary upon a cognovit. *Clethier v. Ess.* 508

5. Where a writ of *scire facias* has not lain in the office the proper number of days, the motion should be to set aside the proceedings thereon, and not the writ itself. *Williams v. Brown.* 509

6. It is not necessary for the filacer to sign his name to a writ of summons; if he impress

upon it the stamp of court, it is sufficient, although the rule of Mich. 3 Will. 4, r. 2, allows fees to be taken for signing as well as for sealing such writ. *Burt v. Jackson.* 520

7. Where the sheriff has neglected to comply with rule iv. th of Michaelmas term, 3 Will. 4, by indorsing on the writ of capias the day of its execution, the party's remedy is, not by attachment, but by a rule calling upon the sheriff to amend his return. *Moore v. Thomas.* 532

8. In the case of a London commission, the court will not enlarge the time for the render of the principal until after his final examination before the commissioners. *Coombe v. Dod.* 533

9. Seemle that the rule laid down by the court at Westminster as to new trials where the sum recovered is under 20*l.* applies to causes tried in the sheriff's court. *Hemming v. Samuel.* 535

10. A defendant arrested upon an alias capias must put in bail in the county wherein he is arrested. *Rea v. The Sheriff of Essex.* 535

11. The writ of trial under the 3 & 4 Will. 4, c. 42, s. 17, is to be directed to the judge of the court of record in those places in which there is a court of record, and to the sheriff where there is no such court.

A writ of trial was directed to the Mayor of Colchester, and the cause was tried by his deputy.

The court refused to set aside the proceedings on a suggestion that the cause ought to have been tried by the mayor himself; it not appearing that that officer had no authority to appoint a deputy. *Clark v. Warner.* 551

12. It is no ground for setting aside a declaration, that it has been delivered in defiance of an injunction of a court of equity restraining the plaintiff from proceeding at law. *Horne v. Took.* 551

13. The rule requiring a term's notice prior to proceedings being taken, where the cause has been at issue more than four terms, does not apply to proceedings taken on the part of the defendant. *Shinfield v. Laxton.* 552

14. The 5th rule of Trinity term, 1 Will. 4, which prohibits the changing of bail without leave of the court or a judge, applies to the case of bail put in by the sheriff for the purpose of rendering the defendant. *Rea v. The Sheriff of Essex.* 552

15. The sheriff having seized goods under a *fi. fa.* notice was given to him on the 18th January that a fiat was about to be sued out against the defendant; and on the 28th a claim was made to the goods by the assignees:—Held, that an application by the sheriff on the 29th, for relief under the interpleader act, was sufficiently prompt. *Skipper v. Lane.* 553

16. Appearing to oppose a rule does not waive an objection to the affidavit on which the rule was obtained. *Barkam v. Lee.* 553

17. Practice as to the entry of a *nolle prosequi* by the defendant in a writ of intrusion. *Williams, Demandant, Harris, Tenant.* 558

18. A rule absolute may be drawn up during term on an order of a judge dated in vacation. *Swaine v. Stone.* 567

19. The plaintiff obtained a verdict at the Spring Assizes: the defendant died on the 18th April (the fourth day of Easter term;)

- the costs were taxed on the 21st, final judgment signed on the 22nd, and a *fi. fa.* issued on the same day, tested on the first day of the term. The court refused to set aside the *fi. fa.* for the irregularity in issuing it after the death of the defendant without a *sci. fa.*—the writ being warranted by the judgment, which the motion did not impeach. *Watson v. Maskell.* 560
20. The court rescinded a rule for judgment on a false plea of *nul tiel record* to a *scire facias*, on the ground that four days had not been suffered to intervene between the delivery of the issue and the rule to produce the record. *Wood v. Frost.* 568
21. The plaintiff issued two writs, one out of this court, which was never served, the other out of the Exchequer, on which he proceeded to declare. The defendant pleaded to the action in the Exchequer, another action pending for the same cause in this court. The plaintiff replied *nul tiel record*, and served the defendant with a rule to produce. The defendant made up a roll from the precept on the file of this court:—The court ordered it to be cancelled with costs. *Kirby v. Siggers.* 562
22. Upon a statement of counsel that he had moved for a rule to set aside an award under a mistaken supposition that an affidavit deposing to certain facts had been sworn, the court, on the day after granting a rule nisi, gave leave for the rule to be drawn up as upon reading such affidavit, on condition that it should be sworn on that same evening. *Perring v. Kymer.* 591
23. Against a rule obtained by the sheriff under the interpleader act—Held, that cause may be shown at chambers. *Sed quere.* *Haines v. Disney.* 627
24. An abstract of a title to an estate sold by auction disclosed a conveyance in fee and a deed assigning terms to attend the inheritance dated in 1737 (showing some terms outstanding which occasioned considerable expense), and a perfect title by possession for sixty years;—Held, that the costs thus occasioned were allowable on taxation:—Held, also, that the costs of attested copies of the will of the vendor's father ought not to be allowed. *Ex parte Quick and Others.* 628
25. In the indorsement on a writ of summons, the residence of the attorney stated thus—“No. 4, Clifford's Inn Passage, Fleet Street, in the city of London,” without mentioning the parish—is sufficient. *Arden and Another v. Garry.* 629
26. That a notice of trial before the sheriff is given for a day not fixed for trying issues, is no ground for moving to set it aside.
In causes to be tried before the sheriff, the issue must be delivered as in other cases. *The Same v. The Same.* 630
27. The defendant was arrested on the 12th May, carried to gaol on the 15th, and a declaration delivered on the 28th:—Held, that an application on the 4th June to discharge him out of custody, on the ground that he had been carried out of the county and there detained two days before he was taken to the county gaol, was too late.
Quere, whether this would be any ground for discharging the defendant, even had the application been made in time. *Fownes v. Stokes.* 632
28. Where an award directs a bond to be delivered to the plaintiff on demand, a demand by one will not suffice, in the absence of a power of attorney from the others. *Sykes v. Haigh.* 632
29. Where there were several pleas, on some of which issue was joined, and as to one a demurrer upon which judgment was given for the defendant four days before the end of Easter term—The court refused to allow the defendant to sign judgment as in case of a nonsuit in Trinity term, on the ground of the want of a notice of trial for the adjournment day of the sittings after Easter term. *Leslie v. Guthrie.* 638
30. Where a defendant is held to bail or detained by virtue of a judge's order, he is not bound to apply either to the same or to another judge at chambers, to rescind the order or to discharge him from custody, on the ground of defects in the affidavit of debt; the application is properly delayed till the court is sitting. *Johnston v. Kennedy.* 647
31. Where a rule is obtained in two causes, the affidavits must be intitled in both of them, though the plaintiff and defendant be the same in both. *Corry v. Wharton.* 648
32. A distringas to compel appearance cannot issue after the expiration of the writ of summons. *Lemon v. Lemon.* 649
33. Upon a reference to the prothonotary to inquire into the circumstances attending the settlement of an action, the prothonotary reported that the settlement was fraudulent as against the plaintiff, stating some of the facts that led him to that conclusion. On motion to confirm the report:—Held, that it was not competent to the counsel on the other side to impeach the facts found by the prothonotary, though they were at liberty to dispute his deductions therefrom.
Seemeth that such a report should be in writing. *Corry v. Wharton.* 648
34. In a *capias* into London, the direction to return the writ was addressed to “the said sheriff;”—Held, no ground for setting aside the writ. *Irving v. Eaton.* 676

PRISONER.

1. The twenty days' notice required to be given before bringing up a prisoner under the compulsory clauses of the Lords' act, must expire before the first day of the term in which he is brought up. *Hayward v. Priest.* 520
2. A person who has lain in prison twelve months under an execution sued out on a judgment for a less sum than 20*l.* is entitled to his discharge under the statute 48 Geo. 3, c. 123, although he had sufficient property at the time of the application to satisfy the judgment, and although several other detainers were lodged against him by other creditors. *Maner v. Piercy.* 520
- A prisoner charged in execution for a debt exceeding 20*l.*, though the excess be made up of interest upon a sum originally less than 20*l.*, is not entitled to his discharge after being in custody twelve months, under the statute 48 Geo. 3, c. 123. *Cooper v. Bliss.* 525

PROMISSORY NOTES.

See BILLS OF EXCHANGE. PLEADING

REPLEVIN.

In an action against the sheriff for taking insufficient pledges in a replevin bond, the court allowed the declaration, which was in the common form, to be amended (upon payment of costs) by alleging instead of a recovery in the original action, a reference by the consent of the sureties and the defendant, and the result of that reference; and also by adding a new count. *Dale v. Gordon.* 517

SLANDER.

Seemingly, that these words "You have robbed me of one shilling tan-money," are not actionable, as the court cannot take notice that the tan-money may be the subject of robbery.

The import of the term "tan-money" cannot be supplied by an *issuendo*, unsupported by a corresponding *inducement*.

No valid judgment can be given upon an assessment of entire damages upon several counts in slander, one of which counts discloses no cause of action.

And when a judgment had in fact been given for the plaintiff to recover damages so assessed, a venire de novo was awarded. *Day v. Robinson.* 619

SPECIAL CASE.

Where fraud is not expressly found by the sessions, this court cannot infer it from any state of facts.

But in a case where the facts stated were such as to render it almost certain that the decision of the justices at sessions must have proceeded on the ground of fraud, the court sent back the case to be restated. *The King v. Inhabitants of Llanfihangel-Abercrombi.* 582

See COPTHOLD.

STATUTE.

1. In an action on a promissory note drawn in a foreign country, and due about twenty years since the defendant pleaded the statute of limitations, and that the plaintiff replied that he resided abroad until within six years of the commencement of the action. The court afterwards (upon terms) allowed the defendant to add a plea setting up a provision of the law of the country where the note was made and the parties resided, similar in its effect to the statute of limitations. *Huber v. Steiner.* 554
2. In a letter written to the plaintiff within six years, the defendant says, "I can never be happy until I have not only paid you every thing, but all to whom I owe money;" and, "Your account is quite correct; and Oh! that I were now going to enclose you the amount of it." Held, that this was evidence to go to the jury of an acknowledgment taking the case out of the statute of limitations.

Held, that such promise, accompanied by this expression, "It is impossible to state to you what will be done in my affairs at present; it is difficult to know what will be best, but immediately it is settled you shall be informed;" is an absolute unconditional promise, and not a qualified or conditional promise.

Whether proof of such letters, together with proof of a bill drawn more than six years ago, by the plaintiff on the defendant, and accepted by the latter, would entitle the plaintiff to recover more than nominal damages, *quære.* *Dedson v. Mackay.* 580

SUBPENA.

1. A defendant who keeps out of the way a witness material to the plaintiff, and thereby impedes the service of a subpoena, is liable to an attachment. *Clements v. Williams.* 490

TROVER.

Where the sheriff sells under an execution more than sufficient to satisfy the debt and costs, he is liable in trover for the excess. *Batchelor v. Vyse.* 565

VENDOR.

Upon a sale of land, by auction, a written contract is signed by the purchaser, whose signature is attested by the auctioneer's clerk, thus,—"Witness J. N." The clerk also signs a receipt for the deposit and the moiety of duty, and afterwards pays over the deposit to the vendor, whose attorney subsequently writes to the attorney for the purchaser that they cannot make out a marketable title, and that they advise the purchaser to relinquish his purchase. Held, that the vendor was not bound by the contract.

Whether a signature by J. N., who is authorised to sign a contract as agent for one of the parties to a sale of land, thus, "Witness J. N." will be sufficient to bind the principal where there is no other signature to which these words can be referred as attesting such signature, *quære.* *Goobell v. Archer.* 591

WARRANT OF ATTORNEY.

1. The court allowed judgment to be entered upon an old warrant of attorney, on an affidavit that a letter had been received from the party, the twopenny post date on which was within the term. *Anonymous.* 585
2. An affidavit by the plaintiff that the defendant was indebted to him on an old warrant of attorney, and that he had not paid the sum secured by it, that he saw the defendant execute it, and that the attesting witness was also present, but was now residing in France, and that the defendant was alive:—Held, sufficient to entitle the plaintiff to enter up judgment. *Taylor v. Leighton.* 570
3. Judgment cannot be entered up against husband and wife on a warrant of attorney given by the wife *dum sola*, without leave of the court. *Staples v. Purser.* 530
4. Where a joint warrant of attorney is given

by two or more persons, one of whom is an infant, the court will order it to be vacated as against the latter, and to stand against the other parties. *Ashlin v. Langton and Two Others.* 567

WITNESSES.

See also SUBPENA.

1. The Court permitted the examination of a witness before the prothonotary under the statute 1 Will. 4, c. 22, (on payment of costs), upon the affidavit of his medical attendant, who swore that he was in a *precarious* state, and could not attend at the trial without great danger. *Pond v. Dimes.* 494
2. An application under 1 Will. 4, c. 22, for the examination of a witness resident out of

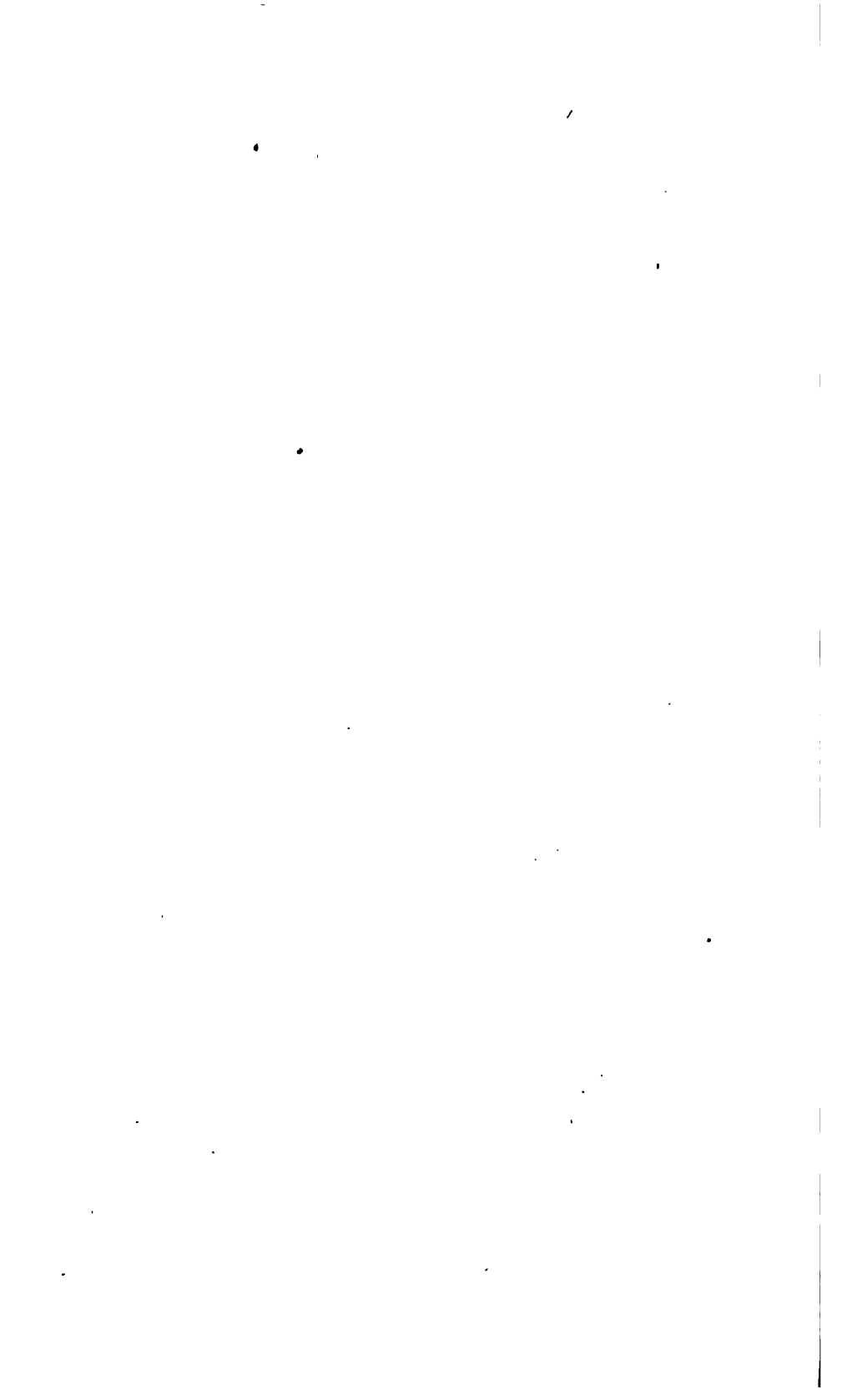
the jurisdiction of the court, must be made as early as possible after issue joined. *Brydges v. Fisher.* 559

WRIT OF RIGHT.

The tenant in a writ of right, not being able to discover who the demandant was, obtained a judge's order directing the demandant's attorney to deliver to the tenant's attorney, within four days, the true name and address of his client. The court refused to allow the tenant to sign judgment of non-pros for disobedience of this order.

Semble, that the proper course would be to make the order a rule of court, and apply for an attachment against the attorney. *Dummeday, Demandant, Hughes, Tenant.* 646









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